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

ELBERT R. COMPTON,

OPINION and ORDER

Plaintiff,

v. 12-cv-837-jdp[1]

NURSE SEQUIN, DR. BURTON COX, and NURSE J. WATERMAN,

Defendants.

In this case, plaintiff Elbert Compton, a prisoner currently housed at the Waupun Correctional Institution, alleges that prison officials have failed for years to provide adequate medical treatment for his broken thumb. The case was originally screened by District Judge William M. Conley on April 23, 2014, and plaintiff was allowed to proceed on the following claims:

- An Eighth Amendment medical care claim against defendant Nurse Sequin for failing to do anything more than gave him ibuprofen immediately following the injury.
- Eighth Amendment medical care and state law medical malpractice claims against defendant Dr. Burton Cox for advising plaintiff that nothing could be done for him and that his finger "would have to remain in its deformed state."
- An Eighth Amendment medical care claim against defendant Nurse J. Waterman for failing to take any action to help plaintiff after he complained about prolonged pain and suffering from his injury.

Dkt. 6. The court dismissed the claims brought against the other 16 prison staff members named as defendants. *Id*. Since the screening of plaintiff's original complaint, several issues have arisen. First, the state notified plaintiff and the court that defendant Sequin is deceased, so plaintiff was given the option to file a motion to substitute the proper party under Federal Rule of Civil Procedure 25. Dkt. 10. Also, plaintiff has filed an amended complaint in which he adds

[1] This case was reassigned to me pursuant to a May 16, 2014 administrative order. Dkt. 11.

further detail to some of his previously dismissed claims as well as brand new allegations regarding his treatment following the November 19, 2012 filing date of his original complaint. Dkt. 13. Finally, plaintiff filed a motion for emergency injunction regarding his current medical care. Dkt. 14.

After considering these filings, I will dismiss plaintiff's claim against defendant Sequin for his failure to comply with Rule 25, grant him leave to proceed on Eighth Amendment deliberate indifference claims and state law medical malpractice claims against numerous defendants, and ask defendants to respond to plaintiff's motion for emergency injunction.

SUBSTITUTION OF DECEASED DEFENDANT

As noted above, the state informed plaintiff and the court that defendant Sequin is deceased. Plaintiff was given the option to file a motion to substitute the proper party under Federal Rule of Civil Procedure 25. Rule 25(a)(1) states in relevant part that "[a] motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." In his amended complaint, plaintiff states that Sequin's "liability is hereby supplemented to her employer Wisconsin D.O.C./B.H.S." Dkt. 13 at 1. However, a state agency such as the Department of Corrections cannot be sued in a § 1983 action, *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (states or state agencies are not "persons" within the meaning of 42 U.S.C. § 1983), and in any case, the state is not a proper replacement for an individual state employee being sued on the basis that her actions violated the constitution; the proper party is "ordinarily the personal representative of the party who has died." *Atkins v. City of Chicago*, 547 F.3d 869, 870 (7th Cir. 2008). Accordingly, I will dismiss plaintiff's claim against Sequin.

AMENDED COMPLAINT

The court is required to screen plaintiff's amended 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 and 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). As stated above, the court already allowed plaintiff to proceed on claims against defendants Sequin, Cox, and Waterman, but denied him leave to proceed on his various other Eighth Amendment an medical malpractice claims. Dkt. 6. Both plaintiff's original and amended complaints contain fairly long, detailed recitations of the medical requests plaintiff made and prison officials' responses to those requests. Because the court already considered most of the allegations in plaintiff's amended complaint in its earlier screening order, I will not recount them all here. Instead, I will focus on (1) the revised allegations regarding claims on which he was originally denied leave to proceed, as well as those original allegations that are now bolstered by plaintiff's revised allegations; and (2) his brand-new allegations regarding treatment since the events detailed in his original complaint.

1. Allegations of fact

a. Allegations concerning events addressed in the original complaint

- On April 24, 2007, plaintiff Elbert Compton suffered an injury to his right "pinkie" finger while playing basketball at the Green Bay Correctional Institution. Upon treating plaintiff that day, defendant Nurse Miller did not reset plaintiff's broken finger to align it properly. She wrapped the finger in "buddy tape," issued him ibuprofen and referred him to defendant Dr. Richard Heidorn.

- On April 27, 2007, defendant Dr. Heidorn refused plaintiff's requests to reset his finger properly or send him to a hospital. Instead, Heidorn ordered an X-ray and increased the dosage of ibuprofen.

- On May 3, 2007, plaintiff was seen for an X-ray by defendant Douglas Armato. After reviewing the results with Dr. Heidorn, Armato allegedly informed plaintiff that his right pinkie finger was "broken," but would not state that it was "fractured." (This allegation is difficult to understand, but based on his original complaint[2] as well as allegations in the amended complaint that subsequent treatment was denied him because medical staff considered the X-rays to show "no fracture," I understand plaintiff to be alleging that Heidorn and Armato misdiagnosed the precise nature of the injury to his finger.)

- Before he was scheduled to see defendant Dr. Cox in June 2008, plaintiff made repeated complaints to defendant nurses Campbell and Waterman about the severe pain he faced but they refused to do anything to help him.

- From December 2008 to June 2011, in the periods between plaintiff's very sporadic appointments with medical staff, he wrote repeatedly to defendant Health Services Unit manager Belinda Schrubbe and other nursing staff about his severe pain but they did nothing. Yet, in response to a September 2011 grievance about Schrubbe's lack of response to him, Schrubbe lied by saying that he never contacted her about being in "unbearable pain."

- In his March 2010 and March 2011 meetings with defendant nurse Mary Gorske, plaintiff informed her that he had severe pain and numbness in his finger, yet Gorske's only response in the March 2010 meeting was to discontinue plaintiff's prescription for ibuprofen and tell him that he could buy ibuprofen at canteen if he needed it, and her response at the March 2011 meeting was that she "wasn't going to do nothing to fix [his] finger." Dkt. 13 at 7, ¶ 23.

- On June 8, 2011, plaintiff was seen by defendant Dr. Sumnicht, who noted his deformity and described the injury as an "old tendon rupture." Sumnicht scheduled plaintiff to be X-rayed again. Plaintiff told Sumnicht about his severe pain, but Sumnicht did nothing to help him.

- On August 8, 2011, plaintiff was again seen by Sumnicht. He was prescribed 600 mg of Gabapentin for temporary relief, which did nothing for his pain. That same day, Sumnicht dictated in plaintiff's progress report that he had "a functional healing of a chronic right finger extensor tendon rupture."

- On September 26, 2011, plaintiff submitted another health service request complaining about continued pain and throbbing in his finger. Sumnicht

[2] Plaintiff's original complaint includes similar allegations regarding this X-ray including an explicit statement that his injury was "misdiagnosed." Dkt. 1 at 5.

responded that it had "healed in a functional position" and there was "no medical necessity to see a bone specialist."

- Plaintiff wrote to Schrubbe and other staff from October 2011 to January 2012 about his "constant pain, throbbing . . . insomnia, and loss of appetite" but did not see a doctor until January 2012. *Id*. at 9, ¶ 43.

- On June 29, 2012, plaintiff was seen by defendant nurse Ann Slinger[3] and asked for treatment for his finger and for his severe pain. She did nothing but make a note that plaintiff reported pain of "8" on a pain scale (which I assume runs from 1 to 10).

b. Allegations concerning events occurring since the original complaint

In January 2013, plaintiff was seen by Dr. Hennessy (a non-defendant), who refused to send plaintiff to a bone specialist but did prescribe him an "anti-depressant/pain medicine." *Id*. at 10, ¶ 48. In February and March 2013 plaintiff wrote three health service requests to defendant Schrubbe and WCI nursing staff, telling them that the medication did not work. Defendant nurses Bridget Bayer and Gail Waltz forwarded the requests to "the provider" (whom I understand to mean Dr. Hennessy) but did not make their own appointment to see plaintiff.

On April 22, 2013, plaintiff met with defendant Dr. Jeffrey Manlove, who sent a "Class III request" for plaintiff to see a bone specialist and prescribed high-strength ibuprofen. Manlove noted that a 2011 X-ray showed "a cyst or geode in the head of the middle phalanx." *Id*. at 10, ¶ 52. This cyst was not previously reported by any medical staff.

On June 5, 2013, plaintiff saw the bone specialist, defendant Dr. Thomas Grossman (whom I understand to work at the Waupun Memorial Hospital). Grossman "found that because of [prison staff's] refus[al] to administer even minimal medical care," plaintiff's finger developed a cyst, the finger is "deformed into a 45 degree angle, where it would not stay in full

[3] Because plaintiff's amended complaint names both Mary Slinger and Ann Slinger as defendants, I will refer to these defendants by their full name throughout this opinion. The same holds true for defendants Margaret Anderson and Sean Anderson.

extension, 'with only 40% of normal light touch.'" Grossman also found that plaintiff's finger had "'deteriorated and deformed' to a point where [the] finger would have to be reconstructed in surgery." *Id*. at 11, ¶55. Plaintiff agreed to have the surgery, which included the placement of a pin in his finger.

On August 8, 2013, defendants Grossman and nurse practitioner Margaret Anderson performed the surgery. On August 12, 2013, plaintiff went to the Health Services Unit "as an emergency" because the incision site was "extremely swollen, throbbing, had puss [sic] coming out if it, and was causing [him] severe pain." *Id*. at 11, ¶ 58. Defendant Waltz said that plaintiff had an infection. She cleaned and changed the dressing, but did nothing else to address the infection or pain.

On August 24, 2013, plaintiff wrote a health service request complaining of severe pain. Defendant Bayer refused to see plaintiff and told him that his pain medication had only been given to him on a short-term basis following surgery. On September 3, 2013, plaintiff wrote another health service request stating that he was in severe pain, and that his finger was still swollen, could not be bent, and had brown pus leaking out of the incision. Defendant nurse Donna Larson wrote back, stating that defendant Manlove had extended his pain medication, but no medical staff approved a visit to assess plaintiff's problems.

On September 10, 2013, plaintiff saw defendant nurse Christine De Young. Plaintiff showed her his swollen, infected finger but she did nothing to help him. On September 13, 2013, plaintiff, with "tears in his eyes" from the pain, met with De Young again. De Young consulted with defendant Manlove, who told her to consult with defendant Dr. Grossman. Defendants Grossman and Margaret Anderson told De Young to get an X-ray of the finger immediately. The X-ray confirmed that there was a severe infection.

On September 17, 2013, defendants Grossman and Margaret Anderson took the pin out

of plaintiff's finger. They "found that they incorrectly put [the pin] in and the stitches on top of [plaintiff's] finger leaving a hole where you can see the bone and it had erroneously healed like that." *Id*. at 12, ¶ 64. Later that day after being released from the hospital, plaintiff sent a request stating that he was in excruciating pain and that the ibuprofen was not working. The only response was that an appointment was set with defendant Larson, but that appointment never occurred. On September 25, 2013, plaintiff stopped defendant De Young in the segregation unit and showed her his finger, but she refused to do anything to help him.

On October 31, 2013, plaintiff sent in a health services request stating that he had burning, itching, and severe pain in his finger and that the ibuprofen was not working. Defendant nurse Ann Slinger responded by stating that plaintiff was scheduled to see the doctor, but she did nothing else to help him. Later that day, plaintiff wrote defendant Dr. Manlove, telling him about the continuing pain in his finger. Manlove saw plaintiff on November 18, 2013 but did nothing to assess plaintiff's problems or address his pain. Also on November 18, 2013, plaintiff wrote to defendant Schrubbe about his pain and Manlove's failure to help him. Schrubbe did nothing except pass the letter on to Manlove.

On November 20, 2013, plaintiff was seen by defendant nurse Waltz. Plaintiff told her that he had to wear a finger splint at all times. Waltz refused to address plaintiff's pain. Since November 2013 to the time his amended complaint was filed (June 2014), plaintiff continues to submit health service requests about his pain and how the ibuprofen is ineffective to treat it. None of the defendants have met with plaintiff to assess and treat his pain.

2. Analysis

a. Eighth Amendment medical care

I understand plaintiff to be bringing Eighth Amendment medical care claims against all

of the state defendants who allegedly provided him inadequate medical care. As plaintiff is already aware from the original screening order, 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).

In the April 23, 2014 order, the court assumed for purposes of screening that plaintiff's broken finger is a serious medical need, and I will as well. If anything, plaintiff's newer allegations regarding his severe pain and deformity only provide more support for that conclusion.

As for deliberate indifference on defendants' part, the court explained in the April 23, 2014 order why many of plaintiff's original allegations failed to state Eighth Amendment claims:

> With respect to [whether] most of those defendants [acted with deliberate indifference], the answer is no. Crediting the allegations in Compton's own pleadings, defendants for the most part did provide him with treatment for his injured finger, in the form of x-rays, taping, pain medication and continued doctor appointments.
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> To the extent Compton merely alleges that the treatment chosen was neither adequate nor ultimately successful, he again fails to allege a viable claim for deliberate indifference since "[a] prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Given this high standard and the dearth of allegations suggesting how the standard might be met here, Compton's complaint in large part fails to state a claim on which relief can be granted and he will not be allowed to proceed against most of the named defendants.

Dkt. 6 at 8-9 (citations omitted).

In contrast, the court considered more closely claims "plead[ing] a failure to intervene by other defendants in the course of treatment despite an obvious need to alleviate severe pain." *Id*.

at 9. It appears that most of plaintiff's revisions to his original allegations were to add statements making clear that he informed defendants Campbell, Waterman, Schrubbe, Gorske, Sumnicht, and Ann Slinger about his severe pain and they either did nothing to help him or delayed in helping him. These revised allegations are sufficient to state Eighth Amendment deliberate indifference medical care claims against these defendants. *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).

Plaintiff is also attempting to bring brand-new Eighth Amendment claims regarding his treatment for events following the filing of his original complaint. Plaintiff alleges that defendant nurses Bayer and Waltz responded to plaintiff's February and March 2013 health service requests by forwarding them to Dr. Hennessy rather than make their own appointments to meet with plaintiff. He also alleges that after his surgery, defendant Ann Slinger responded to plaintiff by telling him that he was scheduled to see the doctor, and defendant Schrubbe responded to a letter about Dr. Manlove's pain treatment by forwarding the letter to Manlove. These allegations show that the defendants *did* respond to plaintiff's concerns in some way, just not in the way that plaintiff would have preferred. Therefore, these allegations do not state viable Eighth Amendment claims.

On the other hand, plaintiff includes allegations that, following his surgery, defendant Waltz did not directly treat his infection or severe pain when she could have, that defendant Bayer refused to see him or take other action regarding his pain, defendant Larson would not take action regarding his infection, defendant De Young twice delayed in treating his infection, and Dr. Manlove saw plaintiff but did nothing to assess plaintiff's problems or address his pain. To the extent I understand plaintiff to be saying that these defendants ignored plaintiff's requests for help, he may proceed on Eighth Amendment claims against them.

Additionally, plaintiff raises various vague allegations about ignored requests he made regarding treatment, but does not explain exactly who ignored his requests. Because these allegations do not properly put individual defendants on notice of what they did to violate plaintiff's rights, he may not proceed on these claims. *See, e.g.*, *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).

Finally, plaintiff names the Wisconsin Department of Corrections and Bureau of Health Services as a defendant, arguing that it has longstanding policies and customs of delivering poor health care to prisoners. This appears to be an attempt for governmental liability under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), but such a claim may only be brought against municipalities, which a state and its agencies are not. *See Joseph v. Bd. of Regents of Univ. of Wis. Sys.*, 432 F.3d 746, 748–49 (7th Cir. 2005); *Hernandez v. O'Malley*, 98 F.3d 293, 297 (7th Cir. 1996).

b. State law medical malpractice

Plaintiff is already proceeding on a Wisconsin law medical malpractice claim against defendant Dr. Burton Cox for advising plaintiff that nothing could be done for him and that his finger "would have to remain in its deformed state." In the April 23, 2014 screening order, the court noted that plaintiff raised malpractice claims against defendants Cox, Sumnicht, Heidorn, and Armato and but concluded that "[g]iven that none of this conduct rises to the level of an Eighth Amendment violation, the court declines to exercise supplemental jurisdiction over [malpractice claims against Sumnicht, Heidorn, and Armato.]" Dkt. 6 at 17 n.3.

From his amended complaint, I understand plaintiff to be attempting to bring medical malpractice claims against *all* of the named defendants for how they diagnosed and treated

plaintiff's injury and associated severe pain. In particular, plaintiff's new allegations seem to show that defendant prison officials were negligent in diagnosing and treating his injury, that defendants Grossman and Margaret Anderson negligently performed the surgery to fix his finger, and following surgery, defendant prison officials again negligently ignored his requests regarding his severe pain. Given the long history of alleged mistreatment forming the basis for the Eighth Amendment claims that are already going forward, I conclude that it is appropriate to exercise supplemental jurisdiction over the overlapping malpractice claims.[4]

Many of these claims *completely* overlap with plaintiff's Eighth Amendment claims; plaintiff will be granted leave to proceed on a medical malpractice theory for each Eighth Amendment claim on which he has been allowed to proceed. I conclude that plaintiff also states a medical malpractice claim for each of the following alleged actions by defendants:

- Upon treating plaintiff the day of the injury, defendant Nurse Miller did not reset plaintiff's broken finger.
- defendant Heidorn refused plaintiff's requests to reset his finger properly or send him to a hospital and failed to provide him adequate pain medication.
- Defendants Heidorn and Armato misdiagnosed the injury.
- Defendant Sumnicht refused to refer plaintiff to a bone specialist and failed to provide him adequate pain medication.
- Defendants Grossman and Margaret Anderson botched plaintiff's surgery.
- Defendant Manlove failed to provide plaintiff adequate pain medication.

[4] District courts, may exercise supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Thus, a federal court may exercise supplemental jurisdiction where the state and federal claims derive from a "common nucleus of operative facts." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

c. Other claims

Plaintiff states in his amended complaint that his rights under the "4th . . . 10th, and 11th" amendments were violated, as well as his due process rights. Dkt. 13 at 15. He also invokes 42 U.S.C. §§ 1981 ("Equal rights under the law"), 1985 ("Conspiracy to interfere with civil rights"), 1986 ("Action for neglect to prevent") and 1988 ("Proceedings in vindication of civil rights"). It is unclear why plaintiff believes that those claims belong in a case about the provision of adequate medical care. Because his amended complaint is devoid of any factual allegations suggesting that his rights under any of these theories[5] have been violated, I will dismiss these claims.

EMERGENCY INJUNCTION

Plaintiff has filed a document he titles as "Motion for Emergency Injunction/TRO Fed. R. Civ. P. Rule 65(B)," Dkt. 14, in which he raises troubling allegations regarding treatment decisions postdating the filing of his amended complaint. He states that he was seen by defendant Margaret Anderson at the Waupun Memorial Hospital in June 2014. She examined plaintiff, concluded that plaintiff still has an infection in his finger, and instructed Waupun Correctional Institution staff to place plaintiff on antibiotics and chronic pain medication. However, staff (plaintiff does not explain which particular defendants) is ignoring that instruction, placing plaintiff at risk of further harm and causing him further pain.

I will treat this submission as a motion for preliminary injunction requiring a response from defendants rather than a temporary restraining order, as TROs are generally geared toward preserving the status quo rather than proactively demanding a party to take affirmative action,

[5] It is possible that plaintiff includes 42 U.S.C. § 1988 because § 1988(b) is an attorney fees provision. However, plaintiff, as a pro se litigant, cannot recover attorney fees under this provision. *Smith v. De Bartoli*, 769 F.2d 451, 453 (7th Cir. 1985).

see Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 442, 439 (1974), and the Prison Litigation Reform Act codifies this court's duty to enter preliminary injunctive relief that is "narrowly drawn, extend[s] no further than necessary to correct the harm . . . and [is] the least intrusive means necessary to correct that harm." *See* 18 U.S.C. § 3626(a).

Plaintiff's motion falls short of this court's usual procedures to be followed in briefing motions for injunctive relief; most importantly, he does not swear under penalty of perjury that the facts he presents are true. However, requiring him to append such a declaration at this point would only cause further delay. Even without explaining precisely which defendants are failing to provide him the recommended treatment, the factual basis for his motion is clear enough. I will give defendants a short time to respond to the motion, at which point I will decide whether a hearing is necessary.

ORDER

IT IS ORDERED that:

1. Plaintiff Elbert Compton's Eighth Amendment medical care claim against defendant Nurse Sequin is DISMISSED under Fed. R. Civ. P. 25(a)(1).

2. Plaintiff is GRANTED leave to proceed on the following claims:

    a. Eighth Amendment deliberate indifference claims against defendants Burton Cox, Nurse J. Waterman, Nurse Campbell, Belinda Schrubbe, Mary Gorske, Paul Sumnicht, Ann Slinger, Gail Waltz, Bridget Bayer, Donna Larson, Christine De Young, and Jeffrey Manlove.

    b. Wisconsin law medical malpractice claims against defendants Cox, Nurse Miller, Richard Heidorn, Douglas Armato, Waterman, Campbell, Schrubbe, Gorske, Sumnicht, Ann Slinger, Thomas Grossman, Margaret Anderson, Waltz, Bayer, Larson, De Young, and Manlove.

3. Plaintiff is DENIED leave to proceed on all other claims in his amended complaint.

4. The caption is AMENDED to include all of the defendants against whom plaintiff is proceeding.

5. The state may have 21 days to file an answer to the amended complaint for all defendants it chooses to represent.

6. Defendants may have until December 17, 2014, to submit a response to plaintiff's motion for preliminary injunctive relief, Dkt. 14.

Entered this 10th day of December, 2014.

BY THE COURT:
/s/

JAMES D. PETERSON
District Judge