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

DAVID HEBERT,

Plaintiff,

v.

NURSE NITZ, CAPTAIN SPECKHART, and JOHN DOES,

Defendants.

OPINION and ORDER

14-cv-372-jdp

Pro se plaintiff David Hebert, an inmate at the Stanley Correctional Institution, has filed this proposed civil action under 42 U.S.C. § 1983 and state negligence law alleging that prison staff delayed in giving him his prescribed pain medication following surgery. Plaintiff has paid the $400 filing fee. The next step in this case is for the court to screen the 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. § 1915A.

In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After considering plaintiff's allegations, I will allow him to proceed on Eighth Amendment and state law negligence claims against defendants Nurse Nitz and Captain Speckhart, but deny him leave to proceed on claims against the "John Doe" defendants.

ALLEGATIONS OF FACT

Plaintiff David Hebert is an inmate at the Stanley Correctional Institution. On June 8, 2011, plaintiff had right-wrist surgery at the Marshfield Clinic; a metal plate with 12 screws was inserted into his wrist. Dr. Taylor at the clinic prescribed plaintiff Vicodin for his pain, two

tablets to be taken every four to six hours as needed.

Upon arrival at the prison at about 9:45 p.m., plaintiff was given two Vicodin tablets. At about 2 a.m., plaintiff awoke in extreme pain. Plaintiff told defendant Nurse Nitz that his pain was a "7" on a 1-10 scale, and he requested more Vicodin. Nitz refused to give plaintiff the medication and told him that he would have to wait until 8 a.m. for "pill call." Plaintiff continued to experience extreme pain (between "8 through 10" on the pain scale) and "begged" Nitz for the medication, but she refused.

Plaintiff asked correctional officer Boffmen (who is not named as a defendant) to call a supervisor. The officer initially told plaintiff that the supervisor "was not going to be happy when he gets here" and later told plaintiff that he contacted defendant Captain Speckhart, but Speckhart said that he was not going to come to plaintiff's cell and instead just agreed with whatever Nitz decided.

The next morning at about 6:30 a.m., the nurse on duty immediately gave plaintiff more Vicodin.

ANALYSIS

Plaintiff states that he is attempting to bring Eighth Amendment and state law negligence claims against defendants Nurse Nitz, Captain Speckhart, and "John Does."

1. Eighth Amendment medical care claims

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 defendants were "deliberately indifferent" to this need. *Estelle v. Gamble*, 429 U.S. 97, 104 (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). 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 v. Brennan*, 511 U.S. 825, 847 (1994). "Deliberate indifference" means that the officials were 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). 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). Disagreement with a doctor's medical judgment, incorrect diagnosis, or improper treatment resulting from negligence are also insufficient to state an Eighth Amendment claim. *Gutierrez*, 111 F.3d at 1374.

Plaintiff alleges that defendant Nurse Nitz refused to give him pain medication in the early morning even though it was prescribed by an outside doctor and plaintiff told her he was in extreme pain. He also alleges that Captain Speckhart ignored Nitz's refusal to provide medication. These allegations are sufficient to state deliberate indifference claims against Nitz and Speckhart. *See Gayton v. McCoy*, 593 F.3d 610, 619 (7th Cir. 2010) (delay in treatment may constitute deliberate indifference if delay exacerbated the injury or unnecessarily prolonged inmate's pain); *Ralston v. McGovern*, 167 F.3d 1160, 1161-62 (7th Cir. 1999) (refusal to provide prescribed treatment may be deliberate indifference).

Plaintiff also names "John Does" as defendants and states that they "may be responsible for denying plaintiff's pain medication," but does not include any factual allegations explaining any interactions he or any of the defendants had with these officials. Because plaintiff fails to

show how these defendants were personally involved in violating his rights, he will not be allowed to proceed on claims against them. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (liability under § 1983 must be based on defendant's personal involvement in constitutional violation).

2. State law negligence

Wisconsin law defines medical negligence as the failure of a medical professional 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." *Sawyer v. Midelfort*, 227 Wis. 2d 124, 149, 595 N.W.2d 423, 435 (1999); *Schuster v. Altenberg*, 144 Wis. 2d 223, 229, 424 N.W.2d 159, 161-62 (1988). Like all claims for negligence, a claim for medical malpractice includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 42, ¶17, 242 Wis. 2d 507, 625 N.W.2d 860. Plaintiff's allegations against defendant Nurse Nitz are sufficient to state a medical negligence claim.

Plaintiff also argues that defendant Speckhart's actions support a negligent supervision claim. A claim for negligent supervision of an employee requires a plaintiff to plead the following: (1) the employer had a duty of care owed to the plaintiff; (2) the employer breached its duty; (3) a wrongful act or omission of an employee was a cause-in-fact of the plaintiff's injury; and (4) an act or omission of the employer was a cause-in-fact of the wrongful act of the employee. *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 16, 303 Wis. 2d 34, 734 N.W.2d 827. At this early stage of the proceedings, I conclude that plaintiff has alleged enough to state a negligent supervision claim against Speckhart for allowing Nitz to deny plaintiff his medication.

As for defendant John Does, plaintiff does not explain what these defendants did to harm him, so he may not proceed on negligence claims against them.

ORDER

IT IS ORDERED that:

1. Plaintiff David Hebert is GRANTED leave to proceed on Eighth Amendment medical care and state law negligence claims against defendants Nurse Nitz and Captain Speckhart.

2. Plaintiff is DENIED leave to proceed on claims against defendant John Does, and these defendants 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 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 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 has learned what lawyer will be representing defendants, he should serve defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless he 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 10th day of December, 2014.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge