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

IVAN BOYD,

Plaintiff,

v.

SGT KUSSMAUL, OFFICER RIECK, OFFICER PITZER,OFFICER PARISH, OFFICER LATHROP, OFFICER MUMM, TIMOTHY BROMELAND, JOLINDA WATERMAN, RN ANDERSON, and RN DRONE,

Defendants.

OPINION AND ORDER

18-cv-768-wmc

Pro se plaintiff Ivan Boyd filed this lawsuit pursuant to 42 U.S.C. § 1983, claiming that various Wisconsin Department of Corrections ("DOC") employees at the Wisconsin Secure Program Facility ("WSPF") violated his rights under the First and Eighth Amendments, as well as state law, by denying him delivery of his prescribed pain medication, and then retaliating against him for complaining about it. Boyd also claims that retaliatory measures were levied against him by medical staff in response to past lawsuits. Boyd's complaint is ready for screening as required by 28 U.S.C. § 1915A. For the reasons that follow, the court will allow him to proceed on his claims, but only against some of the named defendants.

ALLEGATIONS OF FACT[1]

A. Parties

Boyd is currently incarcerated at Redgranite Correctional Institution, though his claims arise from his time at WSPF. He names ten defendants, all WSPF employees: Correctional Sergeants Kussmaul and Lathrop; Correctional Officers Bromeland, Lathrop, Mumm, Parish, Pitzer, and Rieck; Registered Nurses Anderson and Drone; and Health Services Unit ("HSU") Manager Waterman, who is also a Registered Nurse.

B. Boyd's Injury and Complaints about Waterman's Initial Approach to his Care

On June 26, 2018, Boyd suffered an injury in the HSU during a physical training session. The next morning, on June 27, 2018, Boyd was unable to support his bodyweight during the 6:15 a.m. standing count. Experiencing shooting pain through his spine and down his legs, he pressed his medical alert button and asked the sergeant on duty to alert the HSU to his situation.

At 8:30 a.m., a sergeant on duty escorted Boyd to the HSU in a wheelchair, where Anderson treated him. Boyd explained his inability to support his bodyweight and noted that his pain level was extreme. After speaking with the on-call doctor, Anderson informed Boyd that she would administer a 60 mg injection of Toradol before the doctor saw Boyd at 9:00 a.m. that morning. However, Boyd had to wait until 3:45 p.m. to meet with a doctor, non-defendant Dr. Patterson, and Boyd says that he sat waiting in intense pain

[1] In addressing any *pro se* litigant's complaint, the court must read the allegations generously, drawing all reasonable inferences and resolving ambiguities in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

until Dr. Patterson saw him. In their meeting, Boyd informed Dr. Patterson that the Toradol had been ineffective. Dr. Patterson created an alternative medication plan, prescribing 50 mg of Tramadol every six hours. Additionally, Dr. Patterson instructed Boyd to avoid using the wheelchair whenever possible to reduce a risk of dependence and to strengthen Boyd's core muscles. Dr. Patterson also clarified that if Boyd did require the wheelchair, then he would not be allowed recreation time, as the staff did not want the wheelchair to travel outside. Boyd agreed to these conditions, stating that he would attempt to move without the wheelchair and only use it when necessary.

At a later point in the examination, Waterman entered the room to assist Dr. Patterson. Boyd notes that at that time he had pending litigation in federal court against Waterman and her staff. Boyd contends that he overheard Waterman persuading Dr. Patterson to alter his treatment plan from Tramadol to a Toradol regimen, the drug Boyd had found ineffective. Once Waterman left, Boyd confided his fear to Dr. Patterson that she may wish to retaliate against Boyd for their ongoing litigation, which may have influenced her suggestion.

Dr. Patterson decided to adhere to his original Tramadol prescription and left the room to retrieve Boyd's first dosage. Upon return, Dr. Patterson informed Boyd that Waterman had changed the decision on Boyd's recreation privileges. While the previous agreement between Dr. Patterson and Boyd was that he could engage in recreation, but not with a wheelchair, Waterman instead placed Boyd on a one-week total loss of recreation. Boyd claims that this restriction, along with Waterman's attempt to convince Dr. Patterson to alter his treatment plan, meant to punish him for his ongoing suit and for

his complaints about his medical treatment.

C. Documentation of Boyd's Loss of Recreation Privileges

Boyd subsequently reviewed his medical records. In this review, Boyd discovered that the Warden's Office had contacted the HSU on July 3, 2018, for clarification on the recreation restrictions imposed on Boyd by Waterman on June 27, 2018, the date of his initial exam. Boyd noted that the HSU responded to the warden that Boyd had not been denied all recreation and was allowed to go to the dayroom. However, Boyd claims that representation was false, pointing out that the Medical Restrictions/Special Needs form filled out by Waterman contained no clauses or allowances that would have signaled permission to use the dayroom; it simply mandated seven days of room confinement.

D. Incidents of Denied Medication Delivery

On June 28, 2018, Anderson delivered Boyd's Tramadol to his cell shortly before 6 a.m. Given that the medication was to be taken every six hours, Boyd expected another dose at noon. When his medication did not arrive at that time, Boyd pressed his medical alert button and asked Kussmaul to remind the HSU staff that he was in need of his medication. Kussmaul informed Boyd that the HSU staff would not be delivering his medication to his cell and instead told Boyd he had to walk to the HSU to receive his pill. Boyd responded that he wanted the HSU to deliver his medication because he was experiencing a flare-up of his neck and back pain and was unable to walk to the HSU.

Thirty or forty minutes after this request, Boyd had still not received his medication, so he pressed his medical alert button again, hoping to speak with Kussmaul, but no one responded. Sometime later, Boyd spotted Officer Rieck in the hallway in front of his cell,

and Boyd asked him to call the HSU or Kussmaul to assist him with his medication as he was experiencing severe neck and back pain. Rieck responded that he would talk to Kussmaul. Approximately 30 minutes later, Boyd had still not been helped when he noticed Officer Pitzer passing in the hallway. He made the same request to Pitzer as he had to Rieck, adding that he was in extreme pain. Pitzer responded that he would see what he could do.

Shortly after this, Boyd pressed his medical alert button again for what he estimated to be the tenth time that afternoon. Kussmaul responded, claiming that Boyd had refused his own medication by failing to walk to the HSU. Boyd then explained again that he was in intense pain and felt that he could not walk to the HSU. He also questioned why Waterman placed him on seven days of room confinement, purportedly to keep him from too much movement, if he would be required to walk to the HSU to receive his pills. Kussmaul did not respond to this or any more questions from Boyd.

Throughout the rest of the day, Boyd made similar requests of Officers Mumm, Parish, and Bromeland as they passed by his cell, calling on them to ask the HSU to deliver his medication as he was in intense pain. Officer Mumm did not reply at all. Officer Parish replied that she would inform Kussmaul. Officer Bromeland replied that if Boyd had been able to walk to lunch, he should be able to walk to the HSU. Boyd answered that he walked to get his lunch because his alternative was to not eat at all, and that it was the mealtime walking that had aggravated his back pain to the point that he could not walk to the HSU. To this, Officer Bromeland said that the matter was out of his hands and that Boyd would need to speak with Kussmaul, but apparently Bromeland did not relay Boyd's

concerns to Kussmaul. Boyd claims he received no assistance in response to any of these requests for help.

Finally, at 3:36 p.m., Boyd received his second dose of Tramadol. However, Boyd's medical alert calls later that day for subsequent doses were largely ignored, this time by Lathrop. After several disregarded calls, Lathrop eventually responded, "[d]idn't you refuse to go over to HSU for your meds?" (Compl. (dkt. #1) ¶ 41.) Boyd notes that he had filed an unrelated complaint against Lathrop on June 6, 2018, and that Lathrop dismissed his request for his medication to punish him for filing that complaint.

The next day, June 29, 2018, Boyd pressed his medical alert button at approximately 9:20 a.m., asking Kussmaul to reach out to the HSU for his pain medication. Kussmaul replied that the nurses on staff would again require that he walk himself to the HSU to take his pill. Boyd decided that he would walk to the HSU, despite his pain.

Drone greeted Boyd with his pill when he arrived at the HSU. Boyd asked to see Waterman, but Drone stated that she was busy. Boyd then asked why the nursing staff was forcing him to walk to the HSU when they were aware that such movement exacerbated his pain. Drone did not answer this question, instead asking if Boyd wanted his dose of Tramadol. Boyd took his medication and returned to his cell.

On July 2, 2018, Boyd's request for his medication was again met with a requirement, from Drone, that he walk to the HSU to retrieve it. Boyd complied reluctantly and requested that the HSU provide a wheelchair if he would be forced to travel to the HSU in the future. Drone stated that they would.

On July 4, 2018, at approximately 8:25 a.m., Boyd pressed his medical alert button

to request that his pain pill be delivered. Moments later, Parish arrived at Boyd's cell and informed him that the nursing staff was again requiring that Boyd walk to the HSU for his medication. Boyd responded that he would rather suffer through his existing pain than experience additional pain while walking to the HSU. Soon after, however, non-defendant Sgt. Furr asked Boyd over the intercom whether he would be able and willing to travel to the HSU if he were in a wheelchair, to which Boyd agreed.

On July 6, 2018, Boyd pressed his medical alert button at half past noon to request that his pain medication be delivered. Yet again, Anderson in the HSU responded that Boyd would need to pick up his medication in person. Boyd stated that he was in too much pain to travel to the HSU. Anderson did not deliver his medication, and it does not appear Boyd had access to a wheelchair to obtain his medication that afternoon.

OPINION

Plaintiff seeks leave to proceed against defendants on Eighth Amendment and Wisconsin negligence claims for being required to walk to the HSU or denied medication delivery between June 28, 2018, and July 6, 2018. He also asserts First Amendment retaliation claims against a handful of defendants related to his medication delivery denial and his seven days of room confinement without recreation time. The court addresses these claims in turn.

I. Eighth Amendment Deliberate Indifference

A prison official who violates the Eighth Amendment in the context of a prisoner's medical treatment demonstrates "deliberate indifference" to a "serious medical need."

Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). "Serious medical needs" include: (1) life-threatening conditions or those carrying a risk of permanent serious impairment if left untreated; (2) withholding of medical care that results in needless pain and suffering; or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997). "Deliberate indifference" encompasses two elements: (1) awareness on the part of officials that the prisoner needs medical treatment and (2) disregard of this risk by conscious failure to take reasonable measures. *Estelle*, 429 U.S. at 104.

Allegations of delayed care may violate the Eighth Amendment if the alleged delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *Estelle*, 429 U.S. at 104–05; *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *see also Petties v. Carter*, 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that inexplicable delay in medical treatment for a prisoner, which serves no penological interest, can support an inference of deliberate indifference, as element for a prisoner's Eighth Amendment claim); *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable under the Eighth Amendment for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference).

Plaintiff alleges that Sergeants Kussmaul and Lathrop, Officers Rieck, Pitzer, Parish, Mumm and Bromeland, and Nurses Anderson and Drone were all deliberately indifferent to his serious medical need. As an initial matter, the court will accept for purposes of screening that plaintiff's pain from his injury, which was treated with prescription pain

medication, constitutes a serious medical need. Furthermore, it is reasonable to infer that each of these defendants was either directly aware of his treatment plan or, at least, heard his exclamations of pain and stated need for his prescribed medication. Finally, at this stage, it is reasonable to infer that Kussmaul, Bromeland, Lathrop, Mumm, Anderson, and Drone responded to his need for pain medication with deliberate indifference, since each of them either ignored Boyd's complaints of pain and request for medication, or appeared to have needlessly exacerbated his pain by requiring him to walk himself to the HSU to take his Tramadol medication.

However, plaintiff's allegations as to Officers Rieck, Pitzer, and Parish do not support an inference of deliberate indifference. Each of these defendants indicated that he or she would report Boyd's request to their superiors at the time, and Boyd has not alleged that any of these defendants had reason to believe that Boyd would either have to walk to HSU to get his medication or that Boyd ultimately would not receive his medication. As such, it would be unreasonable to infer that Rieck, Pitzer or Parish consciously disregarded plaintiff's need for his medication.[2] Accordingly, although the court will grant plaintiff leave to proceed on deliberate indifference claims against Kussmaul, Lathrop, Mumm, Bromeland, Anderson and Drone, he may not proceed against Rieck, Pitzer and Parish, who will be dismissed.

[2] If plaintiff omitted any allegations that these defendants had reason to believe that their actions would not result in plaintiff receiving his medications, he should seek leave to amend his complaint to include such allegations, which would require the court's screening under §§ 1915(e)(2), 1915A.

II. State Law Claim

Plaintiff also seeks to proceed against Drone on a Wisconsin negligence/medical malpractice claims, over which the court may exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) ("[D]istrict courts shall have 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 under Article III of the United States Constitution."). Under Wisconsin law, the elements of a cause of action in negligence and medical malpractice are the same: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty, which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 307 (1987); *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis.2d 507, 625 N.W.2d 860. Indeed, medical malpractice is simply a subset of "negligence" claims. *See Jeckell v. Burnside*, 2010 WI App 71, ¶ 10, 325 Wis .2d 401, 786 N.W.2d 489, 2010 WL 1233970 (unpublished) (listing the elements of a claim for medical malpractice as the same as a claim for negligence). As such, the court will refer to plaintiff's proposed state law claim against Drone as a negligence claim.

Drone owed Boyd a duty of care, and it is reasonable to infer that Drone's decision to require that Boyd walk himself to the HSU, without the use of a wheelchair, may have breached her duty of care, allegedly causing Boyd unnecessary pain and suffering. Accordingly, plaintiff may proceed on negligence claims against Drone.

III. First Amendment Retaliation

Finally, plaintiff seeks to proceed on retaliation claims against defendants Kussmaul, Lathrop, Waterman and Drone. To state a claim for retaliation, a plaintiff must allege that: (1) he engaged in activity protected by the Constitution; (2) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in that protected activity in the future. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

As to the first element, plaintiff claims that defendants retaliated against him both for complaining about his missing medication and for his prior lawsuits, both of which are constitutionally protected activity. *See Powers v. Snyder*, 484 F.3d 929, 932 (7th Cir. 2007) (ruling that first amendment retaliation occurred when a prison official denied an inmate family visits in response to his filing of grievances against the prison); *Zorzi v. Cnty. of Putnam*, 30 F.3d 885, 896 (7th Cir.1994) ("Retaliation for filing a lawsuit is prohibited by the First Amendment's protection of free speech."). Starting with Waterman, plaintiff's allegations support a claim, if barely. Waterman, who knew about a prior lawsuit, allegedly urged Dr. Patterson to prescribe ineffective medications and removed his recreation privileges for a week. On one hand, Waterman's discussion with Dr. Patterson about Boyd's medications had no adverse impact on Boyd, since Patterson did not take Waterman's suggestion with respect to the appropriate medication. However, in construing plaintiff's allegations generously and in his favor, Waterman's decision to revoke his recreation time during that week may have been sufficiently adverse to deter a

prisoner of ordinary firmness to file a lawsuit again, or at least the court accepts as much for purposes of screening. In fairness, the court has concerns with this element of this claim, since plaintiff *also* alleges that he was allowed to leave his cell for other purposes such as meal time, but for the most part declined to do so because of the pain it caused. Indeed, it appears quite possible that this is the type of inconvenience that does not support an adverse action of constitutional dimension. *See Long v. Hammer*, 727 F. App'x 215, 217 (Mem) (7th Cir. June 15, 2018) (verbal harassment and requiring a prisoner to sign up for extra library time were insufficient to support a retaliation claim); *see also Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise"). Fact-finding will reveal more about the precise ramifications of Waterman's decision about recreation, but under the court's generous screening standard plaintiff's allegations are sufficient for him to develop this claim.

Plaintiff may also proceed against Lathrop. It appears that on June 28, 2018, plaintiff missed a medication dose, at least in part, because Lathrop refused to ensure that he received his dose. At this stage, given the pain plaintiff says he endured without his medication, it is conceivable that a prisoner of ordinary firmness might be deterred from pursuing inmate complaints again because of that pain. Moreover, plaintiff claims that Lathrop knew about an inmate complaint he filed against Lathrop, and he alleges that Lathrop failed to respond appropriately to his need for medication because of that complaint, which supports an inference that Lathrop retaliated against him.

However, plaintiff's allegations do not support retaliation claims against Kussmaul or Drone, since he does not allege facts suggesting that either of these defendants knew about his lawsuits or prior inmate complaints when they were responding to his requests about his medications. As such, it would be unreasonable to infer that they were motivated, even in part, by a desire to punish him for engaging in protected conduct. *Morfin v. City of E. Chi.*, 349 F.3d 989, 1005 (7th Cir. 2003) (finding that a successful retaliation claim requires that a plaintiff's protected first amendment act was known to and motivated the defendant). Accordingly, the court will grant plaintiff leave to proceed on retaliation claims against defendants Waterman and Lathrop, but not Kussmaul or Drone.

ORDER

IT IS ORDERED that:

1) Plaintiff Ivan Boyd is GRANTED leave to proceed on:

   (a) Eighth Amendment deliberate indifference claims against defendants Kussmaul, Lathrop, Mumm and Bromeland, Anderson and Drone.

   (b) a Wisconsin negligence claim against defendant Drone.

   (c) First Amendment retaliation claims against defendants Waterman and Lathrop.

2) Plaintiff is DENIED leave to proceed on any other claim. Defendants Rieck, Pitzer, and Parish are DISMISSED.

3) Pursuant to 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 the defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.

4) For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the defendants or to the defendants' attorney.

5) 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.

6) If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute.

Entered this 3rd day of March, 2022.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge