

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

TERRANCE J. SHAW,

Plaintiff,

OPINION & ORDER

v.

15-cv-511-wmc

EDWARD WALL, SANDY DEYOUNG,
KATHY SABEL, MICHAEL TURNER,
SERGEANT HUNT, JENNIFER DELVAUX,
and SERGEANT COOK,

Defendants.

Pursuant 42 U.S.C. § 1983, plaintiff Terrance Shaw has filed suit for damages and injunctions arising from various incidents during his incarceration by the Wisconsin Department of Corrections (“WDOC”). In fact, this lawsuit actually arises out of another of Shaw’s lawsuits in this court. In *Shaw v. Wall*, Case No. 12-cv-497-wmc, the parties entered into a settlement agreement, according to which this court dismissed the case with prejudice on June 29, 2105. Shaw later filed motions for emergency relief, alleging that staff at Oshkosh Correctional Institution (“OSCI”) were retaliating against him for bringing the earlier lawsuit by transferring him. While the court denied Shaw’s motion for lack of jurisdiction, it also suggested that he may file a new lawsuit for wrongful retaliation if good grounds existed for him to do so. *Id.* (Dkt. #172.)

Hence, the current lawsuit; only Shaw expanded his complaint to add claims for violations of his rights under the First, Eighth and Fourteenth Amendments, and the Americans with Disabilities Act (“ADA”). Shaw also filed two emergency motions, seeking an injunction barring his transfer from OSCI. (Dkts. #2, #6.)

Shaw’s proposed complaint is now before the court for screening under 28 U.S.C. § 1915A. For the reasons that follow, Shaw will be permitted to proceed, although only on

his First Amendment claim against defendants DeYoung, Sabel, Turner, Delvaux, Hunt and Wall, and on his Eighth Amendment claim against defendants Delvaux and Hunt. In addition, Shaw's motions for emergency relief will be denied.

ALLEGATIONS OF FACT¹

Shaw is currently confined at OSCI. The defendants include WDOC Secretary Edward Wall and the following employees at OSCI: Sandy DeYoung, Shaw's social worker; Kathy Sabel, Shaw's unit supervisor; Michael Turner, a correctional officer; Christopher Hunt, a sergeant in Shaw's unit; Jennifer Delvaux, another unit supervisor; and Sergeant Cook.

As an overview, Shaw's complaint alleges that the defendants retaliated against him for filing Case No. 12-cv-497 in the following four ways: (1) recommending his transfer from OSCI; (2) forcing him to destroy his litigation documents; (3) refusing to mail his settlement agreement to an inmate in another institution; and (4) on one occasion, denying him the same access to a wheelchair that he enjoyed before the settlement. Shaw also alleges that he submitted complaints about each of these retaliatory acts to Wall.

More specifically, Shaw alleges that DeYoung recommended his transfer from OSCI in June of 2015, and that he received a Program Review Committee ("PRC") written summary on July 27, 2015, which indicates that he will be transferred out of OSCI. On October 3, 2015, Shaw further alleges that he received a notice stating the transfer will go forward. In fact, Shaw believes the transfer could happen "any day now."

¹ In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court will assume the above facts are true based on the allegations in Shaw's complaint.

Shaw also alleges that DeYoung called him to Sabel's office in September of 2014, and in the presence of Sabel and Turner told Shaw that he was "forced" to destroy 36,000 pages of his pending litigation documents. This occurred after Sabel provided an affidavit against Shaw in his other lawsuit, Case No. 12-cv-497-wmc.

After he entered into the settlement agreement, Shaw further alleges that Sergeant Cook prevented him from mailing his settlement agreement in Case No. 12-cv-497-wmc to a jailhouse legal assistant located at the Columbia Correctional Institution ("CCI"). When Shaw persisted, Cook supposedly reversed himself and allowed the letter to go through, although the letter never arrived at its intended destination.

Finally, Shaw apparently has a disability in his right knee and has been diagnosed with cardiac ischemia, for which he has been afforded wheelchair access while at OSCI. This is because when Shaw walks, especially long distances, it "feels like there are shards of broken glass" in his right knee, and he experiences chest pain and shortness of breath. Therefore, Shaw has had access to a wheelchair when he needs to walk distances, along with an aide that pushes his chair, for the past several years. However, "immediately after" Shaw entered into the settlement agreement, Delvaux and Hunt allegedly prohibited him access to a wheelchair. In particular, when he was working in the OSCI law library, a guard was allegedly told to send him back to his unit immediately without his aide, requiring him to walk the half-mile back to his unit while pushing his wheelchair.

OPINION

Since plaintiff's First Amendment claim relates to all defendants, it will be addressed first. Afterward, the remaining claims under the Eighth and Fourteenth Amendments, and

the ADA and Rehabilitation Act that relate only to defendants Delvaux and Hunt will be discussed.

I. First Amendment

To state a claim for retaliation under the First Amendment, a plaintiff must identify: (1) the 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 defendant took the action she did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009).

Plaintiff fulfilled the first prong by claiming the acts of retaliation were prompted by exercising his protected right to file a lawsuit. At this stage, Shaw has also sufficiently alleged facts to infer the second prong -- deterrence -- by claiming that defendants DeYoung, Sabel, Turner, Delvaux and Hunt caused him to be transferred against his will, forced him to destroy pending litigation documents and denied him wheelchair access. However, plaintiff has not alleged sufficient facts to infer that defendant *Cook* took an adverse action against him in retaliation for exercising a protected right. On the contrary, he actually alleges that Cook eventually *did* agree to mail the settlement agreement, while including no further allegations about what Cook did or did not do to his mail. Accordingly, the complaint does not allege that defendant Cook took any adverse action against plaintiff and, in particular, there are no facts supporting an inference that Cook took some additional action to thwart plaintiff’s attempted mailing.

Plaintiff's allegations as to the third prong are not well-pled, but nonetheless sufficient at the screening stage. The allegation that in 2014, DeYoung prepared an affidavit for use against him in his lawsuit is sufficient to show that she knew about Shaw's lawsuit when she allegedly recommended his transfer and ordered him to destroy litigation documents. As to defendants Sabel and Turner, although the complaint does not explicitly state that they knew about the lawsuit, it is reasonable to infer that they both knew Shaw had filed lawsuits because they ordered him to destroy all of his litigation documents. As to defendants Delvaux and Hunt, plaintiff alleges only that they prohibited him from using the wheelchair "immediately after" the lawsuit was settled. The timing of these two events is also sufficiently close to permit an inference the events are linked, because plaintiff is "not required to allege facts in his complaint that would establish every aspect of the claim's validity." *Johnson v. Kingston*, 292 F. Supp. 2d 1146, 1158-59 (W.D. Wis. 2003) (citing *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002)).

Finally, plaintiff appears to name defendant Wall in his official capacity. The only allegations related to Wall's involvement are vague references to complaints plaintiff submitted to him related to alleged retaliations. Plaintiff's First Amendment claim against Wall may only proceed for injunctive relief. *See Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011) (section 1983 requires a defendant to be personally involved to be held liable for damages, but not to be liable for injunctive relief).

Accordingly, plaintiff may proceed on his First Amendment claim against defendants DeYoung, Sabel, Turner, Delvaux and Hunt in their individual capacities, and against defendant Wall in his official capacity. Moreover, plaintiff may not proceed on his First Amendment claim against defendants Cook.

II. Eighth Amendment, Fourteenth Amendment and ADA and Rehabilitation Act Claims Against Delvaux and Hunt

Each of plaintiff's remaining claims under the Eighth and Fourteenth Amendment and ADA, as well as under the Rehabilitation Act against defendants Delvaux and Hunt, stem from defendants' decision to deny him access to a wheelchair with an aide, forcing him to walk back to his unit from the law library.

A. Eighth Amendment

A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical or mental health care needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)); see *Belbachir v. County of McHenry*, 726 F.3d 975, 980 (7th Cir. 2013); *Rice ex. rel Rice v. Corr. Med. Servs.*, 675 F.3d 650, 665 (7th Cir. 2012). 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). To state a deliberate indifference claim, a plaintiff must also allege facts from which it may be inferred that (1) he had serious medical need and (2) prison officials knew about plaintiff's need and did nothing due to a "sufficiently culpable state of mind." *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1970)) (internal quotation marks omitted).

Finally, plaintiff has successfully alleged a serious medical need by describing the pain he experiences when he walks on his injured right knee. Plaintiff has also alleged

sufficient facts to infer that defendants Delvaux and Hunt knew about his need because plaintiff alleges that he has been permitted to use the wheelchair with an aide for several years. The allegation that they prohibited him from using the wheelchair with an aide, despite his previous use, is similarly sufficient to show that they disregarded his condition. Plaintiff may therefore proceed on his Eighth Amendment claim against Delvaux and Hunt.

B. Fourteenth Amendment Equal Protection Claim

Plaintiff may not proceed on an equal protection claim. Although he alleges being treated differently from other “similarly situated disabled prisoners,” a plaintiff bringing an equal protection claim that must allege a state actor treated him differently *because* of his membership in a particular class and that the state actor did so purposefully. *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). Because Shaw provides no facts indicating defendants Delvaux and Hunt treated him differently because of his disability, his equal protection claim cannot go forward.

C. ADA and Rehabilitation Act Claim

Finally, plaintiff may not proceed on his ADA and Rehabilitation Act claims for much the same reason. Title II of the ADA provides that qualified individuals with disabilities may not “by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity.” 42 U.S.C. § 12132. This provision of the ADA applies to state prisons. *Penn. Dep’t of Corr. Yeskey*, 524 U.S. 206-09 (1998). The Rehabilitation Act is substantially identical, providing that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected

to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). A claim under § 504 of the Act has four, similar elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *Jaros v. Illinois Dep’t of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

The proper defendant for claims under the ADA and the Rehabilitation Act is generally the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(b); *Jaros*, 684 F. 3d at 670 n.2 (noting that because individual capacity claims are not available, the proper defendant is the agency or its director in his official capacity). Because plaintiff has not named them in their official capacities, plaintiff may not proceed against defendants Delvaux and Hunt. Plaintiff does name Wall as a defendant, and so at this early stage in the proceedings, the court will consider him a proper defendant because he is being sued in his official capacity.

Although it appears that Shaw has sufficiently alleged a disability and was denied a service, this claim may not proceed because he has not alleged that the service was denied *because of* his disability. *See Barrett v. Wallace*, 570 Fed. Appx. 598, 600 (7th Cir. 2014) (plaintiff had no ADA claim where his claims related to the failure to properly treat mental health issues and he did not allege denial of treatment *because of* his mental illness). On the contrary, Shaw actually alleges that defendants Delvaux and Hunt did not permit him access to the wheelchair because of *his lawsuit*, not his disability. Shaw’s ADA and Rehabilitation Act claim, therefore, may not proceed.

MOTIONS FOR EMERGENCY INJUNCTIVE RELIEF

Last, Shaw also filed two motions for emergency injunctive relief, both seeking a court order that would prevent him from being transferred out of OSCI, where he is currently incarcerated. (Dkts. #2, #6.) Plaintiff states that on October 3, 2015, he received a notice stating that the transfer will go forward, that the transfer could happen “any day now,” and that he has written a letter to the OSCI warden asking for relief from transfer until this court decides his motion.

Based on Shaw’s filings, however, his motions must be denied. Shaw did not follow this Court’s Procedure to be Followed on Motions for Injunctive Relief, nor has Shaw offered any *facts* that establish when he will be transferred out of OSCI, preventing the court from evaluating the immediacy of his request. A copy of the local procedures is being provided to Shaw with this Order. At this stage, his motions will be denied without prejudice to him re-filing in accordance to these procedures. To prevail on any later motion for a preliminary injunction, Shaw must, however, show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. *Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007). If he meets the first three requirements, then the court must balance the relative harms that could be caused to either party. *Id.*

ORDER

IT IS ORDERED that:

1. Plaintiff Terrance Shaw may proceed on his First Amendment claim against DeYoung, Sabel, Turner, Delvaux and Hunt in their individual capacities, and against Wall in his official capacity. Plaintiff may also proceed on his Eighth Amendment claim against Delvaux and Hunt.

2. Plaintiff may not proceed on his First Amendment claim against defendant Sergeant Cook, his Fourteenth Amendment claim, or his ADA and Rehabilitation Act claim. Sergeant Cook is dismissed from this lawsuit.
3. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to the defendants' attorney.
4. 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.
5. Pursuant to an informal 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 defendant. 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 the defendant.
6. Plaintiff's motions for emergency injunctive relief (dks. #2, #6) are DENIED.

Entered this 13th day of October, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge