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

HENRY WESTON,

Plaintiff,

v. OPINION & ORDER

WARDEN WILLIAM POLLARD, DR. MANLOVE, BELINDA SCHRUBBE, and D. LARSON, 14-cv-306-jdp

Defendants.

Pro se plaintiff Henry Weston is a prisoner in the custody of the Wisconsin Department of Corrections currently housed at the Waupun Correctional Institution (WCI). Plaintiff filed a complaint with this court alleging that the warden and certain medical staff were deliberately indifferent to his chronic low back and left leg pain, in violation of the Eighth Amendment. After considering plaintiff's allegations, I dismissed his complaint for failing to comply with Federal Rule of Civil Procedure 8, and I directed him to file an amended complaint describing how each named defendant violated his rights. Dkt. 10, at 4. Plaintiff filed an amended complaint, and I again dismissed it for failing to comply with Rule 8. Dkt. 25. I allowed plaintiff one final opportunity to file an amended complaint that stated a claim for relief.

Now plaintiff has filed a second amended complaint. Dkt. 26. After reviewing plaintiff's allegations, I will grant him leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Cole, Amy Radchiff, Belinda Schrubbe, Ed Neiser, and Jeffrey Manlove. I will deny plaintiff leave to proceed against defendants F. Monroe, Donna/Donnell Larson, Gail Waltz, and the Health Services Unit. I will also deny plaintiff's requests for counsel at this time.

ALLEGATIONS OF FACT

In his third attempt to comply with Rule 8, plaintiff replaces almost all of the previously named defendants with new prison employees. Plaintiff originally sued William Pollard, Dr. Manlove, Belinda Schrubbe, and D. Larson. Then plaintiff's first amended complaint named six defendants, replacing all but defendant Schrubbe: the Department of Corrections, Lori Alsum, Belinda Schrubbe, James Muenchow, Charles Facktor, and Cindy O'Donnell. Now plaintiff has replaced *those* defendants with a new set of prison officials: the Health Services Unit (HSU), F. Monroe, Cole, Donna/Donnell Larson, Gail Waltz, Amy Radchiff, Belinda Schrubbe, Jeffrey Manlove, and Ed Neiser. Although the named defendants have changed over the course of the screening process, plaintiff's core allegation remains largely unchanged: defendants were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment.

I draw the following facts from plaintiff's second amended complaint. Dkt. 26. During his time at WCI, plaintiff has experienced chronic back and left leg pain; the pain prevents him from sitting or lying in one position for an extended period of time. Plaintiff contacted HSU to see someone about his pain on February 6, 2012. Defendant Monroe, a WCI nurse, examined plaintiff on February 8, 2012. Plaintiff told defendant Monroe that he had been experiencing pain in his back and shooting down his left leg for about one month; plaintiff described the pain as very intense, "sharp, aching and throbbing." *Id.* at 4. Defendant Monroe recommended that plaintiff treat the pain with ibuprofen and scheduled plaintiff for a follow-up with a nurse on February 14, 2012. Defendant Monroe did not refer plaintiff to a doctor.

Defendant Larson, another WCI nurse, examined plaintiff on February 14. During the examination, plaintiff stated that he had been having trouble walking. Plaintiff rated his pain as a 10 out of 10. After completing the examination, defendant Larson did not believe that referring plaintiff to a doctor was necessary. Defendant Larson scheduled plaintiff for another follow-up with a nurse one week later.

Defendant Radchiff, a third WCI nurse, examined plaintiff on February 22. Plaintiff explained that he believed that he injured himself after hopping down off a top bunk. He complained that stretching exercises and ibuprofen were not working; he was in constant pain. After examining plaintiff, defendant Radchiff instructed plaintiff to continue stretching and using ibuprofen as needed, despite the fact that plaintiff had stated that these treatments were not working.

Several months later, plaintiff requested another appointment with HSU, and on July 28, 2012, defendant Cole, another WCI nurse, examined plaintiff. Here plaintiff's story changes a bit. He told defendant Cole that he had been experiencing back pain for *years*—since 2005—and that the pain had gotten better on its own in May and June but had recently returned. Defendant Cole noted that plaintiff was limping and prescribed ibuprofen and an extra pillow. Plaintiff protested, arguing that ibuprofen did not and would not help.

It appears that defendant Manlove, a WCI doctor, examined plaintiff in June or July 2012. (Plaintiff's allegations regarding defendant Manlove jump between 2012 and 2014 throughout the second amended complaint. The clearest, most generous reading of plaintiff's allegations is that defendant Manlove first saw plaintiff in 2012 but did not order x-rays or an MRI until 2014.) Defendant Manlove diagnosed plaintiff with an L5/S1 sprain. Defendant Manlove referred plaintiff to physical therapy on August 6, 2012. Defendant

Neiser, plaintiff's physical therapist, saw plaintiff for six weeks. Plaintiff complained that "this process wasn't working." *Id.* at 9. Plaintiff's complaint, although fairly detailed, is difficult to follow at times, but he appears to allege that although defendant Manlove examined him, diagnosed him, and sent him to physical therapy, he somehow failed to treat plaintiff.

In January 2015, plaintiff requested another appointment with HSU, and defendant Waltz, a WCI nurse, examined plaintiff on January 29, 2015. At some point someone had prescribed plaintiff naproxen, because he informed defendant Waltz that he had stopped taking it. Plaintiff stated that he did not want to try ibuprofen again but that he was willing to try acetaminophen. After examining plaintiff and looking at his x-rays and MRI scans, defendant Waltz did not believe that a referral or a follow-up was necessary.

At some point, plaintiff wrote a letter to defendant Schrubbe, HSU manager, and complained that he was not receiving adequate medical care for his "serious chronic distressful pain[.]" *Id.* at 12. Schrubbe responded that HSU had seen plaintiff the week before, examined him, and provided treatment. She said that she would schedule plaintiff for a follow-up, but she never did.

ANALYSIS

Plaintiff's second amended complaint fixes the Rule 8 problems that the court identified in previous orders.

A. Proposed amended complaint

As I discussed in my previous orders, the Eighth Amendment prohibits prison officials from acting with deliberate indifference toward prisoners' serious medical needs. *Estelle v.*

Gamble, 429 U.S. 97, 103-04 (1976). For a defendant to be deliberately indifferent to a plaintiff's serious medical need, he or she must know of the need and disregard it. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Plaintiff's allegations separate the named defendants into two categories: those who treated plaintiff in ways that did not satisfy him but were not deliberately indifferent to his serious medical needs, and those who may have been deliberately indifferent to plaintiff's serious medical needs.

Defendants Monroe, Larson, and Waltz fall into the first category. Plaintiff alleges that defendants Monroe and Larson examined plaintiff, asked him questions about his pain, and ultimately *treated* plaintiff, by prescribing ibuprofen and scheduling follow-up appointments with nursing staff. Plaintiff complains that neither defendant referred him to a doctor, scheduled x-rays or MRIs, or gave him any mobility-assisting tools (i.e., a wheelchair, crutches, walker, etc.). Similarly, plaintiff alleges that defendant Waltz examined him, reviewed the scans in his file, and prescribed acetaminophen. She did not refer plaintiff for any follow-up. The fact that plaintiff believes that these defendants should have done more for him does not establish that these defendants were *deliberately indifferent* to plaintiff's serious medical needs. "To demonstrate deliberate indifference, a plaintiff must show that the defendant acted with a sufficiently culpable state of mind, something akin to recklessness." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (citation and internal quotation marks omitted). Deliberate indifference is more than negligence and more than medical malpractice; it "approaches intentional wrongdoing." *Id.* To qualify as deliberate indifference, treatment must be "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition." *Id.* (citation and internal quotation marks omitted). Plaintiff does not allege that these defendants knew that plaintiff required more treatment

than they recommended. Plaintiff does not allege that these defendants recklessly or intentionally deprived plaintiff of the appropriate treatment. And plaintiff certainly does not allege that the treatment was so outside the scope of acceptable treatment as to be blatantly inappropriate. To the contrary, plaintiff's own allegations indicate that these nurses thoughtfully examined plaintiff and treated his pain as they saw fit.

But plaintiff's allegations regarding the remaining individual defendants state claims for deliberate indifference because he alleges something more: that these defendants should have known that the treatment they prescribed was not working. *Id.* at 752 (determining that the plaintiff had stated a claim for deliberate indifference when he alleged that "[e]ven though he informed prison officials that the pain medication was not working, they persisted in a course of treatment . . . known to be ineffective."). Plaintiff complained to defendants Radchiff and Cole that the stretching exercises and ibuprofen were not relieving his pain, yet they did not change his course of treatment. Plaintiff complained to defendant Neiser that the physical therapy was not working, yet defendant Neiser did not change course or refer plaintiff for any additional or alternative treatment. Defendant Schrubbe promised to schedule plaintiff for a (presumably necessary) follow-up examination in response to his complaints of ongoing pain, but she never did. And finally, although plaintiff's allegations concerning defendant Manlove are most difficult to follow, it appears that plaintiff alleges that the doctor was deliberately indifferent when he was able to diagnose plaintiff with an L5/S1 sprain in 2012 but did not confirm with x-rays, an MRI, or appropriate treatment until 2014. Unlike with respect to defendants Monroe, Larson, and Waltz, plaintiff has explained how each of these defendants deliberately disregarded information about plaintiff's serious medical need to his detriment. For this reason, plaintiff has alleged that these defendants

acted with deliberate indifference. Plaintiff has pleaded facts sufficient to state an Eighth Amendment deliberate indifference claim against defendants Radchiff, Cole, Neiser, Schrubbe, and Manlove in their individual capacities.

One final point: in my last order I mentioned that I would dismiss the Department of Corrections if plaintiff attempted to name it as a defendant in his second amended complaint. Although plaintiff has not named the Department of Corrections, he has named HSU as a separate defendant. But for the same reasons that I would have dismissed the Department of Corrections, I will dismiss HSU. HSU is not a "person" within the meaning of 42 U.S.C. § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-66 (1989).

B. Motions for assistance in recruiting counsel

Plaintiff has also filed two motions for assistance in recruiting counsel. Dkt. 27 and Dkt. 29. I will deny these motions without prejudice to plaintiff renewing his request later in this case. Litigants in civil cases do not have a constitutional right to a lawyer, and the court has discretion to determine whether assistance in recruiting counsel is appropriate in a particular case. *Pruitt v. Mote*, 503 F.3d 647, 654, 656 (7th Cir. 2007). To prove that assistance is necessary, this court generally requires that a pro se plaintiff: (1) provide the names and addresses of at least three lawyers who declined to represent him in this case; and (2) demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his demonstrated ability to prosecute it. *Id.* at 655; *see also Young v. Cramer*, No. 13-cv-77, 2013 WL 5504480, at *2 (W.D. Wis. Oct. 3, 2013).

Although plaintiff appears to have made some effort to locate an attorney (he appears to have contacted four attorneys, but only two have declined to represent him), it is too early

in the case to determine whether the legal and factual difficulty of the case exceeds plaintiff's ability to prosecute it. The case has not passed the relatively early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which could result in dismissal of this case before it advances very far. Should the case pass the exhaustion stage, and should plaintiff continue to believe that he is unable to litigate the suit himself, then he may renew his motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Henry Weston is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Cole, Amy Radchiff, Belinda Schrubbe, Ed Neiser, and Jeffrey Manlove.

2. Plaintiff is DENIED leave to proceed against F. Monroe, Donna/Donnell Larson, Gail Waltz, and the Health Services Unit, and these defendants are DISMISSED.

3. Plaintiff's motions for assistance in recruiting counsel, Dkt. 27 and Dkt. 29, are DENIED.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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 amended complaint if it accepts service for defendants.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered June 1, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge