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

JASON RIVERA,

Plaintiff,

v.

KRISTINE PRALLE, KEVIN CARR, DAVID BURNETT, TAMMY MAASSEN, DEBRA TIDQUIST, and SANDRA ENDER,

Defendants.

OPINION AND ORDER

19-cv-506-wmc

Pro se plaintiff Jason Rivera, an inmate at Jackson Correctional Institution, alleges that defendants violated his federal constitutional and Wisconsin state-law rights by failing to provide adequate medical care after he injured his shoulder. Defendants have now moved for summary judgment, arguing that Rivera's claims lack merit. (Dkt. #32.) For the following reasons, the court will grant defendants' motion as to Rivera's federal constitutional claims against defendants Pralle, Carr, Burnett, Tidquist, and Ender, and decline to exercise jurisdiction over his related state-law claims with respect to these defendants. The court will reserve ruling on defendants' motion as to defendant Maassen, and on Rivera's motion for assistance with the recruitment of counsel.[1] (Dkt. #49.)

[1] For this reason, the court need not reach these defendants' alternative assertion of qualified immunity. As explained, the court will reserve ruling on Rivera's claim against Maassen, including her assertion of qualified immunity.

UNDISPUTED FACTS[2]

A. Background

Plaintiff Rivera's claims are based on alleged events at Jackson in 2017 through 2019. Most of the defendants were working there at that time, including nurses Kristine Pralle and Sandra Ender, Heath Services Unit ("HSU") Manager Tammy Maassen, and Advance Practice Nurse Prescriber ("APNP") Debra Tidquist. Rivera is also proceeding against Wisconsin Department of Corrections ("DOC") Secretary Kevin Carr, who began his service in January of 2019, and Bureau of Health Services ("BHS") Medical Director David Burnett, who served in that role from October of 2001 through October of 2013.

The HSU is overseen by its manager, who provides overall administrative support and supervises nursing staff. Unit nursing staff and advanced care providers, including physicians, physician assistants, and advanced practice nurse prescribers, provide medical care. Advanced care providers can make diagnoses and off-site referrals, prescribe medications, and approve the treatment recommendations of off-site providers. By contrast, neither nurses nor the HSU manager may order or prescribe medications, lab work, tests, imaging, surgery, or consultations with off-site medical providers, and must defer final treatment decisions and plans to the advanced care providers. Nurses may, however, provide over-the-counter pain relievers, interventions such as ice therapy, activity

[2] Unless otherwise indicated, the following facts are material and undisputed. Consistent with its practice, the court has drawn these facts from the parties' proposed findings and the evidence of record viewed in a light most favorable to plaintiff. *See Miller v. Gonzalez*, 761 F.3d 822, 877 (7th Cir. 2014) ("We must . . . construe the record in the light most favorable to the nonmovant and avoid the temptation to decide which party's version of the facts is more likely true.").

restrictions, extra pillows, ace wraps, muscle rub, and education on treatment measures.

The Bureau of Health Services recruits, hires, and trains DOC healthcare providers. Based on its budgetary parameters set by the Governor and Legislature, the Bureau determines how many nurses and advanced care providers will be allocated to each institution. Staff can make requests or advocate for more HSU staffing at a given institution, but staff does not control the number of positions allocated.

There are approximately 1,000 inmates at Jackson. At the time relevant to this lawsuit, Jackson had two advanced care providers: a nondefendant, Dr. Martin, who did not work full time, and defendant Tidquist, who covered five of DOC's minimum-security centers, as well as Jackson. As a result, there was a temporary increase in delayed appointments for non-urgent and non-emergent conditions. Even when an advanced care provider is not onsite at a particular institution, however, a provider is always available on-call. In emergency situations, a nurse or security can also call for an ambulance and send the inmate out without notifying an advanced care provider first.

When an inmate at Jackson has a medical concern or wants to be seen by or to otherwise communicate with medical staff, he submits a health services request ("HSR"). Nursing staff triage inmate HSRs daily, using their training and judgment to prioritize inmate needs. If the reviewing nurse determines that an HSU manager should review an HSR, the nurse will forward the HSR to the manager for review. If not, the reviewing nurse may provide requested information or schedule inmates requiring an appointment for a nurse sick call. However, if the inmate has already been seen by a nurse for the same issue, or the condition has worsened and further evaluation and treatment may fall outside

what a nurse is authorized to provide, the reviewing nurse will forward the HSR to a scheduler to schedule the inmate to be seen by an advanced care provider. When an inmate returns from an off-site appointment, a nurse will review the paperwork to see if there are any urgent recommendations. Due to security concerns, inmates are not given the dates of their off-site appointments ahead of time.

As a general matter, nurses are not required to follow up to ensure that an appointment was scheduled, and it generally takes time to be seen by an advanced care provider, especially for a chronic condition. This is because of the number of inmates at Jackson, and because inmates with emergent conditions and medical emergencies are given priority, so scheduled appointments may be pushed back or rescheduled at the discretion of the designated care provider based on his or her schedule.

B. Rivera's Relevant Medical Treatment

Rivera's primary advanced care provider was Dr. Martin.[3] On November 30, 2017, Rivera saw a nurse about a small bump on his left temple from an elbow to the head while playing basketball, along with left shoulder pain that had begun "weeks ago while lifting weights." (Dkt. #35-1 at 19.) At that time, Rivera rated his pain at an intensity of 8 out of 10, and the nurse ordered Tylenol, ibuprofen, and ice. The nurse also told Rivera to rest his shoulder and arm, as well as referred Rivera to be seen by a physical therapist that same day. After examining Rivera, the therapist further recommended that he be seen by an advanced care provider within 24 hours. (*Id.*) The nurse's follow-up notes reflect the

[3] Dr. Martin was a named defendant in this lawsuit, but Rivera voluntarily dismissed him at screening after learning that he had passed away. (Dkt. #14 at 1 n.1.)

therapist's recommendation. (*Id.*)

However, Rivera was not seen by an advanced care provider for his shoulder issue for nearly eight more months. In the meantime, on December 13, 2017, Rivera submitted an HSR stating that his shoulder was "not getting any better" and asking when he would see the doctor. (*Id.* at 2.) Nurse Pralle reviewed that request and responded that Rivera's "[a]ppointment with Dr. Martin is soon." (*Id.*)

Rivera sent three more HSRs, in February, April, and June, stating that his shoulder was not getting better, and consistently asking when he would be seen by an advanced medical provider. Each of these HSRs were reviewed by nondefendants, who consistently responded by noting that Rivera had a scheduled appointment with a physician. Rivera was also seen by nurses in the HSU on January 16, April 28, May 21, and July 11, 2018, for medical issues unrelated to his shoulder pain. (*Id.* at 12-17.) Although Rivera attests that he complained at each of these visits about his shoulder pain, none made a note of his complaint during these visits.

Dr. Martin finally saw Rivera about his shoulder and arm pain on July 17, 2018. The doctor described Rivera's range of motion as "fairly good," but he ordered an EMG of Rivera's arm and an x-ray of Rivera's shoulder to rule out nerve compression and increased his dose of ibuprofen. (*Id.* at 9-10.) The x-ray was taken on July 25 and revealed degenerative joint disease of the left shoulder. That same day, Rivera submitted an HSR directed to HSU Manager Maassen about his shoulder and ongoing pain, but a nondefendant nurse responded. (*Id.* at 6-7.) On July 30, Rivera filed an inmate grievance complaining about the length of time he had waited to see Dr. Martin, which was affirmed.

The EMG was done on August 8, and found mild bilateral median neuropathy at the wrists, slightly worse on the left, consistent with carpal tunnel syndrome, and left ulnar neuropathy likely localized to Rivera's elbow. Dr. Martin reviewed the results with Rivera on August 22, 2018. Finding that his symptoms were "minimal," Dr. Martin's care plan for Rivera was to "follow for now," meaning to continue to monitor his shoulder and arm over time. (*Id.* at 11.) However, since Rivera continued to experience pain, Dr. Martin eventually ordered an MRI of his left shoulder, which was completed on October 26. Because those results were normal, Dr. Martin reasoned that Rivera's shoulder pain "may be mostly referred nerve pain" from his elbow. (*Id.* at 40.) Accordingly, Dr. Martin referred Rivera to physical therapy and for a neurosurgery consult.

On January 23, 2019, Rivera saw a surgeon for left carpel tunnel and ulnar neuropathies. That surgeon concluded Rivera's conditions needed to be addressed surgically with a carpel tunnel release and a left ulnar nerve decompression, which were performed on February 21. While the hospital instructed that ibuprofen be withheld from Rivera beginning on February 18, it was the routine practice at the time that Jackson's advanced care providers discontinue any blood-thinning medication 5 to 7 days before surgery to reduce the risk of bleeding. (*Id.* at 52.) In addition, these care providers used a "time range," rather than a set number of days, to discontinue in order to avoid alerting inmates to the exact dates of their procedures, which would pose a security risk. Leading up to surgery, therefore, Rivera received patient communications from Nurse Ender, initially on February 13 and again on February 20, indicating that he could not have any aspirin or non-steroidal anti-inflammatory medications, such as ibuprofen. (*Id.* at 39, 68-

69.) He also received a third patient communication from a nondefendant nurse indicating the same on February 15. (Dkt. #43-37.) After River's pre-operative appointment at the hospital on February 18, a nondefendant nurse told him to continue holding ibuprofen, but gave him Tylenol to use as needed for pain control instead.

Nurse Ender's February 20 patient communication also instructed Rivera to begin fasting after midnight and indicated that he could not have ibuprofen for 3 days after surgery and must return that medication to the HSU. (Dkt. #35-1 at 68.) However, Rivera attests that he was then told to bring *all* his medication to the HSU that he kept in his cell, including his blood pressure medication, all of which Nurse Ender confiscated while reminding him, "no Ibuprofen for 3 days after surgery." (Dkt. #43 at ¶ 50.)

After surgery on February 21, Rivera was given oxycodone at the hospital. The surgeon recommended that Rivera "sleep in [the] bottom bunk" until his incisions healed and advised that he may need a splint. (Dkt. #35-1 at 56.) As for pain, the surgeon indicated that it could be treated with "Tylenol, ibuprofen, and/or short duration of Lortab," which is a combination of acetaminophen and hydrocodone. (*Id.*) Similarly, Rivera's patient instructions recommend anti-inflammatories to minimize post-surgery pain. (Dkt. #43-1 at 9.) When Rivera returned to Jackson that same day, he saw another nondefendant, Nurse Hurless, and asked about stronger pain medication. APNP Tidquist decided in response to extend Rivera's order for Tylenol through March 6, 2019, because: his procedure had been "minimally invasive"; he had received a large dose of a narcotic at the hospital; and he would soon resume ibuprofen as well. (Dkt. #36 at ¶ 42.) At the time of her decision, Tidquist had already received training on CDC guidance on

prescribing narcotic medications, and she was aware of the risks of using certain narcotics in an institutional setting, including the risk that inmates may divert and abuse the drug, or be targeted by other inmates who want their prescriptions.

The very next day, February 22, 2019, the HSU learned that Rivera was asking for the narcotics that he believed the surgeon had prescribed. While outside providers can order these medications, Jackson's providers still must approve the orders as appropriate for use in the institution. Nurse Pralle raised the issue with a provider, who concluded that Rivera could instead take his Tylenol and ibuprofen, and that these medications would be sufficient to address his pain. Although Rivera again asked for narcotic pain medication at his follow-up with a nurse the next day, February 23, he was able to move his left arm (despite swollen fingers), and a nurse directed Rivera to take his Tylenol and ibuprofen as directed, to always keep his arm in a sling, and to use ice. At his next follow-up, Rivera once again told the nurse that Tylenol and ibuprofen were not sufficiently controlling his pain, which he rated at a 5 out of 10. Moreover, when Rivera explained that he was taking ibuprofen three times a day, but Tylenol only once a day, the nurse advised that he take Tylenol more frequently and ordered him another bottle of the medication.

Rivera filed an inmate grievance dated March 1, 2019, alleging that he had received inadequate pain management after his surgery. After consulting with HSU Manager Maassen, the ICE recommended dismissal given that the specific treatment offered inmates is a matter of professional judgment, and Rivera concedes that there was no reason for Maassen to believe he was not being provided with adequate pain medication at that point. (Dkt. #48 at ¶ 121.)

Nurse Ender next saw Rivera on March 7, and she reported no redness, swelling or drainage from his surgical incisions and marked "yes" for "adequate pain control." (Dkt. #35-1 at 63.) Finally, Rivera had a follow-up appointment with his surgeon on March 25, 2019, who: reported that Rivera "has had good results"; advised that Rivera could "resume all activities as tolerated"; and discharged him. (*Id.* at 59, 67.)

OPINION

A party is entitled to summary judgment if the movant shows (1) no genuine dispute exists as to any material fact, and (2) judgment is appropriate as a matter of law. Federal Rule of Civil Procedure 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are those that "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. If the moving party makes a showing that the undisputed evidence establishes their entitlement to judgment beyond reasonable dispute, then to survive summary judgment, the non-moving party must provide contrary evidence "on which the jury could reasonably find for the nonmoving party." *Trade Fin. Partners, LLC v. AAR Corp.*, 573 F.3d 401, 406-407 (7th Cir. 2009) (quoting *Anderson*, 477 U.S. at 252).

I. Plaintiff's Eighth Amendment Claims

Plaintiff is proceeding under the Eighth Amendment on two, related claims of liability. *First*, he claims that Secretary Carr, HSU Manager Maassen, and former Bureau of Health Services Director Burnett allowed chronic understaffing in Jackson's HSU, causing him and other inmates lengthy delays in medical appointments and treatment. *Second*, he claims that Nurses Pralle and Ender and advanced care provider Tidquist each

failed to provide him adequate medical care after he injured his shoulder, leading to months of pain. The court will address each type of claim in turn.

A. Systemic Deficiencies Claims

Plaintiff argues that Carr, Maassen and Burnett are ultimately responsible for the chronic HSU understaffing at Jackson that caused lengthy treatment delays, including the one he experienced.[4] The Seventh Circuit has recognized that systemic deficiencies in a prison's health care facility may give rise to a finding of deliberate indifference where department-wide problems have been shown to affect inmates adversely on a widespread basis. *E.g.*, *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 428-31 (7th Cir. 1989) (systemic deficiencies found where prison failed to review and change procedures after an inmate died from medication prescribed over the phone); *Wellman v. Faulkner*, 715 F.2d 269, 272-74 (7th Cir. 1983) (systemic deficiencies found based on (1) a language barrier between inmates and the majority of physicians, (2) psychiatrist position was vacant for two years, (3) prisoners were denied important surgeries for two to five years, and (4) medical supplies were reused and not restocked).

However, as the court warned plaintiff in its screening order, succeeding on a such a claim is difficult because he cannot rely solely on evidence regarding his own medical care; rather, he "must demonstrate that there are such systemic and gross deficiencies in

[4] While plaintiff argues that he is also proceeding against these defendants in their official capacities, the court did not grant him leave to proceed on official capacity claims. In any event, such claims would only entitle him to injunctive relief, which he is not seeking. *See Power v. Summers*, 226 F.3d 815, 819 (7th Cir. 2000) (Section 1983 permits official-capacity suits against state officials that seek injunctive relief); (*see* dkt. #11 at 10 (requesting damages)).

staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 554 (7th Cir. 2016) (citation omitted); *see also Gutierrez v. Peters*, 111 F.3d 1364, 1375 n.10 (7th Cir. 1997) (a few instances of delay did not demonstrate a pattern of conduct that would establish deliberate indifference).

To begin, neither Carr nor Burnett could have been sufficiently involved in, and thus held responsible for, any understaffing and treatment delays during the period relevant to this lawsuit. That is because Carr did not assume the role of DOC Secretary until January of 2019, *after* the delay in plaintiff seeing Dr. Martin had already occurred. As for Burnett, he would not be the Bureau's Director for approximately four years *after* plaintiff first sought treatment for his shoulder pain in 2017. These defendants must be dismissed.

In contrast, HSU Manager Maassen was working at Jackson during the relevant time period. Maassen had no control over the number of advanced care provider positions allocated to Jackson, and the court rejects plaintiff's unsupported contention that Maassen was deliberately indifferent in failing to advocate for more staff. However, Maassen acknowledges that there was a temporary increase in delayed appointments for non-urgent and non-emergent conditions at Jackson in 2017 and 2018, because Dr. Martin was not full time and APNP Tidquist was covering 6 institutions. (Dkt. #35 at ¶ 33.) The record neither documents how widespread these delays were, nor how the inmate population was affected overall by this shortfall.

This is not the first time that the court has confronted a disturbingly long period within a DOC institution between an inmate's referral to an advanced care provider and the inmate actually being seen by that or a different provider. Moreover, as noted, defendants acknowledge that plaintiff was not alone in facing delays in being seen. (Dkt. ##35 at ¶ 33; 48 at ¶ 101.) Further, when Dr. Martin finally saw plaintiff nearly eight months after the original referral, his examination eventually led to surgery and plaintiff's first real relief from chronic pain some six months after that. The evidence does not show that HSU Manager Maassen knew personally that plaintiff had followed up, four more times with HSRs during this seven-and-a-half-month delay. Instead, each HSR appears to have been reviewed by different triage nurses, each kicking the can down the road, so that no one defendant can be held personally aware that Dr. Martin, who is now deceased, had continually rescheduled plaintiff, despite an ongoing need to be seen, though certainly the last few nurses should have realized how long the delay in plaintiff being seen by an advance practitioner had become. This apparent indifference to such long delays, along with Maassen's failure to explain what steps she took in response to the "temporary increase in delayed appointments" leaves an open question as to whether she knew or was deliberately indifferent to situations like plaintiff's.[5] (Dkt. #35 at ¶ 33.)

While the court could once again conclude simply that there is a lack of personal knowledge by a specific advanced care provider or providers, it is a closer question as to whether Maassen should have recognized that a systemic problem may exist where no one

[5] Obviously, a question remains as to whether Dr. Martin himself should have acted giving the mounting number of HSRs without plaintiff being seen, but he is no longer a defendant.

is tracking a delay of a half a year or more between an initial referral to be seen by an advanced care provider and an inmate actually being seen. Accordingly, before dismissing plaintiff's systemic deficiency claim against Maassen, the court will require DOC Secretary Carr to: (1) advise the court who was or were the BHS Medical Director between January 2017 and December 2018; and (2) provide the average time between an initial referral to an advanced care provider and being seen for each calendar year between 2015 and 2019 at Jackson.[6] Pending production of that information, the court will reserve ruling on defendants' motion for summary judgment with respect to his claim against Maassen, as well as plaintiff's motion for assistance with the recruitment of counsel with respect to that claim only.

B. Individual Medical Care Claims

At the same time, the court must dismiss plaintiff's claims against defendants Pralle, Ender, and Tidquist for allegedly failing to provide constitutionally adequate medical care. A prison official may violate the Eighth Amendment right if "deliberately indifferent" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). For purposes of summary judgment, the parties do not dispute that plaintiff was suffering a serious medical need. Therefore, the question is whether plaintiff has submitted enough evidence from which a reasonable jury could conclude that any of the defendants acted with "deliberate

[6] The court is painfully aware that this data may not be readily available, even for a single institution, but that may be the exact problem. Regardless, the DOC may have 60 days to compile this data.

indifference" toward his serious medical need. *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012).

"Deliberate indifference" means that the defendants were aware that the prisoner faced a substantial risk of serious harm but disregarded the risk by consciously failing to take reasonable measures to address it. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). Deliberate indifference constitutes *more than* negligent acts, or even grossly negligent acts, but may require something less than *purposeful* acts. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). In cases like this one, in which a plaintiff contends that the treatment was inadequate, the relevant question is whether the medical provider's actions were "such a substantial departure from accepted professional judgment, practice, or standard, as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996). In such cases, courts must defer to a medical professional's treatment decision unless no minimally competent professional would have chosen the same course of treatment under the circumstances. *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). A "[d]isagreement between a prisoner and his doctor, or even between two medical professionals, about the proper course of treatment generally is insufficient, by itself, to establish an Eighth Amendment violation." *Id*. However, a medical provider may violate the Eighth Amendment if the provider prescribes a course of treatment without exercising medical judgment or one that the provider knows will be ineffective. *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662-63 (7th Cir. 2016). The court is to consider the "totality

of [the prisoner's] medical care when considering whether that care evidences deliberate indifference to serious medical needs." *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016).

1. Nurse Pralle

Plaintiff alleges that Nurse Pralle failed to ensure that he received prompt medical attention in response to his December 13, 2017, HSR. About two weeks earlier, plaintiff had an initial sick call with another nurse about his shoulder and arm pain, and a physical therapist had recommended that he be seen by an advanced care provider within 24 hours. In this HSR, plaintiff wrote that he had been seen on November 30 about his shoulder, but noted that it was "not getting any better" and asked when he would see a doctor. (Dkt. #35-1 at 2.) Nurse Pralle responded the next day by noting that plaintiff's appointment with Dr. Martin was "soon." (*Id.*) Plaintiff argues that Nurse Pralle was deliberately indifferent to his medical needs because she "did not arrange for any kind of assessment, same day or otherwise," even if it was just another nurse sick call. (Dkt. #40 at 3.)

A jury could not reasonably conclude that Nurse Pralle recklessly disregarded plaintiff's medical needs based on how she triaged this HSR. She did not, for one, ignore the request -- she reviewed it and responded promptly to his question within a day. Although plaintiff argues that Pralle should have taken more urgent action, plaintiff did not indicate in his HSR that he was experiencing worsening pain or symptoms since his most recent nurse sick call, and there is no evidence suggesting that Pralle knew about the physical therapist's recommendation. Moreover, plaintiff asked to see a doctor, not another nurse, and there is no dispute that Nurse Pralle had no control over the advanced

care providers' schedules or how those providers triage their patient lists.[7] (Dkt. #48 at ¶¶ 125-26.) Thus, a reasonable jury could not attribute an unconstitutional delay in seeing Dr. Martin to Nurse Pralle as opposed to subsequent scheduling difficulties resulting from Dr. Martin's availability or other reasons. *E.g.*, *Forstner v. Daley*, 62 F. App'x. 704, 706 (7th Cir. 2003) (finding that a delay of 26 months for a knee joint injury caused mainly by transfer of inmate and scheduling of appointments was not deliberate indifference).[8]

2. Nurse Ender

As for Nurse Ender, plaintiff alleges that she confiscated all the medications that he brought to the HSU the day before surgery, including his "keep-on-person" blood pressure medication, even though he only needed to stop taking blood thinners. As a result, plaintiff alleges that he suffered severe pain. Because the record does not include any order or note indicating that all of his medications would be *or* were confiscated in preparation for his surgery, a genuine dispute of fact exists as to which medications, if any, were surrendered.

[7] Plaintiff also argues that Nurse Pralle violated policy because "a face to face encounter between the inmate and health professional is required" when an inmate "describes a symptom" as he did in his HSR. (Dkt. #47 at ¶ 12 (citing DAI Policy 500.30.11(I)).) Defendants assert that this was not the version of the policy in effect during the relevant time period, and note that the policy also provides for staff to triage HSRs based on the severity of complaints or need for immediate assessment. (*Id.*) Regardless, plaintiff was not complaining of a *new* symptom; moreover, policy violations, in and of themselves, are not constitutional violations actionable in this type of civil lawsuit. *See Earl v. Karl*, 721 F. App'x 535, 537 (7th Cir. 2018) (a policy violation is not itself an Eighth Amendment violation); *Estate of Simpson v. Gorbett*, 863 F.3d 740, 746 (7th Cir. 2017) (rejecting contention that a violation of policy supports an inference that defendants violated the Eighth Amendment).

[8] Although Nurse Pralle reviewed another HSR from plaintiff concerning his shoulder and arm nearly a year later, on November 19, 2018, by that point, plaintiff had already seen Dr. Martin and an MRI had been done; plus, plaintiff wrote in that HSR that he needed to see the doctor to discuss the results and pain issues in his arm. (Dkt. #35-1 at 73.) As before, Pralle appropriately responded within a day informing plaintiff that he had an appointment coming up.

However, even taking plaintiff at his word, there is no evidence from which a jury could reasonably conclude that defendant *Ender* behaved with deliberate indifference in taking all of plaintiff's meds. First, plaintiff received no patient communication from Ender suggesting that he had to surrender any medication, other than his ibuprofen; and plaintiff does not allege that he said anything to Ender about surrendering his Tylenol and blood pressure medication, in addition to the ibuprofen the patient communication form instructed him to bring to the HSU. (Dkt. #35-1 at 68 (telling plaintiff to return his ibuprofen to the HSU)). Second, Ender's reported response -- reminding plaintiff that he could not have ibuprofen for three days after his surgery -- suggests that she thought he had surrendered that medication.

At most, plaintiff's allegations suggest a misunderstanding, rather than an awareness of serious risk, in that Ender mistakenly assumed plaintiff had surrendered only the medication she had told him to surrender per the surgeon's pre-surgery order. *See Shesler v. Sanders,* No. 13-cv-394-jdp, 2014 WL 5795486, at *1 (W.D. Wis. Nov. 6, 2014) ("We do not charge government officials with constitutional-level violations because they make mistakes on the job, even if those mistakes have serious consequences."). Perhaps, Ender should have checked plaintiff's medications to make sure what he had with him, but as noted above, negligence, even gross negligence, does not rise to the level of deliberate indifference. *Farmer*, 511 U.S. at 836. Moreover, plaintiff does *not* claim to have suffered any harm after going temporarily without his blood pressure medication, and he was given more Tylenol upon his return from surgery the next day. Accordingly, Ender is entitled to summary judgment on plaintiff's Eighth Amendment claim against her.

3. APNP Tidquist

Finally, the crux of plaintiff's claim against Tidquist is that she did not provide him a short-term, narcotic pain medication after his surgery. (Dkt. #41 at ¶¶ 52, 58-62.) While a medical provider's choice of treatment violates the constitution when "no minimally competent professional would have so responded under those circumstances," *Pyles*, 771 F.3d at 409, no reasonable jury could find on this record that APNP Tidquist provided post-surgery care fitting this description. As an initial matter, plaintiff contends that he saw Tidquist upon his return from the hospital, and again the day after, and claimed he was in obvious pain. However, his medical records show that he met with a different, nondefendant nurse on February 21 and 22, 2019, who noted that plaintiff was asking about stronger pain medication. (Dkt. #35-1 at 32-35, 64-65 (indicating plaintiff was seen by Nurse Hurless).) The record also shows that in response to plaintiff's requests, APNP Tidquist actually extended plaintiff's Tylenol order through March 6, 2019, and that the very next day, February 22, when plaintiff again complained of pain to security staff, he was allowed to take ibuprofen, as well as Tylenol. (Dkt. #35-1 at 38.) After plaintiff continued to complain of pain, the medical notes further show that he was advised by another nurse to take more Tylenol, which he had only been taking once a day up to that point, and he does not allege that he ever complained to Tidquist again. (Dkt. #43 at ¶¶ 63-66.)

Even so, plaintiff maintains that Tidquist left him without effective pain relief, and he asserts, without supporting evidence, that standard practice is to prescribe short-term, narcotic pain relief after "any invasive medical procedure." (Dkt. ##43, 47 at ¶ 61.)

However, Tidquist attests that she did not prescribe a narcotic medication because: plaintiff's procedure had been "minimally invasive"; he had been given a large dose of narcotic medication before he left the hospital; and he would soon resume ibuprofen as well. (Dkt. #36 at ¶ 42.) Tidquist further explains that the combination of ibuprofen and Tylenol "is one of the strongest pain reliever combinations available," and also without contradiction, that she had to consider security and addiction concerns in light of Jackson's correctional setting. (Dkt. #36 at ¶¶ 50-54.)

Plaintiff does not specify any evidence to the contrary, beyond his own assertions of pain, his claim that the injury was not "trivial," and his never being accused of misusing medications; nor does he allege experiencing any post-operative complications that required a different response that prescribed by Tidquist. (Dkt. ##40 at 7; 48 at ¶ 92.) To the contrary, plaintiff's own patient instructions upon leaving the hospital recommends anti-inflammatories to minimize post-surgery pain, just as Tidquist prescribed. (Dkt. #43-1 at 9.) And although plaintiff's surgeon also recommended a narcotic (Lortab) (dkt. #35-1 at 56), along with the recommended Tylenol and ibuprofen, Tidquist obviously had reasonable security concerns about introducing a narcotic into Jackson's environment. Regardless, "evidence that another doctor would have followed a different course of treatment is insufficient to sustain a deliberate indifference claim." *Burton v. Downey*, 805 F.3d 776, 786 (7th Cir 2015).

As a result, plaintiff's claim against Tidquist amounts to a disagreement over her exercise of medical judgment concerning appropriate post-surgery, pain medication, and dissatisfaction or disagreement with the method of treatment alone does not constitute an

Eighth Amendment claim of deliberate indifference. *Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003). Indeed, using pain medications requires medical providers to weigh their risks and benefits, and providers are *not* required to keep an inmate pain-free. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996). While plaintiff may have preferred a narcotic, "[w]hether and how pain associated with medical treatment should be mitigated is for [providers] to decide free from judicial interference, except in the most extreme situations." *Id.* Because plaintiff does not present evidence that APNP Tidquist's prescription decisions to which he now objects were "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment," *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261-62 (7th Cir 1996), Tidquist is also entitled to summary judgment.

In dismissing plaintiff's medical care claims, the court readily acknowledges plaintiff's frustration at having to wait nearly eight months to be seen by a doctor for his shoulder and arm pain, as well as the challenges faced by HSU staff working under difficult conditions to provide health care to large inmate populations. Under the circumstances presented, however, the evidence does not support a reasonable jury finding that any of these defendants personally acted with deliberate indifference to plaintiff's need for treatment or ongoing pain.

II. Exercise of Supplemental Jurisdiction over Plaintiff's State-Law Claims

That leaves plaintiff's state-law negligence claims against defendants Ender, Pralle, and Tidquist. While the court may exercise supplemental jurisdiction over these claims, *see* 28 U.S.C. § 1367(a), the court will decline to do so here because plaintiff's related

federal claims against these defendants are being dismissed before trial, and the court has not considered the merits of the state-law claims. In other words, exercising jurisdiction over those claims does not serve judicial efficiency, and neither party asks the court to retain jurisdiction over them if the federal claims are dismissed. Accordingly, plaintiff's state-law claims will be dismissed without prejudice to him pursuing them in state court, subject to any applicable statute of limitations.

ORDER

IT IS ORDERED that:

1) Defendants' motion for summary judgment (dkt. #32) is GRANTED as to plaintiff's federal constitutional claims against defendants Pralle, Carr, Burnett, Tidquist, and Ender, but DENIED as to plaintiff's state-law negligence claims.

2) The court RESERVES ruling on defendants' motion for summary judgment as to plaintiff's Eighth Amendment systemic deficiencies claim against defendant Maassen and on plaintiff's motion for assistance with the recruitment of counsel with respect to that claim (dkt. #49).

3) The clerk of court is directed to enter judgment in favor of defendants Pralle, Carr, Burnett, Tidquist, and Ender on all federal claims and to DISMISS without prejudice all state-law claims against those defendants.

4) Defendant Carr has until November 20, 2023, to: (1) advise the court who was the BHS Medical Director between January 2017 and December 2018; and (2) provide the average time between an inmate's initial referral to an advanced care provider and the inmate being seen between 2015 and 2019 at the Jackson Correctional Institution.

Entered this 20th day of September, 2023.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge