IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL CORTEZ ROWE,

Plaintiff,

v.

NURSE TRISH, DR. MARTIN,
DR. HEINZYL, NURSE JANE DOE,
HSU MANAGER KAREN ANDERSON,
SGT. HAGG, LT. PITZEN,
SGT. HOOPER, C.O. EXNER,
LT. KARNA and NURSE DAVID
SPANNAGEL,

Defendants.

OPINION and ORDER

14-cv-195-bbc

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Pro se prisoner Michael Cortez Rowe has filed a proposed complaint under 42 U.S.C. § 1983 in which he asserts two claims. First, he alleges that prison staff failed to give him appropriate medical treatment when he began suffering from seizures in May 2013. Second, he alleges that defendant Lieutenant Karna disciplined him for complaining about Karna's failure to provide treatment. Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A.

Having reviewed the complaint, I conclude that plaintiff may proceed on his claims that (1) defendants Karen Anderson, Nurse Trish, Nurse David Spannagel, Lieutenant

Karna and Sergeant Hagg refused to provide appropriate treatment for his seizures, in violation of the Eighth Amendment; and (2) defendant Karna disciplined plaintiff for filing a grievance, in violation of the First Amendment. However, I am dismissing the complaint as to the remaining defendants for his failure to state a claim upon which relief may be granted.

Plaintiff fairly alleges the following facts in his complaint.

ALLEGATIONS OF FACT

During the time relevant to the complaint, plaintiff Michael Cortez Rowe was a prisoner at the Columbia Correctional Institution, where all of the defendants are employed. Those defendants include: Nurse Trish; Dr. Martin; Dr. Heinzyl; Nurse Jane Doe; Nurse David Spannagel; Health Services Unit Manager Karen Anderson; Sergeant Hagg; Lieutenant Pitzen; Sergeant Hooper; Correctional Officer Exner; and Lieutenant Karna.

In May 2013, plaintiff began suffering from seizures, during which he would lose consciousness and sometimes hit his head. The seizures were preceded by cluster headaches, which "shut down the whole left side of [his] body." When plaintiff complained to defendant Nurse Trish, she told him to place a wet towel on his face and sleep. Plaintiff continued to have many seizures in May, June and July.

On August 3, 2013, after plaintiff suffered from two seizures the same day, a lieutenant took plaintiff to the hospital. Plaintiff was taken to the hospital again on August 8. (Plaintiff does not say whether hospital staff determined the cause of his seizures,

prescribed treatment for them or recommended any followup care.).

On August 19, 2013, plaintiff again suffered from two seizures and he woke up covered in urine and feces. When defendant Spannagel asked defendant Karna whether to take plaintiff to the hospital, Karna refused, stating something about "saving money."

On August 20, 2013, plaintiff "wrote [Karna] up" for failing to help him. On August 27, 2013, plaintiff received a "ticket" from Karna on the ground that plaintiff was faking his seizure and refused to come to his cell door when ordered by Karna to do so. At plaintiff's disciplinary hearing, the committee relied on a letter from Spannagel, who concluded that plaintiff had faked his seizures. Plaintiff was found guilty and was disciplined with 90 days in segregation.

On August 28, 2013, plaintiff had three seizures and he was taken to the hospital. On August 31, 2013, plaintiff had another seizure. He vomited, defecated and urinated on himself in his bed. Defendant Hagg gave plaintiff new clothes and sheets, but he did not provide any medical care.

On September 2, 2013, plaintiff complained to defendant Pitzen, who told plaintiff that he would "look into it," but Pitzen did not take any action.

OPINION

A. Medical Care

Plaintiff's medical care claim arises under the Eighth Amendment to the United States Constitution. A prison official may violate the Eighth Amendment if the official is

"deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

Plaintiff's allegations are sufficient to state a claim upon which relief may be granted under the Eighth Amendment against defendants Nurse Trish, Karen Anderson, Lieutenant Karna, David Spannagel and Sergeant Hagg. With respect to the first element, the Court of Appeals for the Seventh Circuit has held that seizures may qualify as a serious medical need. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012). Second, plaintiff alleges that

each of these defendants was aware of his seizures.

With respect to whether defendants consciously refused to take reasonable measures to provide treatment, plaintiff says that Nurse Trish tried to treat his seizures by telling him to put a towel on his face and go to sleep. Although Trish did not ignore plaintiff's complaints, that is not required to sustain an Eighth Amendment claim if the defendant's conduct "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." King, 680 F.3d at 1018 . See also Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006) ("[M]edical personnel cannot simply resort to an easier course of treatment that they know is ineffective."). At the pleading stage, it is reasonable to infer from plaintiff's allegations that plaintiff has satisfied that standard.

With respect to defendants Karna and Spannagel, plaintiff alleges that they refused to take him to the hospital after he suffered from seizures in August 2013. At that point, prison staff had taken plaintiff to the hospital on two previous occasions after he suffered from seizures, so it is not clear whether another trip would have been beneficial, particularly because plaintiff does not allege that hospital staff had prescribed any particular treatment for plaintiff or gave instructions regarding what steps should be taken the next time plaintiff suffered from a seizure. However, at this early stage, I will assume that defendants Karna and Spannagel were aware of some treatment they could have provided, but they refused to do so.

Plaintiff's claim against Hagg is similar to the claim against Karna and Spannagel.

Plaintiff alleges that Hagg failed to provide any medical care for him after a seizure on August 31, 2013. Again, I will assume at this early stage that Hagg knew of steps that he could have taken to help plaintiff, but he refused to do so.

Defendants Trish, Karna, Spannagel and Hagg are the only four defendants that plaintiff identifies specifically as refusing to provide treatment. However, he seems to be alleging more generally that the health services unit did not provide appropriate care for his seizures and he identifies defendant Karen Anderson as the manager of the health services unit. Because plaintiff alleges that he suffered from so many seizures between May 2013 and August 2013, it is reasonable to infer for the purpose of pleading that Anderson knew about plaintiff's seizures and knew of other treatment options, but she refused to take reasonable action to help plaintiff. Accordingly, I will allow plaintiff to proceed on a claim against Anderson as well.

At summary judgment or trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each element of his claim. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). It will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment, Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). In particular, he will have to show that defendants' conduct was "blatantly inappropriate" and that defendants knew about obvious, reasonable alternatives, but refused to consider them. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996) (internal quotations omitted)

I am not allowing plaintiff to proceed on an Eighth Amendment claim against the remaining defendants. Plaintiff's only allegation against defendant Pitzen is that Pitzen told plaintiff he would "look into"something, but then failed to do that. However, plaintiff does not say what he wanted Pitzen to do or why, so it is not reasonable to infer that Pitzen violated plaintiff's rights. Plaintiff lists several other defendants in the caption of his complaint, but he does not include any allegations against them. Accordingly, I am dismissing the complaint as to defendants Dr. Martin, Dr. Heinzyl, Nurse Jane Doe, Sergeant Hooper and Correctional Officer Exner.

B. Retaliation

Plaintiff alleges that defendant Karna gave him a "ticket" after plaintiff "wrote [Karna] up" for failing to provide treatment for his seizures, which I understand to mean that Karna disciplined plaintiff for filing a grievance. I understand plaintiff to be asserting a claim for retaliation.

To prevail on a retaliation claim, a plaintiff must prove three things: (1) he was engaging in activity protected by the Constitution; (2) the defendant's conduct was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity. Gomez v. Randle, 680 F.3d 859, 866-67 (7th Cir. 2012); Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009).

Prisoners have a right to file grievances under the First Amendment. Powers v.

Snyder, 484 F.3d 929, 932 (7th Cir. 2007), so it is reasonable to infer that plaintiff was engaging in protected activity. In addition, plaintiff says that he was punished with 90 days in segregation, which could be sufficiently severe to deter a reasonable person from exercising his rights in the future. Finally, I must accept as true plaintiff's allegation that defendant Karna disciplined him for filing a grievance. Carlson v. CSX Transportation, Inc., 758 F.3d 819, 828 (7th Cir. 2014). Accordingly, I will allow plaintiff to proceed on this claim.

In going forward with this claim, plaintiff should keep in mind that a claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Plaintiff will have to come forward with evidence either at summary judgment or at trial that defendant Karna disciplined him for filing a grievance rather than because Karna believed that plaintiff violated prison rules. First, plaintiff will have to prove that Karna knew he had filed the grievance. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 313 (7th Cir. 2007) (in retaliation case, plaintiff must show that defendant knew that plaintiff was engaging in protected conduct). After that, plaintiff may prove Karna's retaliatory intent in various ways. For example, he may show that similarly situated prisoners not engaging in similar protected conduct were treated better than he was, cf. Scaife v. Cook County, 446

F.3d 735, 739 (7th Cir. 2006), or point to other evidence suggesting a retaliatory motive, such as suspicious timing or statements by Karna suggesting that he was bothered by the protected conduct. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). However, even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive without additional evidence. Sauzek v.Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). Finally, plaintiff may support his claim by coming forward with evidence that Karna is lying about the reasons he disciplined plaintiff.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Cortez Rowe is GRANTED leave to proceed on his claims that: (1) defendants Karen Anderson, Nurse Trish, Nurse David Spannagel, Lieutenant Karna and Sergeant Hagg refused to provide appropriate treatment for his seizures, in violation of the Eighth Amendment; and (2) defendant Karna disciplined plaintiff for filing a grievance, in violation of the First Amendment.

2. Plaintiff's complaint is DISMISSED as to defendants Dr. Martin, Dr. Heinzyl, Nurse Jane Doe, Lieutenant Pitzen, Sergeant Hooper and Correctional Officer Exner for plaintiff's 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 the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the 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.

6. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

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 defendant or the court are

unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 12th day of November, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge