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

JAMES A. LEWIS,

Plaintiff,

v.

ANGELA MCCLEAN, MEENA JOSEPH, PAUL BROWN-LUCAS, JOHN HACKETT, SHAWN FOLEY, JOSEPH C. CICHINOWICZ, BRENT BROWN, JONI SHANNON-SHARPE, AND THOMAS TAYLOR,

Defendants.

OPINION and ORDER

14-cv-280-jdp

On February 8, 2014, pro se plaintiff James A. Lewis woke up in his prison cell with a sharp pain in his back. Because of the pain, he was unable to move and sought help from various prison officials. He later filed a proposed complaint under 42 U.S.C. § 1983 against those prison officials, alleging cruel and unusual punishment under the Eighth Amendment to the United States Constitution for their response and treatment of him. Dkt. 1. More specifically, plaintiff argues that officers used excessive force against him and demonstrated deliberate indifference to his serious medical needs. He also alleges assault, battery, negligence, and medical malpractice under Wisconsin state law.

Plaintiff has paid an initial partial payment of the filing fee. 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, 1915A. Having reviewed the complaint, I conclude that plaintiff has stated Eighth Amendment

medical care and excessive force claims. He has also stated a medical malpractice claim under Wisconsin state law. The rest of plaintiff's state-law claims face a procedural hurdle: plaintiff must comply with the state's notice of claim requirements. I will defer my decision on whether he may proceed with them, giving plaintiff the opportunity to amend his complaint to address the notice of claim issue.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff is an inmate at the Wisconsin Secure Program Facility. He alleges that on February 8, 2014, he woke up there at 5:30 a.m. with a sharp pain shooting from the base of his neck, down his spine, to his tailbone. He was in such pain that it was difficult for him to move. He managed to press the emergency call button in his cell and spoke to an officer over the intercom system. That officer sent another officer to assist plaintiff. A few different prison officials came to plaintiff's cell, apparently to assess the situation, and left without assisting him. I do not understand plaintiff to be alleging that any of these officers violated his rights. Eventually, after plaintiff indicated that he could not move and needed medical assistance, defendants prison nurse Angela McClean and Lieutenant Joseph C. Cichinowicz came to his cell.

McClean told plaintiff that staff would bring him to the Health Services Unit to receive medical attention, but that he would need to be shackled before he could be transported. Cichinowicz told plaintiff that unless he came to the door to be shackled, they would "throw [him] down and cuff [him] from the back." He further suggested that

if plaintiff could not walk to the door, he should get on his knees and crawl. After McClean and Cichinowicz left, plaintiff attempted to ease himself onto the floor and make his way to the door. He was then unable to move from the floor and lay there in a face-down position.

Later, more officers, including defendants Lieutenant Joni Shannon-Sharpe, and correctional officers Thomas Taylor, Paul Brown-Lucas, John Hackett, and Shawn Foley, came to the cell to tell plaintiff that he was going to the hospital. Because he could not move from the floor, the officers planned to come into the cell to shackle plaintiff. Plaintiff promised to hold as still as he could. Armed with a taser, they opened the door and Foley rushed into the cell and "threw himself" onto plaintiff's back to handcuff him. Brown-Lucas and Hackett "snatched and twisted" his legs to shackle them.

The officers then put plaintiff into a wheelchair, over his protests that he needed to lie flat on a stretcher to protect his neck and back. When plaintiff protested over the use of the wheelchair and van, the officers told him that the prison doctor said that he could go in the van, despite never examining plaintiff when he was in distress. (I understand plaintiff to be referring to defendant Meena Joseph when he refers to the prison doctor.) Before taking him out of the prison, Shannon-Sharpe ordered that plaintiff be stood up and handcuffed to the strip-search cage to be searched. Defendant correctional officers Brent Brown and Taylor lifted plaintiff from the wheelchair into a standing position, but when he cried out in pain, they abandoned the attempt and used a wand to check for contraband instead. They put him back in the wheelchair to transport him to a van.

Defendants Brown and Taylor moved plaintiff into the van by picking him up under his shoulders and his legs and pulling him across the bench seat on his back until he was in place. They then drove him to the Gunderson Boscobel Area Hospital emergency room. Plaintiff alleges that the hospital records reflect that he arrived at the hospital at 8:53 a.m., approximately and hour and a half after the I.C.E. records indicate. Plaintiff alleges that all of these actions exacerbated the pain he was in.

ANALYSIS

I understand plaintiff to be bringing claims against defendants for violating his Eighth Amendment rights to adequate medical care and to be free from excessive force by prison officials. I also understand plaintiff to be bringing state law claims against defendants for medical malpractice, assault, battery, and negligence.

A. Eighth Amendment Medical Care

Plaintiff claims that prison officials were deliberately indifferent to his need for medical assistance when he woke up suffering from back pain. I understand plaintiff to be alleging that prison officers recklessly disregarded a serious risk to plaintiff's health by taking too long to respond to his medical need, insisting that he move to the door of his cell to be shackled, despite being unable to move and in extreme pain. Then, in attempting to assist him, defendants further exhibited recklessness by allowing officers to climb on and wrench his back, contorting his limbs to shackle him, putting him in a wheelchair instead of on a backboard with support for his neck and back, attempting to stand him up and

strip search him, and pulling him into a van while he was in severe back pain. Plaintiff also notes that he did not arrive at the hospital until 8:53 a.m., suggesting that defendants took a long time to get him medical attention.

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain" and violates the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."). 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, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer*, 511 U.S. at 847. To be deliberately indifferent, the defendants must have been aware of plaintiff's need for medical treatment but exhibited "subjective recklessness" in failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262 (7th Cir. 1997) (citations omitted). Inadvertent error, negligence, gross negligence, and ordinary malpractice are insufficient. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *Estelle*, 429 U.S. at 105-06 ("An inadvertent failure to provide adequate medical care cannot be said to constitute an 'unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

I understand plaintiff to be bringing the following Eighth Amendment medical care claims:

1. Defendant McClean refused to come into plaintiff's cell to help him and instead insisted that he be shackled and brought to the HSU to be seen;

2. Defendant Cichinowicz insisted that plaintiff come to the door of his cell to be shackled, telling plaintiff that the officers would throw him down and cuff him from behind if he did not, and suggesting that plaintiff get on his knees and crawl to the door;

3. Defendant Joseph approved the officers using a wheelchair and van to transport plaintiff, despite not examining him or diagnosing him.

4. Defendant Shannon-Sharpe instructed defendants Foley, Brown-Lucas, Hackett, Brown, and Taylor to use force to shackle and transport plaintiff in a wheelchair and van without properly supporting his neck and back, causing him increased pain, despite knowing that he was already in severe back pain.

I conclude that plaintiff may proceed on these claims. Plaintiff states that these actions all caused him increased pain beyond what he was already suffering. *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012) ('[D]eliberate indifference to prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim."); *Gutierrez*, 111 F.3d at 1373. Construing his complaint generously, plaintiff's allegations suggest that the officers acted with deliberate indifference to exacerbating his pain, although they were obviously aware of his distress. *See McGowan v. Hulick*, 612 F.3d 636 (7th Cir. 2010). Wrenching a person's back while it is already in distress for an unknown reason would likely cause increased pain. Given that the officers were attempting to help plaintiff by taking him to the hospital to receive care, plaintiff may find it difficult to prove his case at summary judgment or trial. He will need to present evidence that their actions were deliberately indifferent and not just incidental to their overall effort to attend to his medical need.

B. State Medical Malpractice

Plaintiff asks that the court exercise supplemental jurisdiction over state law medical malpractice claims against defendants and medical professionals McClean and Joseph. I understand plaintiff to be alleging that: although he was complaining of back pain, defendants McClean and Joseph allowed him to be transported in a wheelchair and van, without first assessing his condition and without properly supporting his neck and back. Plaintiff bases these allegations on the same facts described above and relied on in his Eighth Amendment medical care claim.

Wisconsin law defines medical malpractice as the failure of each of the defendant medical professionals to "exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances." *Sheahan v. Suliene*, 12-cv-433, 2014 WL 1233700, *9 (W.D. Wis. Mar. 25, 2014) (internal citations omitted). To succeed on a medical malpractice claim in Wisconsin, plaintiff must prove that defendants breached their duty of care to him and he suffered an injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Unless the situation is one in which common knowledge affords a basis for finding negligence, medical malpractice cases require expert testimony to establish the standard of care. *Carney–Hayes v. Nw. Wis. Home Care, Inc.*, 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524. Plaintiff need not file a notice of claim for his medical malpractice claims. Wis. Stat. § 893.82(5m).

As medical staff, McClean and Joseph owed plaintiff a duty of care. Plaintiff does not allege any tangible injury that he suffered as a result of defendants' actions; he instead asserts that those actions harmed him by exacerbating his pain. Construing plaintiff's claims

generously, I will allow him to proceed on these state law claims. *Wade v. Castillo*, 658 F. Supp. 2d 906, 910 (W.D. Wis. 2009) ("The standard for medical malpractice is significantly lower than that for the Eighth Amendment."). Again, plaintiff will have to overcome the overall context in which defendants were attempting to assist plaintiff in his medical need by taking him to the hospital.

C. Eighth Amendment Excessive Force

Plaintiff alleges that several defendants used excessive force against him by "throwing" themselves onto his back to shackle him, making him stand to be strip searched, and putting him into a wheelchair and then pulling him across the backseat of a van, while he was in obvious and extreme back pain. According to plaintiff, defendant officers Foley, Brown-Lucas, Hackett, Taylor, and Brown used physical force against plaintiff, while Lieutenant Shannon-Sharpe allowed or instructed them to do so. Notably, the officers were not using force to suppress a prison security risk like a disturbance or altercation; plaintiff was on the floor of his own cell, seeking medical assistance.

Excessive physical force constituting "the unnecessary and wanton infliction of pain" violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (collecting cases). "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The analysis has both an objective and a subjective component:

whether, in the context of contemporary standards of decency, the alleged wrong was objectively harmful enough to establish a constitutional violation and whether the officers' subjective motivations were malicious and sadistic. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). Where force is used maliciously and sadistically to cause harm, the standard of decency has been violated. *Hudson*, 503 U.S. at 9, *citing Whitley*, 475 U.S. at 327. Factors relevant to the analysis include: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury inflicted; (4) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and (5) any efforts made to temper the severity of a forceful response. *Whitley*, 475 U.S. at 321; *DeWalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 2000).

I understand plaintiff to be bringing the following Eighth Amendment excessive force claims:

1. Defendant Foley "threw himself" onto plaintiff's back to shackle his arms behind his back, which defendant Shannon-Sharpe allowed him to do, exacerbating his pain, despite knowing of his distress;

2. Defendants Brown-Lucas and Hackett "snatched and twisted" plaintiff's legs to shackle them, which defendant Shannon-Sharpe allowed them to do, exacerbating his pain, despite knowing of his distress;

3. Defendant Shannon-Sharpe instructed defendants Taylor and Brown to stand plaintiff up to be strip searched, exacerbating his pain, despite knowing of his distress; and

4. Defendant Shannon-Sharpe instructed defendants Taylor and Brown to transport plaintiff in a wheelchair and a van, pulling on and positioning his body in different ways, exacerbating his pain, despite knowing he was in extreme back pain.

I conclude that plaintiff may proceed on these claims as well. Plaintiff states that when force was used against him, he was already incapacitated by extreme pain and in need of medical attention, lying face down on the floor. He claims that each use of force against him exacerbated his pain and harmed him by subjecting him to increased pain. *Gutierrez*, 111 F.3d at 1373. Again construing plaintiff's allegations generously, he has made out a plausible claim of excessive force. However, as is also noted above, the use of force in this case was in the context of attempting to assist plaintiff by taking him to the hospital for his back pain. Plaintiff will have to demonstrate that the force was excessive in this context in order to prevail on his claims.

D. Assault, Battery, and Negligence

Plaintiff asks the court to exercise supplemental jurisdiction over state law claims of assault, battery, and negligence against defendants Shannon-Sharpe, Foley, Brown-Lucas, Hackett, Brown, and Taylor. Plaintiff bases these allegations on the same facts described above in the excessive force claim. The court need not determine the merits of these claims because plaintiff faces a procedural issue. Because plaintiff intends to sue state government official acting in the course of their duties, Wisconsin law requires him to file notice of claim with the Attorney General's office. *Estate of Hopgood ex rel. Turner v. Boyd*, 2013 WI 1, ¶ 20 n.11, 345 Wis. 2d 65, 825 N.W.2d 273 ("Serving notice of claim is an essential step in commencing an action."). Plaintiff must submit written notice of the claims stating the time, date, location and the circumstances of the events giving rise to the claims, and the names of people involved. *Id.* § 893.82(3). Because plaintiff is a prisoner, he cannot bring suit until

the claim has been disallowed or rejected. Wis. Stat. § 893.82(3m).

In his complaint, plaintiff does not state whether he has filed a notice of claim that has been disallowed. Because this is a threshold requirement for his state law assault, battery, and negligence claims, I will defer my decision on whether to grant plaintiff leave to proceed on those claims and allow time for him to supplement his complaint.

ORDER

IT IS ORDERED that:

1. Plaintiff James A. Lewis is GRANTED leave to proceed on the following claims:

    a. Eighth Amendment medical care claims against defendants Angela McClean, Meena Joseph, Joseph C. Cichinowicz, Joni Shannon-Sharpe, Shawn Foley, Paul Brown-Lucas, John Hackett, Brent Brown, and Thomas Taylor;

    b. State law medical malpractice claims against defendants Angela McClean and Meena Joseph;

    c. Eighth Amendment excessive force claims against defendants Joni Shannon-Sharpe, Shawn Foley, Paul Brown-Lucas, John Hackett, Brent Brown, and Thomas Taylor.

2. Plaintiff's request for leave to proceed on his state law claims of assault, battery, and negligence is DENIED without prejudice. Plaintiff has until October 22, 2014 to supplement his complaint with information about his compliance with notice requirements under Wis. Stat. § 893.82. If plaintiff does not submit a supplement to his complaint by that date, those state law claims will be dismissed.

3. 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 or lawyers 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.

4. 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.

5. 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 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 complaint if it accepts service for defendants.

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.

Entered this 8th day of October, 2014.

BY THE COURT:
/s/
JAMES D. PETERSON
District Judge