

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL S. ZIEGLER,

Plaintiff,

v.

OPINION AND ORDER

13-cv-410-wmc

DEBORAH McCULLOCH, DR. JAMES
LOVAS, GRETCHEN AZARIAN, and
CINDY SELTZNER,

Defendants.

Plaintiff Michael S. Ziegler is presently in state custody pursuant to Wis. Stat. ch. 980 at the Sand Ridge Secure Treatment Center in Mauston. Ziegler has filed this proposed civil action pursuant to 42 U.S.C. § 1983, alleging that he has been denied adequate dental care with deliberate indifference to his health and safety. Ziegler has been found eligible to proceed *in forma pauperis* and has made a partial payment of the filing fee. Having filed a supplemental version of his complaint (dkt. # 10), Ziegler seeks leave to proceed.

Because he proceeds *in forma pauperis*, the court is also required to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2). After considering all of the pleadings and the applicable law, the court will grant Ziegler leave to proceed with his claims against one defendant, Dr. James Lovas. For reasons set forth below, his claims against the remaining defendants will be dismissed.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations as true and assumes the following probative facts.¹

Ziegler was convicted of one count of first-degree sexual assault of one child and two counts of second-degree sexual assault of a second child. *See State v. Ziegler*, Fond du Lac County Case No. 1994CF303. When Ziegler was nearing the end of his prison sentence in that case, the State filed a petition for his involuntary civil commitment as a "sexually violent person" pursuant to Wis. Stat. ch. 980. *See State v. Ziegler*, Fond du Lac County Case No. 2007CI2. After a jury found that Ziegler was a sexually violent person as defined by Wis. Stat. § 980.01(7), the circuit court granted the State's petition. The Wisconsin Court of Appeals later affirmed that decision in an unpublished opinion. *See State v. Ziegler*, 2013 WI App 128, 351 Wis. 2d 225, 838 N.W.2d 866 (per curiam). Ziegler remains committed at the Sand Ridge Secure Treatment Center ("Sand Ridge").

Each of the defendants in this case is employed by the Wisconsin Department of Health Services at Sand Ridge. Deborah McCulloch is the superintendent. Dr. James Lovas is a dentist. Cindy Seltzner is a dental hygienist. Gretchen Azarian is a "nursing supervisor" in charge of the Health Services Unit.

¹ Because plaintiff references his underlying criminal case, the court has supplemented the facts with dates and procedural information from the electronic docket available at Wisconsin Circuit Court Access, <http://wcca.wicourts.gov> (last visited January 10, 2014). The court draws all other facts from the complaint and any attached exhibits, which are deemed part of that pleading. *See* FED. R. CIV. P. 10(c); *see also Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading).

According to Ziegler, Dr. Lovas and his assistant Seltzner pulled all but six of his teeth after he was diagnosed with extensive periodontal disease. Ziegler was given dentures or partial plates which adhered to his remaining teeth, but the plates reportedly made him “choke and vomit.” Dr. Lovas “work[ed] on them,” but could not get them to fit properly. Unsatisfied, Ziegler returned his dentures and asked for dental implants. That request was denied.

Ziegler contends that, without properly fitting dentures or implants, his six remaining teeth “stab” into his upper gum when he attempts to chew. As a result, eating is painful. Ziegler also reports losing weight because he is unable to chew his food without pain and difficulty. Alleging that the defendants have left him “toothless and unable to eat properly,” Ziegler contends that they have denied him adequate dental care in violation of the Eighth Amendment to the United States Constitution. Ziegler seeks \$1 million in compensatory damages and dental implants at no cost.²

OPINION

Ziegler seeks relief pursuant to 42 U.S.C. § 1983 for violations of his civil rights. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the

² Ziegler also seeks his immediate release from civil commitment. Because challenges to the fact of confinement are not actionable under 42 U.S.C. § 1983, the court will not consider this request as part of the current lawsuit. “[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” *Prieser v. Rodriguez*, 411 U.S. 475, 500 (1973).

defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989). A plaintiff must also establish each defendant's personal involvement in the constitutional violation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

Ziegler's complaint implicates both the Fourteenth Amendment Due Process Clause and the Eighth Amendment. The Eighth Amendment, which prohibits "cruel and unusual punishment," typically applies only to convicted state prisoners. *See Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005) (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 259 & n.1 (7th Cir. 1996)). As a civil detainee, Ziegler's claim is governed by the Fourteenth Amendment Due Process Clause, which is "functionally indistinguishable from the Eighth Amendment's protections for convicted prisoners." *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013). To state a claim under this standard, a plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

I. Dr. Lovas

At this stage, Ziegler's allegation that he is unable to chew food without pain is sufficient to state an Eighth Amendment claim against Dr. Lovas. *See McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) (citing *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010)); *see also Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001) (finding that an inability to chew food, bleeding, headaches, cracked teeth and extreme pain are examples of harms that present serious dental needs). Ziegler alleges that he returned his dentures

to Lovas because they did not fit properly. After Lovas was unable to adjust them to Ziegler's satisfaction, he requested dental implants, and this request was denied.

Whether plaintiff will be able to demonstrate that Dr. Lovas denied him properly fitting dentures or dental implants with deliberate indifference remains to be seen. Indeed, it would seem likely that Dr. Lovas had a good faith basis to believe that Ziegler's problems with his dentures were not sufficient to justify implants, much less render the denial of implants a constitutional violation. For now, however, Ziegler has articulated sufficient facts showing that Dr. Lovas failed to provide adequate dental care, if barely. Accordingly, Ziegler will be allowed to proceed past the screening stage on this sole claim against Dr. Lovas, understanding that going forward Ziegler he will have to present admissible evidence permitting a reasonable trier of fact to conclude that defendant acted with deliberate indifference, which is a high standard. A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment only when his conduct demonstrates deliberate indifference to a prisoner's serious medical needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104). Inadvertent error, negligence and gross negligence are insufficient to satisfy the deliberate-indifference standard. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

To prevail, it will be Ziegler's burden to prove: (1) his condition constituted a serious medical or dental need; and (2) perhaps even more daunting, that Dr. Lovas knew his condition was serious, causing associated pain and suffering, which could be relieved by better fitting dentures or dental implants, but deliberately ignored his need for

additional dental care. Both elements may well require plaintiff to provide credible, expert testimony from a physician or dentist in the face of evidence to the contrary.

II. Other Defendants

Ziegler will *not* be allowed to proceed with claims against Seltzner because he has alleged no facts suggesting that she was involved personally in the constitutional violation alleged in this case. More specifically, Ziegler neither alleges that Seltzner even knew his dentures fit poorly, nor that he needed additional dental care because he was unable to eat without experiencing pain. As importantly, the allegations make plain that both the responsibility for fitting Ziegler's dentures, as well as the decision to deny him implants, was Dr. Lovas's, *not* his assistant's.

Likewise, to the extent that McCulloch and Azarian are named as defendants in their supervisory capacity, this is not sufficient to show liability. In a state-run facility like Sand Ridge, supervisory officials are entitled to delegate medical and dental treatment to health care personnel because of their expertise, which means that any failure to intervene in treatment decisions does not violate the Eighth Amendment. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). To state a claim, a prisoner must allege facts showing that he contacted supervisory officials whose job responsibilities make them liable for his alleged mistreatment. *See id.* (“Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another’s job.”). A supervisor must “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see[.]” *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988)).

Because Ziegler's allegations fail to meet this requirement, his claims against these defendants will also be dismissed.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Michael S. Ziegler's request for leave to proceed with an Eighth Amendment deliberate-indifference claim against defendant Dr. James Lovas is GRANTED.
- 2) Plaintiff's request for leave to proceed against defendants Deborah McCulloch, Gretchen Azarian and Cindy Seltzner is DENIED and his complaint against these defendants is DISMISSED without prejudice for failure to state a claim upon which relief may be granted.
- 3) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.
- 4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- 5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 17th day of June, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge