

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

DARREYLL T. THOMAS,

Plaintiff,

v.

MEREDITH MASHAK, GWEN SCHULTZ
EDWARD WALL, JAMES GREER
and DAVID BURNETTE,

Defendants.

OPINION and ORDER

16-cv-496-bbc

Pro se prisoner Darreyll Thomas has filed a complaint under 42 U.S.C. § 1983 and state law regarding the medical care he received from the Wisconsin Department of Corrections. He alleges that he went without needed medication for 10 days in August 2014 because of a failure by prison staff to reorder it on time.

Plaintiff is not suing the staff member or members responsible for ordering his medication. Instead, he is suing prison administrators (defendants Edward Wall, James Greer and David Burnette) for failing to have policies and procedures in place for how to handle a medication shortage. In addition, he is suing prison staff members (defendants Meredith Mashak and Gwen Schultz) for failing to help him when he complained about the shortage.

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 has alleged the bare minimum necessary to state a claim against each of the defendants under both the Eighth Amendment and state common law.

Accompanying plaintiff's complaint are documents called "motion for stay of motion for judgment on the pleadings" and "plaintiff's brief in support of judgment of the pleadings." Dkt. ##2 and 3. Plaintiff seems to realize that a court cannot grant a motion for judgment on the pleadings until the defendants have filed an answer to the complaint, Fed. R. Civ. P. 12(c), so he asks the court to stay a ruling on the motion until then. I am denying both the request for a stay and the motion for judgment on the pleadings.

Plaintiff's brief in support of his motion is devoted to arguments that he has stated a claim upon which relief may be granted or that it is reasonable to infer from his allegations that defendants have violated his rights. However, those are the standards for allowing plaintiff to proceed on his claims, not to prevail as a matter of law. To win this case, plaintiff must *prove*, not just allege, that defendants violated his rights. I could grant a motion for judgment on the pleadings in plaintiff's favor only if defendants relieved plaintiff of that burden by admitting in their answer all the facts that would be necessary for plaintiff to prove his claims. That is unlikely to happen, but even if it does, plaintiff will have to file a new motion at the appropriate time because there is no way for him to anticipate now what defendants will admit and what they will deny.

If plaintiff chooses to file a renewed motion after defendants file an answer, he will

have to show where in each answer a particular defendant admitted to every element of plaintiff's claims. If he cannot do this, then he should not file a renewed motion for judgment on the pleadings.

OPINION

A. Overview of Plaintiff's Claims

Plaintiff's claims arise out of a series of events in August 2014. Plaintiff alleges that he is prescribed setraline for a number of mental health conditions, including posttraumatic stress disorder, panic disorder and depression. The notes he received with the prescription instruct him not to stop using the medication suddenly, but for 10 days he did not receive any of this medication. Staff told him that it was "unavailable." Two days after stopping the medication, plaintiff began experiencing a number of symptoms, including panic attacks, hallucinations, suicidal thoughts, headaches and a tightness in his chest. Staff later told him that his medication ran out because they failed to reorder it on time.

Plaintiff blames two sets of defendants for the deprivation that he suffered. First, he says that defendants Edward Wall (Secretary of the Wisconsin Department of Corrections), James Greer (Director of the Wisconsin Bureau of Health Services) and David Burnette (Medical Director of the bureau) failed to enact any policies or procedures for addressing emergency situations like his in which there is a medication shortage. Second, he says that he complained to defendant Meredith Mashak (Health Services Unit Manager) and defendant Gwen Schultz (Unit Manager) about the medication shortage, but they failed to

take any action.

B. Legal Theories

Plaintiff raises claims under both the Eighth Amendment and the Wisconsin common law of negligence. 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 of the need for treatment?
- (3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

In addition to these elements, the Court of Appeals for the Seventh Circuit has recognized a fourth element that is implicit in many claims under § 1983, which is that the defendant had some responsibility or authority over the matter at issue. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009). “Public officials do not have a free-floating obligation to put things . . . right[] Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job.” Id. In other words, if a defendant’s alleged failure to act was not related to an issue that was part of that defendant’s job responsibilities, he or she cannot be held liable under § 1983.

To prevail on a claim for 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. The elements for negligent supervision are the same, except that the plaintiff must show that the failure to supervise caused the harm. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶ 16, 303 Wis. 2d 34, 50-51, 734 N.W.2d 827, 834.

C. Eighth Amendment

I conclude that plaintiff has alleged the bare minimum facts necessary to state a claim under the Eighth Amendment against each of the defendants. First, because plaintiff alleges that he needed his medication to treat a variety of serious mental health conditions and that he had been instructed not to stop his medication suddenly, it is reasonable to infer at the pleading stage that he had a serious medical need for his medication.

With respect to the second and third elements (defendants' awareness of plaintiff's need and a conscious failure to act), the analysis is different for the two different sets of defendants. With respect to defendants Wall, Greer and Burnette, plaintiff does not allege that any of the administrators knew about the medication shortage at issue in this case or even that they knew who plaintiff was. However, that type of knowledge is not always required. "While [the Court of Appeals for the Seventh Circuit] often f[inds] deliberate indifference where custodians know of threats to a specific [prisoner] posed by a specific source, [the court has] not been constrained by this fact pattern." Brown v. Budz, 398 F.3d 904, 915 (7th Cir. 2005) . The key question is whether a particular defendant was aware of a substantial risk of harm of the type the plaintiff suffered; "it does not matter . . . whether a prisoner faces an excessive risk . . . for reasons personal to him or because all prisoners in his situation face such a risk." Farmer, 511 U.S. at 843.

In this case, plaintiff alleges that defendants Wall, Greer and Burnette knew of a substantial risk of serious harm because they knew that there were no policies or procedures in place for handling a medication shortage. I understand plaintiff's argument to be that, without such policies and procedures, it was inevitable that prisoners throughout the Wisconsin Department of Corrections would be harmed as a result of sudden stops in their medication. "[I]n situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable." Jones v. City of Chicago, 787 F.2d 200, 204 (7th Cir.1986).

At the screening stage, it is reasonable to infer that defendants Wall, Greer and

Burnette each had some responsibility for enacting policies and procedures related to the issues in this case; that each of them actually knew that the policies and procedures they had in place subjected prisoners to a substantial risk of serious harm if their medications ran out; that plaintiff in particular was subjected to a substantial risk of serious harm when his medication was stopped; and that there were reasonable steps that defendants could have taken that would have prevented plaintiff from being harmed. Accordingly, I conclude that plaintiff may proceed on this claim. At summary judgment or trial, plaintiff will have to come forward with specific evidence in support of each one of those elements. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999).

To some extent, plaintiff's claim against the administrators is in tension with his claim against prison staff (defendants Mashak and Schultz). Plaintiff alleges that he told Mashak and Schultz that his medication had run out but they failed to do anything to help him. Thus, it is reasonable to infer that Mashak and Schultz were aware of plaintiff's serious medical need, but if there was nothing that Mashak and Schultz *could* do to help plaintiff because of the absence of policies and procedures, then they cannot be held liable for failing to act. Miller v. Harbaugh, 698 F.3d 956, 962 (7th Cir. 2012).

At the pleading stage, a plaintiff is permitted to rely on alternative legal theories that may turn out to be inconsistent. Fed. R. Civ. P. 8(d) (2)-(3) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. . . . A party may state as many separate claims or defenses as it has, regardless of consistency."). Further, in determining whether a complaint is legally

sufficient, courts must consider whether the plaintiff has access to information that would allow him to provide more specific allegations. Buechel v. United States, 746 F.3d 753, 761-62 (7th Cir. 2014); Bausch v. Stryker Corp., 630 F.3d 546, 560 (7th Cir. 2010). Without conducting discovery, it is unlikely that plaintiff could know with any certainty which set of defendants is more likely to be at fault. Accordingly, at this stage, I will infer that defendants Mashak and Schultz were aware of ways in which they could have helped plaintiff and that they had the ability to help plaintiff, but chose not to do so. Again, at the summary judgment stage or trial, plaintiff will have to come forward with specific evidence to prove each element of this claim.

D. Negligence

The standard for proving negligence is more lenient than proving an Eighth Amendment claim, so it follows that plaintiff has stated a claim against each of the defendants as well. In addition, plaintiff alleges that he followed Wisconsin's requirements for pursuing an administrative claim before filing this lawsuit. Wis. Stat. § 893.82. Accordingly, I will allow plaintiff to proceed on a negligence claim against each defendant.

ORDER

IT IS ORDERED that

1. Plaintiff Darreyll Thomas is GRANTED leave to proceed on the following claims:

(1) defendants Edward Wall, James Greer and David Burnette failed to enact policies or procedures to prevent prisoners from being harmed when there is a medication shortage, in violation of the Eighth Amendment and Wisconsin's common law of negligence; and (2) defendants Meredith Mashak and Gwen Schultz refused to help plaintiff when he complained about not receiving his medication, in violation of the Eighth Amendment and Wisconsin's common law of negligence.

2. Plaintiff's motion for judgment on the pleadings and his motion to stay his motion for judgment on the pleadings, dkt. ##2 and 3, 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.

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 20th day of September, 2016.

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