

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

JAMES RZEPLINSKI,

Plaintiff,

v.

DEBBIE TIDQUIST, CHERYL
MARSOLEK, TAMMY MAASEN,
JOHN DOE #1 PRISON GUARD
and JOHN DOES #2-10,

Defendants.

OPINION AND ORDER

14-cv-41-bbc¹

Plaintiff James Rzeplinski, a prisoner incarcerated at the Jackson Correctional Institution, has filed a proposed complaint regarding his treatment for hepatitis C. Plaintiff seeks leave to proceed in forma pauperis and has made an initial partial payment of the filing fee as previously ordered by the court. The next step is 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. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After considering plaintiff's allegations, I conclude that he may proceed

¹ I am assuming jurisdiction over this case for the purpose of issuing this order.

on Eighth Amendment claims against defendants Cheryl Marsolek, John Doe #1 Prison Guard and Tammy Maasen for removing him from his assigned hepatitis C program.

I draw the following allegations from plaintiff's complaint.

ALLEGATIONS OF FACT

James Rzeplinski is an inmate at the Jackson Correctional Institution. He was transferred to Jackson to be part of a pilot program to treat hepatitis C. Plaintiff signed a consent form to participate in this program. It appears that he was placed in this program by a doctor.

Part of the program involves a three-drug regimen that requires the prisoner taking the medication to consume 20 grams of fat each day in order to absorb the medications properly. The prisoners are served peanut butter sandwiches and milk to supply this fat. There have been "a lot of problems" with the provision of the sandwiches and milk; the sandwiches do not always have the necessary amount of peanut butter and other times there is far too much.

On October 15, 2013, the prisoners in the pilot program went to get their medications, sandwiches and milk. Defendant nurse Cheryl Marsolek yelled at them because a correctional officer working the night before noticed that the prisoners had thrown away some of the sandwiches. She said, "You guys have to eat the whole thing." Plaintiff replied that it was difficult to eat the sandwich "when the peanut butter is an inch thick." Marsolek reiterated that "You have to eat it all for it to work." Plaintiff responded that he had been

eating all of the sandwiches. Marsolek "got flustered" and asked defendant correctional officer John Doe, "What should I do?" The officer said, "Kick him out." At that point plaintiff's participation in the program was ended.

Plaintiff has "gone through the chain of command" to try to get back into the program. Plaintiff talked to his unit manager, who talked to defendant Marsolek. Marsolek told the unit manager that plaintiff "was done." Plaintiff wrote defendant Tammy Maasen, the health services manager, but she has not responded.

Defendant Debbie Tidquist is a nurse practitioner in charge of the hepatitis C treatment program. Plaintiff believes that "she must be cosigning" the decisions about plaintiff's treatment.

I understand plaintiff to be alleging that he is not receiving any treatment for his hepatitis C at the present time.

OPINION

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Id. at 104.

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). A medical need may be serious

if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), “significantly affects an individual's daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

“Deliberate indifference” means that defendant was aware that the prisoner needed medical treatment but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate’s pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). However, inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Thus, disagreement with a doctor’s medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (“[E]ven admitted medical malpractice does not give rise to a constitutional violation.”).

At this point I conclude that plaintiff has alleged that he has a serious medical need in the form of his hepatitis C. With regard to his claims that defendants have acted with deliberate indifference toward his condition, I understand plaintiff to be saying that he was

removed from the hepatitis C pilot program without a good reason and given no other treatment in its place. If plaintiff is alleging that defendant nurse Marsolek removed him from the program to which he had been assigned by a doctor and that defendant correctional officer Doe suggested this course of action, I will allow him to proceed on an Eighth Amendment claim against both of these defendants. Estelle, 429 U.S. at 104-05 (prison official violates Eighth Amendment by “intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”). At the preliminary pretrial conference for this case, Magistrate Judge Stephen Crocker will explain the process plaintiff must use to identify the Doe defendant through the discovery process and amend his complaint to add the defendant’s full name. I will also allow plaintiff to proceed on a claim against defendant Maasen for ignoring his complaints about being taken off the program.

However, I will not allow plaintiff to proceed against the remaining defendants. Plaintiff believes that defendant Tidquist, who ran the pilot program, “must be cosigning” the decisions about plaintiff’s treatment, but that is mere speculation about Tidquist’s role and not enough to state a claim against her. Atkins v. City of Chicago, 631 F.3d 823, 830-32 (7th Cir. 2011) (to avoid dismissal, plaintiff “must plead some facts that suggest a right to relief that is beyond the speculative level”). If plaintiff knows more about Tidquist’s involvement in denying him treatment or finds out more about it in the course of discovery, he may amend his complaint to add the new allegations.

Plaintiff states that he will add facts relating to defendant John Does #2-10 as he

finds them through the discovery process, by which I understand plaintiff to be including these defendants as “placeholders” for additional defendants that may or may not materialize. I will dismiss these defendants because there is no reason to include them at this point. As I stated above regarding defendant Tidquist, if plaintiff discovers new information about other prison officials who had a hand in violating his rights, he may amend his complaint to add them as defendants, so long as he does so promptly.

Finally, I note that plaintiff states that his due process rights were violated by defendants when they delayed the inmate grievance process in some respect, although plaintiff does not explain how this came about. However, prison officials are under no constitutional obligation to provide due process in the internal grievance system or, for that matter, provide any grievance system at all. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) (“Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim.”). Accordingly, plaintiff will not be allowed to proceed on this claim.

ORDER

IT IS ORDERED that

1. Plaintiff James Rzeplinski is GRANTED leave to proceed on Eighth Amendment claims against defendants Cheryl Marsolek, John Doe #1 Prison Guard and Tammy Maasen for removing him from his assigned hepatitis C program.

2. Plaintiff is DENIED leave to proceed on claims against defendants Debbie Tidquist and John Does #2-10 or on his due process claims against all of the named defendants. Defendants Tidquist and Does #2-10 are DISMISSED from the case.

3. Under 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 state 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 on behalf of the state defendants.

4. 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.

5. 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.

6. Plaintiff is obligated to pay the balance of his unpaid 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 account until the filing fee has been paid in full.

Entered this 7th day of April, 2014.

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