IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM TEAS,

OPINION and ORDER

Plaintiff,

16-cv-452-bbc

v.

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

Defendants.

- -

Pro se prisoner William Teas has filed a complaint in which he alleges that various prison officials have failed to provide appropriate treatment and accommodations for various medical conditions plaintiff has that are related to his back. Plaintiff has made an initial partial payment of the filing fee as required by 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 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 Michael 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 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.

I am dismissing two other claims for plaintiff's failure to provide fair notice in accordance with Fed. R. Civ. P. 8, but I will give plaintiff an opportunity to amend his complaint to fix the problems.

OPINION

Plaintiff alleges that he suffers from various medical conditions related to his back, including degenerative disk disease, causing him great pain. I understand plaintiff to be raising the following claims related to defendants' alleged failure to treat and accommodate plaintiff's conditions:

(1) defendants Dalia Suliene and Karl Hoffman (physicians at the Columbia Correctional Institution, where plaintiff is housed) failed to treat plaintiff's back pain adequately, in violation of the Eighth Amendment and Wisconsin law;

(2) defendants Karen Anderson, Meredith Mashak, Lillian Tenebruso and Nancy White (managers of the health services unit) failed to schedule appointments with physicians in a timely manner, in violation of the Eighth Amendment;

(3) 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;

(4) defendants Suliene, Hoffman, Mashak, James Greer (the medical director for the Wisconsin Department of Corrections), Michael Dittman (the warden) and Michael Weber (a "security supervisor") denied requests for a "medically appropriate mattress and pillow," in violation of the Eighth Amendment, the Americans with Disabilities Act and the Rehabilitation Act;

(5) defendants Kevin Boodry, Janel Nickel and Anthony Ashworth ("security supervisors") 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

(6) 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.

This summary of plaintiff's claims is modified slightly from the summary that plaintiff provides at the end of his complaint. First, plaintiff's summary includes a person named "Kottka" who is not included in the caption or otherwise identified in the complaint. I cannot consider individuals who are not named in the caption, so I have disregarded "Kottka." Myles v. United States, 416 F.3d 551, 551 (7th Cir. 2005).

Second, plaintiff omits from his summary defendants who are included in the caption and discussed in the body of the complaint. I have included any individuals included in the

caption and discussed in the body of the complaint, even if they were not included in plaintiff's summary.

Third, it is difficult to tell from the summary which actions plaintiff believes violated the Eighth Amendment and which actions violated the Americans with Disabilities Act. I have assumed that plaintiff wishes to raise both Eighth Amendment claims and ADA claims with respect to all of his allegations about his bedding.

Fourth, plaintiff does not mention the Rehabilitation Act in his complaint, but it makes sense to include it because the substantive standards are the same under it and the ADA, but the Rehabilitation Act does not raise questions about sovereign immunity. Norfleet v. Walker, 684 F.3d 688, 690 (7th Cir. 2012) (reading in Rehabilitation Act for these reasons).

Finally, plaintiff cites Wis. Stat. § 106.52, but I have not include that statute because it relates to "public accommodations," which do not include prisons. Wis. Stat. 106.52(1)(e). See also Castle v. Eurofresh, Inc., 734 F. Supp. 2d 938, 945 (D. Ariz. 2010) (public accommodations do not include prisons); Danberg v. Ovens, No. CV S15A-07-006 THG, 2016 WL 626476, at *3 (Del. Super. Feb. 15, 2016) (same); In re Outman, 49 Misc. 3d 1129, 1134, 19 N.Y.S.3d 678, 684 (N.Y. Sup. Ct. 2015) (same); Skaff v. West Virginia Human Rights Commission, 191 W.Va. 161, 444 S.E.2d 39, 42 (1994) (same); Blizzard v. Floyd, 149 Pa. Cmwlth. 503, 613 A.2d 619, 620–21 (1992) (same).

A. Pain Medication

Plaintiff alleges that two doctors at the prison, defendants Suliene and Hoffman, failed to treat his chronic back pain adequately. Although he acknowledges that they prescribed various drugs (nortyptaline, amitryptaline, maloxicam, gabepentin, naproxen and acetaminophen), he says that defendants knew when they prescribed the drugs that the drugs would be ineffective. He asserts claims under the Eighth Amendment and state medical malpractice law.

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?

To prevail on a claim for medical negligence in Wisconsin, a plaintiff must prove that the defendants breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865.

With respect to plaintiff's Eighth Amendment claim, he alleges that he suffered from severe chronic pain, which is sufficient at the pleading stage to show that he had 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, it is reasonable to infer that defendants knew about plaintiff's chronic pain, so plaintiff has satisfied the second element as well for the purpose of screening.

With respect to the question whether defendants consciously failed to provide adequate treatment, it is well-established that "medical personnel cannot simply resort to an easier course of treatment that they know is ineffective." Johnson v. Doughty, 433 F.3d 1001,1013 (7th Cir. 2006). See also Gonzalez v. Feinerman, 663 F.3d 311, 314–15 (7th Cir. 2011) ("[P]hysicians [a]re obligated not to persist in ineffective treatment."); Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011) ("[A] medical professional's actions may reflect deliberate indifference if he chooses an easier and less efficacious treatment without exercising professional judgment."); 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."); Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005) (noting that persistence in course of treatment "known to be ineffective" violates Eighth Amendment). Because plaintiff alleges that Suliene and Hoffman knew they were giving him ineffective medication, plaintiff has stated a claim under the Eighth Amendment. Further, because the standard under state law is less demanding, I conclude that plaintiff has stated a claim under state law as well.

Although plaintiff's allegations meet the bare minimum requirements to state a claim, plaintiff should keep in mind two things as the case proceeds. First, his allegation that defendants Suliene and Hoffman knew even before they prescribed certain medications that they would be ineffective seems unlikely to be true. After all, different individuals respond differently to different medications, particularly in the context of chronic pain, so it is not clear how defendants would have known the effect of particular medications before plaintiff even tried them. Plaintiff provides no explanation in his complaint.

At the screening stage, I must accept as true even unlikely allegations, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), but plaintiff's conclusory statements will not be sufficient at later stages of the case to prove that defendants violated the Eighth Amendment or committed malpractice. Rather, plaintiff will need to produce specific evidence to prove that they violated his rights under federal and state law. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740 (7th Cir. 2006) ("[I]t is . . . axiomatic that a plaintiff's conclusory statements do not create an issue of fact."); Hall v. Bodine Electric Co., 276 F.3d 345, 354 (7th Cir. 2002) ("It is well-settled that conclusory allegations . . . do not create a triable issue

of fact."). If it turns out that defendants tried different medications in good faith, plaintiff will have to show that defendants persisted in using the same medication even when it became clear that the medication was ineffective.

Second, plaintiff will have to identify what alternative course of action defendants should have taken. In his complaint, plaintiff makes it clear that he believes defendants should have done something different, but he does not identify what that something is. To the extent plaintiff intends to argue that defendants should have given him narcotics, he will have to show that the decision not to prescribe them was "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, 61–62 (1996). In light of the discretion that doctors are afforded under the Eighth Amendment and the risks associated with narcotics, plaintiff will have an uphill battle in meeting his burden. 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."); Banks v. Cox, No. 09–cv–9–bbc, 2010 WL 693517, *7 (W.D. Wis. 2010) ("Although plaintiff may believe that he needed narcotic pain medication, the Constitution does not require prison officials to provide prisoners the medical care they believe to be appropriate; it requires officials to rely on their medical judgment to provide prisoners with care that is reasonable in light of their knowledge of each prisoner's

problems."). But see McGhee v. Suliene, No. 13-cv-67-bbc, 2014 WL 576150, at *10–12 (W.D. Wis. Feb. 12, 2014) (denying summary judgment motion on prisoner's claim that doctor violated Eighth Amendment by refusing to prescribe stronger pain medication when defendant did not allege that prisoner was exaggerating his pain or had history of abusing drugs and defendant did not otherwise identify specific reason stronger medication was not appropriate).

B. Delay in Scheduling Doctor Appointments

Plaintiff alleges that various managers of the health services unit (defendants Anderson, Mashak, Tenebruso and White) "failed to ensure that [he] was seen [by a physician] in an appropriate amount of time." However, plaintiff does not identify any particular instances of delays, how long he had to wait, the reasons for the delays, why he believes his wait time was too long or how an earlier appointment would have made a difference. Further, plaintiff alleges that he had a chronic condition; he does not identify any emergency situations that required immediate attention. Accordingly, without more information, it is not reasonable to infer that any of the health service unit managers violated plaintiff's rights. If plaintiff wishes to proceed on this claim, he will have to file an amended complaint that provides fair notice to each defendant, as required by Fed. R. Civ. P. 8.

C. Response of Health Service Unit Managers to Physicians' Treatment Decisions

In one paragraph of his complaint, plaintiff alleges that defendants Anderson, Mashak, Tenebruso and White "failed to take a course of action to identify whether the treatment provided by Hoffman or Suliene was proper." However, plaintiff does not allege that the managers of the health service unit were physicians themselves and he does not identify any reason to believe that they had the authority, responsibility or even necessary knowledge to second guess the decisions of plaintiff's physicians. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012). Even if I assume that the managers had some medical expertise, the general rule is that medical staff are entitled to rely on the opinion of another medical professional who examined the prisoner. Smego v. Mitchell, 723 F.3d 752, 758 (7th Cir. 2013). There is an exception when it is obvious that a prisoner is receiving bad care, id., but plaintiff does not identify any reason that the managers would have known either that the physicians were providing poor treatment or what treatment that plaintiff should have been receiving instead. Accordingly, I cannot allow plaintiff to proceed on this claim. Again, I will give plaintiff an opportunity to file an amended complaint that provides more information, if he has it.

D. Bedding Accommodations

Plaintiff includes three sets of allegations about defendants' alleged failure to accommodate his special needs for bedding. In particular, plaintiff says that various defendants denied his requests for a special mattress and pillow and a raised bunk, both in

general population and when he was housed in segregation.

With respect to the mattress and pillow, plaintiff says that his medical conditions cause him great pain, so a special mattress and pillow are "medically necessary" to help alleviate his pain and "properly align with his spine and head." A raised bunk is necessary because of the great difficulty plaintiff has getting in and out of bed.

At the screening stage, it is reasonable to infer that plaintiff has a serious medical need for the accommodations he describes. In addition, plaintiff alleges that defendants knew about his need from his requests and complaints, but all of them refused to help. Accordingly, I will allow plaintiff to proceed on these claims under the Eighth Amendment. At summary judgment or trial, however, plaintiff will need more than just his own belief that he needs the requested accommodations and that they would help alleviate his pain or otherwise improve his condition. Rather, he will have to come forward with specific evidence to support his claims. In addition, he will have to show that each of the defendants had the authority to grant his requests.

I am allowing plaintiff to proceed on claims under the Americans with Disabilities Act and the Rehabilitation Act as well. Although plaintiff does not cite any particular provisions of the ADA, Title II is the only portion of the Act that applies to prisons. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998). Title II states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. A person is disabled if he has a "physical or mental impairment

that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

It is reasonable to infer at the screening stage that plaintiff is disabled because his back problems substantially limit one or more major life activities, including sleeping. 42 U.S.C. § 12102(2)(A). It is a closer question whether plaintiff has adequately alleged that defendants' alleged refusal to accommodate his disability has led to his exclusion from a "service, program or activity." Any argument that sleeping meets this requirement has been foreclosed by Bryant v. Madigan, 84 F.3d 246 (7th Cir. 1996), in which the court rejected the ADA claim of a paraplegic prisoner who wanted guardrails for his bed. The court stated that "incarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity.' Sleeping in one's cell is not a 'program' or 'activity.'" Id. at 249. Although an inability to sleep more comfortably is the focus of plaintiff's requests for bedding accommodations, his allegations go beyond sleeping. In particular, plaintiff alleges that, because defendants have refused to accommodate him, he has "difficulty in performing daily activities" and is "unable to do much other than lie in his bed" because it is so difficult to get in and out. Although plaintiff does not identify a particular program, service or activity from which he has been excluded, if he is unable to get out of bed, it is reasonable to assume at the screening stage that there is at least one.

At summary judgment or trial, plaintiff will be required to not only come forward with specific evidence showing that he is substantially limited in performing one or more major life activities, but also identify a particular service, program or activity of the prison

in which he is unable to participate because defendants have refused to accommodate him. In addition, plaintiff will have to show that, by receiving the accommodation he seeks, he will be able to participate in a particular, program, service or activity. 42 U.S.C. § 12131(2) (individual is not "qualified" if he could not participate in program, service or activity even with reasonable accommodation). See also Stern v. St. Anthony's Health Center., 788 F.3d 276, 289 (7th Cir. 2015) (discussing evidence needed to show that reasonable accommodation would make a difference).

ORDER

IT IS ORDERED that

1. Plaintiff William Teas 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 Michael 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 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.

2. Plaintiff is DENIED leave to proceed on the following claims for his failure to state a claim upon which relief may be granted:

(1) 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;

(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.

Plaintiff may have until September 20, 2016, to file an amended complaint that provides fair notice of these claims. If plaintiff does not respond by September 20, 2016, I will dismiss these claims with prejudice.

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. 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.

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 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 31st day of August, 2016.

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