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

RYAN K. ROZAK,

OPINION & ORDER

Plaintiff,

v. 15-cv-134-jdp

RANDALL HEPP, HOLLY MEIER, GEORGE COOPER, MARC CLEMENTS, and DR. LARSEN,

Defendants.

Plaintiff Ryan Rozak, a prisoner in the custody of the Wisconsin Department of Corrections at the Fox Lake Correctional Institution, has filed a complaint alleging that prison officials are subjecting him to unsafe levels of lead and copper in the water supply and refusing to adequately treat his medical problems. Plaintiff has also filed a motion for the court's assistance in recruiting him counsel and several other motions regarding the use of his prison account funds and other claims not mentioned in the complaint. He seeks leave to proceed with his case *in forma pauperis*, and he has already made an initial partial payment of the filing fee previously determined by the court.

The next step is for the court to screen the complaint and dismiss any portions that are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or ask 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 plaintiff to proceed on his claim about the water supply, but deny him leave to proceed on his medical care claims. I will deny each of his additional motions.

ALLEGATIONS OF FACT

The following facts are taken from plaintiff's complaint, Dkt. 1, and the exhibits he later submitted in support of the complaint, Dkt. 17.

Plaintiff Ryan Rozak is a prisoner in the custody of the Wisconsin Department of Corrections at the Fox Lake Correctional Institution (FLCI). Plaintiff submits documents showing that prison officials alerted inmates to elevated levels of lead and copper in the water supply of at least some areas of the prison. A memo from defendant Marc Clements, the former warden, recommended that prisoners flush faucets for 30 to 60 seconds before using water for drinking or cooking.

Plaintiff believes that the lead and copper "messes up [his] body, bones, [and] mind." In health service requests, plaintiff stated that he suffers from headaches, bloody noses, diarrhea, vomiting, stomach pain, pain in his left side, blurry eyes, and dizziness.

Plaintiff states that defendants Randall Hepp (the warden) and Holly Meier (a nurse who serves as the Health Services Unit supervisor) are deliberately indifferent to his serious medical needs and the "unsanitary condition[s] of [his] confinement." He also states that FLCI staff members are not treating his medical needs and are retaliating against him.

Plaintiff filed a grievance about the level of lead in the water but it was rejected by the institution complaint examiner (plaintiff does not provide the identity of the ICE). Plaintiff

filed a second grievance but it was rejected by defendant complaint examiner George Cooper and defendant Clements as being addressed in the previous grievance.

Plaintiff saw defendant Dr. Larsen about severe headaches and bumps of the back of his head. Plaintiff states that Larsen told him the headaches might be a symptom of drinking too much caffeine. Dkt 17, at 41. Plaintiff saw a specialist, who told plaintiff "it's normal," but plaintiff states that he "know[s] for sure it's not." *Id*. Plaintiff wrote to defendant Meier, but she did not help him.

ANALYSIS

I understand plaintiff to be bringing claims against defendant prison officials under the Eighth Amendment, which prohibits cruel and unusual punishment, for subjecting him to water with elevated levels of lead and copper and for failing to properly treat his medical problems.

A. Water supply

The Eighth Amendment requires the government to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). Conditions of confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Farmer*, 511 U.S. at 834. The objective analysis focuses on whether prison conditions were

sufficiently serious so that "a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," *id*., or "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id*. "Deliberate indifference" means that the defendant knew that the plaintiff faced a substantial risk of serious harm and yet disregarded that risk by failing to take reasonable measures to address it. *Farmer*, 511 U.S. at 847. Thus, it is not enough for plaintiff to prove that a defendant acted negligently or should have known of the risk. *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004). He must show that the official received information from which an inference could be drawn that a substantial risk existed and that the official actually drew the inference. *Id*. at 902.

Construing plaintiff's complaint generously, I conclude that he has stated a plausible Eighth Amendment claim regarding the water supply. He alleges that defendant Warden Clements warned the inmates about lead and copper in the water supply, but instead of completely remediating the problem, only recommended that inmates flush their faucets before using the water. It is possible that this response is the proper way to resolve this type of a problem, or at least indicates a lack of deliberate indifference toward the problem, but at this early stage in the proceedings, I will allow plaintiff to proceed on an Eighth Amendment claim against Clements. Because it is reasonable to infer that the current warden, defendant Hepp, is aware of the problem with the water supply as well, I will also allow plaintiff to proceed on a claim against him. Plaintiff alleges that defendants Clements and Cooper were aware of plaintiff's complaints about the problem but did not take action following his

grievances, so plaintiff may proceed against Clements and Cooper with respect to this aspect of his claim. Finally, plaintiff conclusorily alleges that defendant Nurse Meier was deliberately indifferent to the conditions in his cell, but he does not provide any explanation of what Meier could have done to protect plaintiff from the water supply other than to provide him with medical care. Plaintiff's medical care claim will be discussed below. He will not be allowed to proceed on a "conditions of confinement" claim against Meier.

B. Medical care

The Eighth Amendment prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (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). For defendants to be deliberately indifferent to such a need, they must know of the need and disregard it. *Id*. at 834. But "the Eighth Amendment is not a vehicle for bringing claims for medical malpractice." *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996).

Plaintiff alleges that defendants Dr. Larsen and Nurse Meier acted with deliberate indifference toward the various medical problems he believes were caused by the water supply. Plaintiff's allegations that the water supply causes his medical problems is pure speculation, but even assuming that his medical care claims belong in the same lawsuit as his

claim about the water supply, he has pleaded himself out with regard to the medical treatment he received. In one of his inmate grievances, he acknowledges that he was sent to see a specialist after complaining about severe headaches, but the specialist "told [him] it's normal." Dkt. 17-1, at 51. The referral to a specialist and reliance on the specialist's diagnosis forecloses Eighth Amendment liability, because there is no reasonable inference to be drawn from these allegations that defendants acted with deliberate indifference toward his headaches. Rather, plaintiff's allegations show that defendants sought help for plaintiff, and he simply disagrees with the ultimate diagnosis of the specialist.

As for the remainder of plaintiff's symptoms, although they may be serious medical needs, plaintiff does not provide any allegations suggesting that defendants Larsen and Meier ignored them or were even aware of them. Plaintiff is free to amend his complaint to explain in greater detail how these defendants acted with deliberate indifference toward his problems, but for now the case will proceed with his conditions of confinement claim only.

C. Recruitment of counsel

Plaintiff has also filed a motion for the court's assistance in recruiting him counsel. Dkt. 16. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts"). To meet this threshold requirement, this court generally requires plaintiffs to submit correspondence from at least three attorneys to whom they have written and who have refused to take the case. Plaintiff has provided several such letters.

Second, this court will seek to recruit counsel for a pro se litigant only when the litigant demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). I conclude that it is too early to make that assessment. The case has not passed the relatively early stage in which a defendant may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage and plaintiff believes that he is unable to litigate the suit himself, he may renew his motion.

D. Motion for contempt

Plaintiff has filed a motion asking to find defendant Hepp in contempt for failing to allow him to use his release account to pay the $108.49 initial partial payment of the filling fee the court previously calculated. Since plaintiff filed his motion, he submitted this amount, which I understand to have come at least in part from his release account, so there is no reason to consider the motion further.

E. Motions regarding retaliation

Plaintiff has filed a document he calls a "retaliation motion," Dkt. 18, in which he states that prison officials are harassing him and refused to give him a job for which he applied, as retaliation for filing this and another lawsuit. To the extent that I can consider this document to be a motion to amend the complaint to include these new allegations, I must deny it. Plaintiff's allegations cannot be included in this lawsuit because they detail a separate set of actions by prison officials, most of whom are not defendants regarding

plaintiff's conditions of confinement claims. *See* Fed. R. Civ. P. 18 and 20. If plaintiff wishes to pursue a lawsuit about these allegations, he remains free to file a separate lawsuit.

Plaintiff has also filed a motion for temporary restraining order against these prison officials. Dkt. 19. That motion will be denied because plaintiff's retaliation claims are not part of this lawsuit.

F. Use of release account funds

Plaintiff has submitted a motion asking the court to force the state to transfer his release account funds into his regular account. I must deny this motion because the court has no authority to interfere with the administration of prisoners' release accounts in such a fashion. This court has taken the position that prison officials are required to use a prisoner's release account to satisfy an initial partial fee payment if the prisoner has insufficient funds in his inmate trust account, *see Carter v. Bennett*, 399 F.Supp. 2d 936, 936-37 (W.D. Wis. 2005), but I am aware of no authority permitting me to order prison officials to shuffle plaintiff's funds in the manner he now requests.

ORDER

IT IS ORDERED that:

1. Plaintiff Ryan Rozak is GRANTED leave to proceed on an Eighth Amendment conditions of confinement claim against defendants Marc Clements, George Cooper, and Randall Hepp.

2. Plaintiff is DENIED leave to proceed on the remainder of his claims. Defendants Dr. Larsen and Holly Meier are DISMISSED from the case.

3. Plaintiff's motion for the court's assistance in recruiting him counsel, Dkt. 16, is DENIED without prejudice.

4. Plaintiff's remaining motions, Dkt. 10, 18, 19, and 20, are DENIED.

5. 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.

6. 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.

7. 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 July 16, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge