IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM TEAS,

Plaintiff,

v.

DALIA SULIENE, KARL HOFFMAN,
KAREN ANDERSON, MEREDITH MASHANK,
LILLIAN TENEBRUSO, NANCY WHITE,
ANTHONY ASHWORTH, LUCAS WEBER,
DAVID MELBY, JANEL NICKEL,
KEVIN BOODRY, MICHAEL DITTMAN,
JAMES GREER, EDWARD WALL and OFFICER BOWAR,

Defendants.

OPINION and ORDER

16-cv-452-bbc[1]

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Pro prisoner and plaintiff William Teas is proceeding on the following claims: (1) defendants Dalia Suliene and Karl Hoffman (physicians at the Columbia Correctional Institution) failed to treat plaintiff's back pain adequately, in violation of the Eighth Amendment and Wisconsin law; (2) defendants Suliene and Hoffman as well various managers of the health services unit (defendants Meredith Mashak, James Greer, Michael Dittman and Michael Weber) denied requests for a "medically appropriate mattress and pillow," in violation of the Eighth Amendment, the Americans with Disabilities Act and the

[1] Because Judge Crabb is on medical leave, I am issuing this order to prevent an undue delay in the progress of the case.

Rehabilitation Act; (3) various correctional staff members (defendants Kevin Boodry, Janel Nickel, Anthony Ashworth and Officer Bovar) denied plaintiff's request for a raised bunk while he was housed in general population, in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act; and (4) defendants Boodry, Ashworth, Nickel, White, Bovar and Anderson denied plaintiff's requests for a raised bunk while he was housed in segregation, in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act.

Now before the court is plaintiff's motion for leave to amend his complaint under Fed. R. Civ. P. 15, along with a proposed amended complaint. Dkt. #13. (Plaintiff later filed another amended complaint, dkt. #26, but the only change he made was to substitute Lucas Weber for Michael Weber. I have amended the caption to reflect that change.) In his proposed amended complaint, plaintiff makes a number of changes. First, he attempts to cure defects in claims that the court dismissed in a screening order dated August 31, 2016, for plaintiff's failure to provide fair notice under Fed. R. Civ. P. 8. Dkt. #7. (Judge Crabb gave plaintiff leave to amend when she dismissed these claims, but plaintiff missed two deadlines set by Judge Crabb, so she informed plaintiff that he would need to seek leave under Rule 15 to make any future amendments. Dkt. #11.)

Second, plaintiff adds a new section in his amended complaint in which he alleges that defendants Suliene and Hoffman failed to put him on a "chronic pain management plan." Third, he adds "Officer Kottka" to his claim that he was denied a raised bunk while he was housed in segregation. Fourth, plaintiff says that he wishes to clarify that he did not

intend to bring a claim that defendants denied any request for accommodations related to his bedding while he was housed in general population. Fifth, plaintiff adds a number of details to the claims on which he is already proceeding. I will consider each of the proposed changes below.

Also before the court are two motions for assistance in recruiting counsel. Dkt. ##28 and 29. I am denying these motions without prejudice to plaintiff's filing a new motion if the case is not dismissed on the ground that plaintiff failed to exhaust his administrative remedies.

OPINION

A. Motion for Leave to Amend

Under Fed. R. Civ. P. 15, a district court must allow a plaintiff's motion for leave to amend his complaint unless there has been undue delay in bringing the motion, the defendants would suffer unfair prejudice or if the amendments would be futile because they do not have merit. Campania Management Co. v. Rooks, Pitts & Poust, 290 F.3d 843, 848-49 (7th Cir. 2002). In this case, defendants do not argue that any of plaintiff's proposed amendments are untimely or would cause unfair prejudice, so the only question is whether the proposed changes are futile. In other words, the question is whether plaintiff's new allegations state a claim upon which relief may be granted.

1. Claims dismissed in first screening order

Although plaintiff's amended complaint still provides few details regarding the claims that the court dismissed, I conclude that he now has provided the bare minimum notice required by Fed. R. Civ. P. 8. Accordingly, I will allow him to proceed on the following two claims:

(1) defendants Karen Anderson, Meredith Mashak, Lillian Tenebruso and Nancy White (nurses and managers of the health services unit) failed to schedule appointments with physicians in a timely manner, in violation of the Eighth Amendment and Wisconsin's medical malpractice law;

(2) defendants Anderson, Mashak, Tenebruso and White failed to take any action when defendants Suliene and Hoffman failed to provide appropriate treatment for plaintiff's back problems, in violation of the Eighth Amendment and Wisconsin's medical malpractice law.

At summary judgment or trial, plaintiff will have to come forward with specific evidence to support both of these claims. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). For example, as to his Eighth Amendment claim regarding delays in receiving medical appointments, plaintiff will have to show that he needed prompt treatment, that each defendant was aware of this need and each defendant could have scheduled an earlier appointment, but refused to do so without a good reason. Perez v. Fenoglio, 792 F.3d 768, 777-78 (7th Cir. 2015) ("Whether the length of delay is tolerable depends upon the seriousness of the condition and the ease of providing treatment."); Olson v. Morgan, 750

F.3d 708, 714 (7th Cir. 2014) ("[The plaintiff] needed evidence that [the defendant] was aware of his urgent needs well before she took action."); Shields v. Illinois Dep't of Corr., 746 F.3d 782, 796-97 (7th Cir. 2014) (reason for delay is relevant to determining liability under Eighth Amendment; defendant cannot be held liable for delays outside his control). In addition, plaintiff will have to show that the delay in receiving an appointment harmed him. Conley v. Birch, 796 F.3d 742, 749 (7th Cir. 2015). In other words, plaintiff will have to show that an earlier appointment would have prevented some harm or at least lessened it.

With respect to his Eighth Amendment claim regarding failures to provide more or different treatment from what defendants Suliene and Hoffman prescribed, plaintiff faces an even heavier burden. This is because the general rule is that nurses like defendants Anderson, Mashak, Tenebruso and White are entitled to rely on the treatment decisions made by physicians. Smego v. Mitchell, 723 F.3d 752, 758 (7th Cir. 2013). The only exception is that a nurse must take additional action when it is obvious to the nurse that the physician is not providing appropriate care. Id. In addition to showing that Anderson, Mashak, Tenebruso and White knew that plaintiff needed additional treatment, plaintiff will have to show that these defendants had the authority and the ability to override or supplement the decisions of defendants Suliene and Hoffman. Miller v. Harbaugh, 698 F.3d 956, 962 (7th Cir. 2012) ("[D]efendants cannot be [held liable under Eighth Amendment" if the remedial step was not within their power.").

2. Chronic pain management plan

Plaintiff adds a new allegation that defendants Suliene and Hoffman violated his rights by refusing to put him on a chronic pain management plan. Defendants object to this claim on the ground that the decision whether to place a prisoner on a chronic pain management plan is a matter of prison policy and plaintiff cannot bring a claim for an alleged violation of a prison policy.

Defendants are correct that a violation of a prison policy is not the same thing as a violation of state or federal law, but this does not mean that the two types of violations are mutually exclusive. Actions that violate a prison policy may violate the law as well. Defendants are also correct that a plaintiff does not have an independent "right" to be placed on a chronic pain management plan. However, he does have a right to receive adequate treatment for his pain. Thus, plaintiff's claim regarding a chronic pain management plan is best viewed as simply part of a broader claim that Suliene and Hoffman failed to provide adequate treatment for his pain. Because plaintiff is already proceeding on that claim, these new allegations do not require any changes to the scope of this case.

3. Defendant Kottka

Plaintiff is proceeding on a claim that defendants Boodry, Ashworth, Nickel, White, Bovar and Anderson denied plaintiff's requests for bedding accommodations bunk while he was housed in segregation, in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act. With respect to a claim under the Eighth

Amendment, Judge Crabb concluded that it was reasonable to infer from plaintiff's allegations that he had a serious medical need for the accommodations, that each defendant knew about the need and that each defendant had the authority and the ability to help plaintiff, but they refused to do so. With respect to a claim under the Rehabilitation Act and the Americans with Disabilities Act, Judge Crabb concluded that it was reasonable to infer that plaintiff's back condition qualified as a disability, that he is being excluded from a "program, service or activity" because of his disability and that the accommodations he requests are reasonable and would allow him to participate in the program, service or activity. 42 U.S.C. § 12132.

Plaintiff wishes to add "Officer Kottka" to this claim on the ground that Kottka also refused plaintiff's request to be placed in a cell with accommodations such as a raised bunk. Because plaintiff alleges that Kottka was personally involved in denying a request for accommodations, I will allow him to proceed on this claim. At summary judgment or trial, plaintiff will have to prove all of the same elements with respect to Kottka as he does against the other defendants, including that Kottka had authority to help plaintiff obtain his requested accommodation.

4. Accommodations in general population

In the original screening order, Judge Crabb understood plaintiff to be alleging that he was denied a raised bunk in both segregation and general population and the court allowed him to proceed on both claims. However, in his motion for leave to amend, plaintiff

says that his claim regarding a request for accommodations "only applies to the period of time when he was in the prison's segregation units, not in general population." Dkt. #20 at 2. I construe this statement as a motion under Fed. R. Civ. P. 41 for voluntary dismissal of the claim as it applies to general population and I will grant the motion.

5. Additional details

Plaintiff's amended complaint includes additional allegations about the claims on which he is already proceeding. Most of the allegations are attempts to provide more detail on matters that Judge Crabb believed to be vague or ambiguous. However, because Judge Crabb did not deny plaintiff leave to proceed on those claims and plaintiff does not suggest that the new details change the scope of his claims in any respect, it is unnecessary to discuss the new allegations in this order.

6. Request for relief

In his motion for leave to amend his complaint, plaintiff states that "the amended complaint reiterates the plaintiff's request for injunctive and declaratory relief, a remedy sought that was apparently overlooked in the initial screening order." Dkt. #20 at 2. Presumably, plaintiff believes that Judge Crabb "overlooked" his request for relief because there is no discussion of it in the order. However, a request for relief is not a separate claim that needs to be screened. Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 693 (7th Cir. 2013). Rather, if plaintiff proves that defendants violated his rights at trial, the court will

determine then whether plaintiff is entitled to declaratory or injunctive relief and, if so, what form that relief should take.

B. David Melby and Edward Wall

In addition to the matters raised in plaintiff's motion for leave to amend, there is one other matter that needs to be addressed regarding the proper defendants in this case. In his original complaint, plaintiff included David Melby and Edward Wall as defendants in the caption, but failed to include any allegations about them in the body of the complaint. In the screening order, Judge Crabb overlooked these defendants, neither allowing plaintiff to proceed against them nor dismissing them from the case.

In his amended complaint, plaintiff again includes these defendants in the caption and again includes no allegations about them in the body of the complaint. Without such allegations, plaintiff has not stated a claim upon which relief may be granted with respect to these defendants, so I am dismissing the complaint as to them.

C. Motion for Assistance in Recruiting Counsel

Plaintiff has submitted two motions for assistance in recruiting counsel. Dkt. ##28 and 29. The first appears to be a form with canned language to support a motion for appointment of counsel in the context of a petition for a writ of habeas corpus. Dkt. #28. The second, filed a few days later, states that it was prepared by another prisoner, Jeffrey Davis, who is helping plaintiff. Dkt. #29.

There is no right to counsel in civil cases, Olson v. Morgan, 750 F.3d 708, 711 (7th Cir. 2014), so a party who wants assistance from the court in recruiting counsel must meet several requirements. Santiago v. Walls, 599 F.3d 749, 760-61 (7th Cir. 2010).

First, he must show that he is unable to afford counsel. Because plaintiff is proceeding in forma pauperis under 28 U.S.C. § 1915, he has met that requirement.

Second, he must show that he made reasonable efforts on his own to find a lawyer to represent him. In this court, a party may satisfy that requirement with evidence that at least three lawyers in the relevant practice area refused the party's request to represent him. That evidence may include rejection letters from the lawyers or a declaration or affidavit from the party in which he identifies the lawyers he asked, the date he made his request and the way in which each lawyer responded.

Plaintiff ignored this requirement in his first motion. In his second motion, he lists several law firms to which he says he wrote letters requesting representation. He attaches the letter he sent and rejection letters that he received from some of the firms. He avers that the others did not respond. These materials are sufficient to show that plaintiff made reasonable efforts to find counsel on his own.

Third, plaintiff must show 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). The question is not simply whether a lawyer might do a better job.

It is still too early to tell whether plaintiff satisfies this requirement. The merits of plaintiff's claim may involve complicated legal and factual questions, but there is a simpler

threshold issue. In particular, because plaintiff is a prisoner, he is required to exhaust his administrative remedies before filing a lawsuit about his treatment in prison. 42 U.S.C. § 1997e(a). Although plaintiff does not have to show in his complaint that he complied with § 1997e(a), defendants may move to dismiss his claims at a later date if he failed to complete the prison grievance process before filing this case. For this reason, it is this court's general policy to defer decisions about counsel until after any issues about exhaustion of administrative remedies are resolved. Because defendants have the burden to show that plaintiff did not properly complete the exhaustion process and issues about exhaustion generally are simpler than the merits and require little discovery, counsel often is not needed for that issue.

In this case, plaintiff has not shown that he is unable to litigate the relatively simple issue of exhaustion. Plaintiff says that he has been receiving the assistance of a jailhouse lawyer, who may be transferred to a different prison in a few weeks or months. However, even if I assume that the other prisoner will not be able to help plaintiff in the future, that does not mean that plaintiff is entitled to court assistance in obtaining a lawyer at this time. If it is true as plaintiff alleges that the other prisoner has been preparing the filings in this case, this gives the court little basis from which to evaluate plaintiff's own abilities. Plaintiff has submitted no evidence showing that his mental abilities are limited in any respect. He does not allege that he is unable to read, write, follow directions or understand basic legal concepts. At this stage of the case, that is all that plaintiff needs to be able to do.

Plaintiff also says that his medical condition limits his ability to litigate generally and

his ability to write in particular. However, plaintiff's alleged condition relates to his back, not his hands. The only medical evidence plaintiff submitted to support a finding that he cannot write consists of two letters from UW Health, one from 2011 and one from 2010. Dkt. #31-3. In 2010, a doctor noted plaintiff's complaints of "right-sided back pain . . . that is worst when he sits in a chair for a prolonged period," but an examination showed that plaintiff had "normal strength and normal sensation." Id. at 2. The doctor recommended that plaintiff "stay active" but limit sitting to 15 minutes at a time. Id. In 2011, the doctor wrote that plaintiff continued to have back pain when sitting; he had normal strength in his arms and legs; there was no evidence of myelopathy or radiculopathy; and he should continue to stay active and avoid sitting for prolonged periods. Id. at 1. The letters say nothing about limitations in plaintiff's writing. Even if I do not consider the date of the letters, they do not support a view that plaintiff's medical condition prevents him from litigating this case.

Accordingly, I am denying plaintiff's motion for assistance in recruiting counsel. If plaintiff's claim survives any motion by defendants to dismiss his case for failure to exhaust his administrative remedies or if defendants do not file such a motion before the deadline for doing so, plaintiff is free to renew his motion.

ORDER

IT IS ORDERED that

1. Plaintiff William Teas's motion to substitute Lucas Weber for Michael Weber, dkt. #26, is GRANTED.

2. Plaintiff's amended complaint, dkt. #26, is ACCEPTED and he is GRANTED leave to proceed on the following claims:

> (1) defendants Dalia Suliene and Karl Hoffman failed to treat plaintiff's back pain adequately, in violation of the Eighth Amendment and Wisconsin law;
>
> (2) defendants Suliene, Hoffman, Meredith Mashak, James Greer, Michael Dittman and Lucas Weber denied requests for a "medically appropriate mattress and pillow," in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act;
>
> (3) defendants Boodry, Ashworth, Nickel, White, Bovar, Anderson and Kottker denied plaintiff's requests for a raised bunk while he was housed in segregation, in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act;
>
> (4) defendants Karen Anderson, Meredith Mashak, Lillian Tenebruso and Nancy White failed to schedule appointments with physicians in a timely manner, in violation of the Eighth Amendment;
>
> (5) defendants Anderson, Mashak, Tenebruso and White failed to take any action when defendants Suliene and Hoffman failed to provide appropriate treatment for plaintiff's back problems, in violation of the Eighth Amendment.

3. Plaintiff's motion to voluntarily dismiss his claim that defendants Boodry, Ashworth, Nickel, White, Bovar, and Anderson denied plaintiff's requests for a raised bunk while he was housed in general population is GRANTED.

4. The amended complaint is DISMISSED as to defendants David Melby and David Wall.

5. Plaintiff's motions for assistance in recruiting counsel, dkt. ##28 and 29, are DENIED WITHOUT PREJUDICE to plaintiff's refiling a motion at a later date.

6. Because plaintiff was not granted leave to proceed against defendants Kottker, Tenebruso and Lucas Weber in the original screening order, the Wisconsin Department of Justice may have until January 23, 2017, to inform the court whether it will accept service on behalf of those three defendants.

Entered January 9, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge