IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RYON STACY REESE,

OPINION and ORDER

Plaintiff,

16-cv-303-bbc

v.

MICHAEL DITTMAN, KAREN ANDERSON,
MEREDITH MASHAK, DOCTOR HOFFMAN,
DOCTOR SYED, CATHY WAYLEN,
EMMA STARKS, NURSE DE-YOUNG,
NURSE VELEIRUS, BARB HARRIS,
NURSE FELTON, NURSE KIM,
CHAD KELLER, MR. HOECHST,
JOHN DOE and JANE DOE,

Defendants.

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Pro se prisoner Ryon Stacy Reese has filed a complaint under 42 U.S.C. § 1983 in which he alleges that he received inadequate medical care after injuring his arm and shoulder. In addition, he alleges that defendant Chad Keller destroyed a videotape that would have provided evidence that some of the other defendants had ignored his requests for medical attention.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915(e)(2) and § 1915A. Having reviewed the complaint, I conclude that plaintiff may proceed on claims defendant Keller violated his right to have access to the courts by destroying evidence

and that the remaining defendants violated his Eighth Amendment rights by failing to provide treatment for his injuries.

OPINION

A. Screening

1. Summary of plaintiff's claims

Plaintiff's claims arise out of an incident in November 2013 in which plaintiff says that he injured his right bicep and shoulder while lifting weights at the Columbia Correctional Institution. (Plaintiff is now incarcerated at the Racine Correctional Institution, but all the events relevant to this case occurred at the Columbia prison.) An MRI taken in March 2014 showed two tears in plaintiff's rotator cuff and a tear in his bicep tendon, but he did not receive surgery until August 2015. At that point, the surgeon was unable to repair the damage.

Plaintiff's complaint spans 20 typed pages, names many defendants and discusses almost every aspect of his medical care related to his injury from November 2013 to January 2016. Because plaintiff did not include a summary of his claims in his complaint, it is not always obvious which of his allegations are meant to be claims and which allegations are merely background information. From my review of the complaint, I understand plaintiff to be raising the following claims regarding this medical care under the Eighth Amendment:

(1) in June 2014, defendant Hoffman (a doctor at the prison) discontinued plaintiff's pain medication and then refused to renew the "proper" medication, cpt. ¶ 33, dkt. #1;

(2) at unspecified times, defendant Syed (a doctor at the prison) failed to prescribe adequate pain medication for plaintiff because Syed "did not believe in prescribing any narcotics for pain," id. at ¶ 34;

(3) in August 2014, defendant Kim (a nurse) refused to schedule a doctor's appointment when plaintiff complained of severe pain and bruising in his upper arm, which plaintiff later discovered was caused by a torn tendon in his bicep, id. at ¶ 39;

(4) when plaintiff complained to defendant Meredith Mashak (a manager of the health services unit) that he was in pain over a two-year period, Mashak failed to provide pain medication or schedule doctor appointments, id. at ¶¶ 40 and 47;

(5) an unknown official or officials refused to approve plaintiff's surgery for 17 months, id. at ¶¶ 41-46;

(6) in August 2015, after plaintiff returned from surgery, defendant Cathy Waylen (a nurse) refused to give plaintiff any pain medication other than codeine, to which plaintiff was allergic, id. at ¶¶ 49 and 54;

(7) after plaintiff returned from surgery, defendant Emma Starks (a nurse) ignored plaintiff's requests for medical attention for his pain, id. at ¶ 50-51;

(8) after plaintiff returned from surgery, two unknown correctional officers refused to help plaintiff when he asked for medical help, id. at ¶ 74;

(9) after plaintiff returned from surgery, when he tried to seek medical attention from defendant Barb Harris (a nurse), she refused to speak to him, id. at ¶ 59;

(10) after plaintiff returned from surgery, defendant De-Young prevented plaintiff from receiving his Vicodin prescription, id. at ¶¶ 68-69;

(11) after plaintiff returned from surgery, defendant Mashak refused to do anything when she learned that plaintiff was not receiving his Vicodin prescription, id. at ¶ 66;

(12) in January 2016, defendant Syed refused to give plaintiff any pain medication or other treatment, id. at ¶ 73;

(13) at an unspecified time, defendant Hoechst (a physical therapist) refused to prescribe a resistance band for plaintiff to help with his shoulder, id. at ¶ 80;

(14) at an unspecified time, defendants Velerius and Felton (both nurses) refused to refill plaintiff's medication, id. at ¶ 81;

In addition to these claims about his medical care, plaintiff is bringing a claim against defendant Chad Keller (a captain) for destroying a videotape that allegedly would show other defendants ignoring plaintiff's requests for medical help. Id. at ¶¶ 75-79. Plaintiff does not identify a legal theory, but I understand him to be asserting a claim for a violation of his right to obtain access to the courts because Keller's alleged conduct makes it more difficult to prove that some of the other defendants denied plaintiff care.

Plaintiff names Michael Dittman (the warden) and Karen Anderson (manager of the health services unit) in the caption of his complaint, but he includes no allegations against them in the body of the complaint other than their job titles. Ordinarily, I would dismiss these defendants for plaintiff's failure to provide notice of his claims against them. However, it is reasonable to infer that plaintiff intended to sue Dittman and Anderson for causing the delay in his surgery because both of them are administrators that could have played some role in approving or scheduling the surgery. Even if this is not what plaintiff intended, it makes sense to include Dittman and Anderson as defendants while plaintiff attempts to determine the person or persons responsible for the delay. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (if prisoner does not know name of defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity).

I have not considered allegations about any individual discussed in the body of the

complaint unless that person was named in the caption. Myles v. United States, 416 F.3d 551, 551 (7th Cir. 2005). If plaintiff believes that the above list omits some of his claims, he will have to file an amended complaint in which he more clearly identifies the claims and explains why he believes that a particular defendant's conduct violates the Eighth Amendment.

2. Eighth Amendment claims

Turning to the merits of plaintiff's claims, I conclude that plaintiff's allegations of inadequate medical care state a claim upon which relief may be granted under the Eighth Amendment. A prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

It is reasonable to infer at the pleading stage that plaintiff's pain was a serious medical need. Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011); Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999). Further, he alleges that he complained to each of the defendants about his medical problems, so it is reasonable to infer that each defendant knew that plaintiff needed treatment.

With respect to the question whether defendants consciously failed to provide treatment, plaintiff alleges that defendants ignored his requests for medical help, interfered with prescribed treatment, refused to treat his pain, delayed needed procedures without justification or provided treatment that is known to be ineffective (or dangerous). All of these actions can violate the Eighth Amendment. McDonald v. Hardy, 821 F.3d 882, 888 (7th Cir. 2016) ("[D]eliberate indifference can be shown with evidence that those employees ignored or interfered with a course of treatment prescribed by a physician."); Smith v. Knox County Jail, 666 F.3d 1037, 1039-40 (7th Cir. 2012) ("[D]eliberate indifference to prolonged, unnecessary pain can itself be the basis for an Eighth Amendment claim."); Berry v. Peterman, 604 F.3d 435, 441 (7th Cir. 2010) ("[A] doctor's choice of the easier and less efficacious treatment for an objectively serious medical condition can still amount to

deliberate indifference for purposes of the Eighth Amendment."); Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 828-29 (7th Cir. 2009) ("[D]elays in treating painful medical conditions, even if not life-threatening, may support an Eighth Amendment claim."); Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996) ("Deliberately to ignore a request for medical assistance has long been held to be a form of cruel and unusual punishment."). Accordingly, I will allow plaintiff to proceed on his Eighth Amendment claims.

At summary judgment or trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each element of his claim. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). It will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Even a showing of negligence or medical malpractice is not enough to prevail on a claim under the Eighth Amendment. Norfleet, 439 F.3d at 396.

Medical staff have considerable discretion under the Eighth Amendment in choosing appropriate treatment, particularly with respect to pain medication, which requires medical staff to consider not just a patient's complaints of pain, but also issues related to security and addiction. Snipes v. DeTella, 95 F.3d 586,592 (7th Cir. 1996) ("Using [pain killers] entails risks that doctors must consider in light of the benefits. . . . Whether and how pain associated with medical treatment should be mitigated is for doctors to decide free from judicial interference, except in the most extreme situations."). Thus, to prove his Eighth

Amendment claims, plaintiff will have to show that defendants' conduct was "blatantly inappropriate" and that defendants knew about obvious, reasonable alternatives, but refused to consider them. Id.

3. Access to Courts

I will allow plaintiff to proceed against defendant Keller on his access to courts claim as well. "The First and Fourteenth Amendments protect the rights of individuals to seek legal redress for claims that have a reasonable basis in law and fact. Interference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights under § 1983." Rossi v. City of Chicago, 790 F.3d 729, 734 (7th Cir. 2015) (citations omitted). At this stage of the proceedings, it is reasonable to infer from plaintiff's allegations that defendant Keller was trying to conceal evidence regarding a nonfrivolous civil rights claim and that Keller's conduct has made it more difficult for plaintiff to prevail on his claim. Accordingly, I conclude that plaintiff has stated a claim upon which relief may be granted under the right to have access to the courts.

4. John Doe defendants

Plaintiff does not know the names of two of the defendants who are correctional officers and, as discussed above, plaintiff does not know whether defendant Dittman, defendant Anderson or someone else is responsible for delaying his surgery. However,

plaintiff's lack of knowledge on these issues is not a reason to deny him leave to proceed on those claims.

"[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996). Accordingly, I will allow plaintiff to proceed against the unknown correctional officers as John Does and I will allow plaintiff to proceed against defendants Dittman and Anderson for the purpose of discovering the names of the other individuals who are allegedly responsible for delaying his surgery.

Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and those responsible for approving surgery for plaintiff. Then the magistrate judge will set a deadline within which plaintiff is to amend his complaint to add the names of the correct defendants.

B. Motion for Assistance in Recruiting Counsel

Under 28 U.S.C. § 1915(e)(1), a district court has discretion to assist pro se litigants in finding a lawyer to represent them. However, before a district court can consider a request for assistance, it must first find that the plaintiff has made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts.

Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). In this case, plaintiff has not shown that he has made any efforts to obtain a lawyer on his own.

To prove that he has made reasonable efforts to find a lawyer, plaintiff must give the court letters from at least three lawyers who denied plaintiff's request for representation. Alternatively, if the lawyers plaintiff writes do not respond after 30 days, plaintiff may explain the efforts he took to obtain a lawyer in a declaration sworn under penalty of perjury. 28 U.S.C. § 1746. Plaintiff should include the date he sent the letters. In addition, plaintiff should send a copy of the letter that he sent the lawyers.

Even if plaintiff had shown that he had made reasonable efforts to find his own lawyer, I would deny plaintiff's motion as premature. Court assistance in recruiting counsel is appropriate only when the plaintiff demonstrates that his is one of those relatively few cases in which it appears from the record 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.

At this stage of the proceedings, it is too early to tell whether this case is too complex for plaintiff to litigate on his own. Generally, it is this court's practice to defer decisions about recruiting counsel until after any issues about exhaustion of administrative remedies are resolved. It makes little sense to ask a lawyer to devote the resources necessary to litigating a potentially complex case before it is known whether the case will be resolved on more straightforward procedural grounds.

Although plaintiff says that his claims raise a number of complicated medical issues,

plaintiff does not need medical expertise to litigate issues related to exhaustion. His complaint was clear and well organized, showing that he has an understanding of both the law and court procedure. He appears to be capable of representing himself at least for the early stages of the case.

Accordingly, I am denying plaintiff's motions for assistance in recruiting counsel. If defendants do not raise an exhaustion defense by the deadline for doing so (which will be set by the magistrate judge after the preliminary pretrial conference) or the court rejects any exhaustion defense that is raised, plaintiff may renew his motion at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Ryon Stacy Reese is GRANTED leave to proceed on the following claims:

(1) in June 2014, defendant Hoffman discontinued plaintiff's pain medication and then refused to renew the "proper" medication, in violation of the Eighth Amendment;

(2) at unspecified times, defendant Syed failed to prescribe adequate pain medication for plaintiff because Syed "did not believe in prescribing any narcotics for pain," in violation of the Eighth Amendment;

(3) in August 2014, defendant Kim refused to schedule a doctor's appointment when plaintiff complained of severe pain and bruising in his upper arm, in violation of the Eighth Amendment;

(4) when plaintiff complained to defendant Meredith Mashak he was in pain over a two-year period, Mashak failed to provide pain medication or schedule doctor appointments, in violation of the Eighth Amendment;

(5) defendant Michael Dittman and Karen Anderson refused to approve

plaintiff's surgery for 17 months, in violation of the Eighth Amendment;

(6) in August 2015, after plaintiff returned from surgery, defendant Cathy Waylen refused to give plaintiff any pain medication other than codeine, to which plaintiff had an allergy, in violation of the Eighth Amendment;

(7) after plaintiff returned from surgery, defendant Emma Starks ignored plaintiff's requests for medical attention for his pain, in violation of the Eighth Amendment;

(8) after plaintiff returned from surgery, two unknown correctional officers refused to help plaintiff when he asked for medical help, in violation of the Eighth Amendment;

(9) after plaintiff returned from surgery, when he tried to seek medical attention from defendant Barb Harris, she refused to speak to him, in violation of the Eighth Amendment;

(10) after plaintiff returned from surgery, defendant De-Young prevented plaintiff from receiving his Vicodin prescription, in violation of the Eighth Amendment;

(11) after plaintiff returned from surgery, defendant Mashak refused to do anything when she learned that plaintiff was not receiving his Vicodin prescription, in violation of the Eighth Amendment;

(12) in January 2016, defendant Syed refused to give plaintiff any pain medication or other treatment, in violation of the Eighth Amendment;

(13) at an unspecified time, defendant Hoechst refused to prescribe a resistance band for plaintiff to help with his shoulder, in violation of the Eighth Amendment;

(14) at an unspecified time, defendants Velerius and Felton refused to refill plaintiff's medication, in violation of the Eighth Amendment;

(15) defendant Chad Keller destroyed a videotape that could have supported plaintiff's claims in this case, in violation of the constitutional right to have access to the courts.

2. Plaintiff's motions for assistance in recruiting counsel, dkt. ##3 and 9, are DENIED.

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 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

4. Once the defendants answer the complaint, the clerk of court will set a telephone conference before Magistrate Judge Stephen Crocker. At the conference, Magistrate Judge Crocker will set a schedule for the case, including a deadline for plaintiff to amend his complaint to name the unknown defendants and substitute new defendants for defendants Dittman and Anderson, if necessary.

5. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or their attorney.

6. 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.

7. If plaintiff is transferred or released while this case is pending, it is his 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 case may be dismissed for failure to prosecute.

Entered this 6th day of September, 2016.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge