

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

ROOSEVELT M. WILLIAMS,

Plaintiff,

v.

JUDY SMITH, JEFFREY L. FREUNA,
CAREY A. HALVERSON, CHRISTOPHER MUSHA,
KEITH E. POND, RUSSELL J. POTRATZ,
ERIC D. SCHROEDER, JAMES A. ZANON,
and SANDY HABECK,

Defendants.

OPINION & ORDER

14-cv-789-jdp

Plaintiff Roosevelt M. Williams, a prisoner in the custody of the Wisconsin Department of Corrections at the Columbia Correctional Institution, alleges that he was served a meal containing particles from his food tray that made him seriously ill. I previously dismissed plaintiff's original complaint because his allegations failed to adequately explain what defendants did to violate plaintiff's rights. Dkt. 19. I directed him to file an amended complaint more fully explaining his claims. *Id.*

Plaintiff has filed an amended complaint. Dkt. 23. After reviewing plaintiff's allegations, I will allow him to proceed on Eighth Amendment and state-law negligence and infliction of emotional distress claims against several of the defendants, but deny plaintiff leave to proceed on the remainder of his claims.

ALLEGATIONS OF FACT

In his amended complaint, plaintiff now makes clear that he was incarcerated at the Oshkosh Correctional Institution at the time of the incident. On November 12, 2013, while

plaintiff was on the segregation unit, he was served a meal on a tray that was defective. The tray was “damaged, and peeling, and as a result particles from the tray [were] hidden in, and mixed in with the food.” Dkt. 23, at 3.

Plaintiff had difficulty breathing after ingesting the tray particles. He pushed his emergency call button, and defendant Nurse Carey Halverson arrived. Plaintiff “appeared to be displaying physical action [as] though he was having a seizure, he was found on the floor of his cell shaking and somewhat, but verbally unresponsive.” *Id.*, at 2. Plaintiff states that “as defendant . . . Halverson watched, [he] regurgitated food and tray particles.” *Id.* Plaintiff was placed in a wheelchair and taken to the Health Services Unit. Medical staff told plaintiff that the plastic would pass through his body with his feces. Since the incident, plaintiff has had abdominal pain, stomach cramps, and diarrhea.

On December 1, 2014, plaintiff was taken to the University of Wisconsin Hospital for a colonoscopy. The colonoscopy was performed without any pain medication. Plaintiff states, “The whole process was humiliating and shameful, resulting in mental stress, and physical pain.” Dkt. 5.

Defendant supervising officer James Zanon filed an incident report stating that the trays in the segregation unit had been “exhibiting some signs of delaminating” and that defendant Food Services Administrator Sandy Habeck was aware of the problem. *Id.* at 8. As part of the litigation of plaintiff’s inmate grievance about the incident, defendant Habeck told the complaint examiner that “she was aware of the problem as other inmates have informed staff of the plastic coming loose.” *Id.*

Defendants Zanon, Correctional Officer Keith Pond, Correctional Officer Russell Potratz, Sergeant Eric Schroeder, and Sergeant Christopher Musha worked on plaintiff’s unit.

Plaintiff states that they “knew or should have known that the trays was damaged, and [were] [n]egligent for serving food on the trays or allowing food to be served on the trays. It can be shown that defendants knew of the broken trays.” *Id.*, at 4.

Plaintiff states that defendant Judy Smith (who I understand to be the warden) “was aware of the trays and did not do anything about it, but forwarded what she knew to [defendants Zanon and Habeck].” *Id.*, at 7.

Plaintiff filed a grievance that was dismissed “with modification” because the tray was removed from service and because plaintiff was transferred away from the Oshkosh prison. Defendant Smith upheld this dismissal.

ANALYSIS

As with screening plaintiff’s original complaint, I must construe plaintiff’s amended complaint liberally. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). However, I must dismiss any portion of the complaint 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.

A. Eighth Amendment

Plaintiff alleges that the food trays in the segregation unit were hazardous and that several defendants either knew about the hazard or should have known about it. He mentions defendants’ negligence at several points in the complaint (which I will address below), but he has also stated facts that raise an inference that some of the defendants violated his Eighth Amendment right against cruel and unusual punishment by acting with deliberate indifference to the hazard. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To

state a claim for a prison official's failure to protect him from harm, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005).

Plaintiff alleges that he almost choked on tray particles, had a seizure-like reaction, vomited, and has continued to suffer gastrointestinal problems after ingesting the tray particles. I conclude that he has alleged a substantial risk of serious harm from the "delaminating" trays.

Plaintiff alleges that defendant Habeck was aware of the delamination of the trays, which raises the inference that she was deliberately indifferent to the hazard faced by plaintiff. I will allow plaintiff to proceed on an Eighth Amendment claim against Habeck.

Plaintiff also alleges that defendants Pond, Potratz, Schroeder, Musha, and Zanon knew about the damaged trays. I infer from plaintiff's allegations that these officers were responsible for serving plaintiff his food in the segregation unit. Construing plaintiff's allegations generously, I conclude that he has stated enough to raise an inference that these defendants knew about the problem yet let plaintiff eat off a damaged tray anyway, which is enough to state an Eighth Amendment claim against them.

Plaintiff states that defendant Judy Smith "was aware of the trays and did not do anything about it, but forwarded what she knew to [defendants Zanon and Habeck]." Dkt. 23, at 7. This sentence seems to be self-contradictory. Defendant Smith does not need to personally address each complaint filed by an inmate just because she is a high ranking prison official. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things to rights Bureaucracies divide tasks; no prisoner is

entitled to insist that one employee do another's job."). Passing on the information to lower-level officials is a reasonable action for the warden, and plaintiff does not explain further what Smith could have done to violate his rights, other than to state that she handled the appeal of the dismissal of his grievance about the issue. Plaintiff's grievance was dismissed "with modification" because the tray was removed from service and because plaintiff was transferred away from the Oshkosh prison. Defendant Smith upheld this dismissal. Usually, I would allow a plaintiff to proceed with an Eighth Amendment claim if a grievance examiner rules in a way that allows the prisoner to remain in danger, but given plaintiff's move out of the prison, I cannot say that Smith's ruling continued to put him in danger. So I will deny plaintiff leave to proceed on an Eighth Amendment claim against defendant Smith.

Prisoners may also state Eighth Amendment claims against prison officials who fail to treat health problems they encounter. Plaintiff alleges that Nurse Halverson watched him vomit tray particles after she arrived at his cell. But plaintiff does not explain whether he believes that Halverson acted in any way that shows deliberate indifference or even negligence to his health problems after he ingested the tray particles. He alleges that he was taken to the Health Services Unit after vomiting, which indicates that Halverson did not act with deliberate indifference to his health. I conclude that plaintiff does not state an Eighth Amendment claim against Halverson.

I note that plaintiff takes issue with the way that his colonoscopy was performed, but there is nothing in his allegations to suggest that any of the named defendants had anything to do with the medical treatment he received at the University of Wisconsin Hospital. Plaintiff may be able to show that the treatment he had to endure was part of the injury he suffered, but he does not state a separate claim for harm inflicted during the treatment itself.

B. Negligence

Plaintiff alternately alleges that defendants Habeck, Pond, Potratz, Schroeder, Musha, and Zanon were negligent by allowing him to eat off the damaged trays. Negligence is a state-law cause of action, but these negligence claims are “so related” to his federal claims against these defendants that “they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). To prevail on a claim for negligence in Wisconsin, plaintiff must prove that defendants breached their duty of care and he suffered injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. It is reasonable to infer at this stage that these defendants may have been negligent by allowing plaintiff to eat off the damaged tray, so I will allow plaintiff to proceed on his negligence claims.

C. Infliction of emotional distress

Plaintiff refers to Wisconsin cases discussing intentional and negligent infliction of emotional distress. See Dkt. 23, at 4-5 (citing *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 517 N.W.2d 432 (1994); *La Fleur v. Mosher*, 109 Wis. 2d 112, 325 N.W.2d 314 (1982); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963)). He also states that he suffered severe emotional distress from the “near death” experience of choking on the tray particles. Construing the complaint generously, I conclude that plaintiff is attempting to bring state-law claims for both intentional and negligent infliction of emotional distress.

To state a claim for intentional infliction of emotional distress, a plaintiff must allege that defendants’ conduct was: (1) intentional, i.e., for the purpose of causing emotional distress to plaintiff; (2) extreme and outrageous; and (3) a cause-in-fact of plaintiff’s injury; and plaintiff must also allege that he (4) suffered an extreme disabling emotional response to

defendants' conduct. *Woltring v. Specialized Loan Servicing LLC*, 56 F. Supp. 3d 947, 952 (E.D. Wis. 2014) (citing *Alsteen*, 124 N.W.2d at 318). To state a claim for negligent infliction of emotional distress, "the elements [are]: negligent conduct, causation, and injury (severe emotional distress)." *Bowen*, 517 N.W.2d at 443. For the same reasons that I am allowing plaintiff to proceed with deliberate indifference and negligence claims against defendants Habeck, Pond, Potratz, Schroeder, Musha, and Zanon, I will allow him to proceed on claims for both intentional and negligent infliction of emotional distress against these defendants.

D. Retaliation

Plaintiff includes an allegation that he was transferred from the medium-security Oshkosh prison to the maximum-security Columbia Correctional Institution because he complained about the incident. To state a claim for retaliation under the First Amendment, a plaintiff must identify: (1) a constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009). A transfer to a high security prison might support a retaliation claim, but plaintiff does not allege who was responsible for transferring him. Without one of the named defendants being responsible for this transfer, I cannot allow him to proceed on a retaliation claim.

E. Due process

Plaintiff contends that his due process rights were violated by the complaint examiners when they dismissed his complaints. 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, I will not allow plaintiff to proceed on a due process claim.

F. Defendant Freuna

Plaintiff names Jeffrey Freuna as a defendant, but he does not provide any allegations indicating what Freuna did to violate his rights, so I will dismiss him from the case.

ORDER

IT IS ORDERED that:

1. Plaintiff Roosevelt M. Williams is GRANTED leave to proceed on the following claims:
 - a. Eighth Amendment claims against defendants Sandy Habeck, James Zanon, Keith Pond, Russell Potratz, Eric Schroeder, and Christopher Musha.
 - b. Wisconsin-law negligence claims against defendants Habeck, Zanon, Pond, Potratz, Schroeder, and Musha.
 - c. Wisconsin-law intentional and negligent infliction of emotional distress claims against defendants Habeck, Zanon, Pond, Potratz, Schroeder, and Musha.
2. Plaintiff is DENIED leave to proceed on the following claims:
 - a. Any claims against defendants Judy Smith and Carey Halverson.
 - b. A retaliation claim for being transferred.
 - c. A due process claim for the processing of his grievance.

3. Defendants Smith, Halverson, and Jeffrey Freuna are DISMISSED from the case.
4. 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.
5. 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.
6. 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 February 23, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge