IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MUSTAFA-EL K.A. AJALA,
formerly known as DENNIS E. JONES-EL,

OPINION and ORDER

Plaintiff,

16-cv-639-bbc

v.

UW HOSPITAL AND CLINICS,
SUTCHIN PATEL, BURTON COX,
SRIHARAN SIVALINGAM, WI HEALTH
CARE LIABILITY PLAN/WI COMMISSIONER
OF INSURANCE and INJURED PATIENTS
AND FAMILY COMPENSATION FUND,

Defendants.

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Pro se prisoner and plaintiff Mustafa-El Ajala has filed a complaint under 42 U.S.C. § 1983 and state law about multiple medical problems he has had while incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He 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.

All of plaintiff's claims relate to his allegation that he suffered from conditions called hypercalcemia and hyperparathyroidism, which caused serious problems such as kidney stones, urinary tract infections, joint pain, bone loss in his teeth, high blood pressure and chest pain. Although he says that he began suffering from symptoms in 2001, he did not

receive effective treatment for the conditions until 2013. At that point, a doctor at the University of Wisconsin Hospital (not a defendant) discovered a tumor on plaintiff's parathyroid gland and removed it, resolving many of his problems.

Plaintiff's allegations span many years and include many decisions by each of the individual defendants, making it difficult to tell which allegations plaintiff intends to bring as claims and which allegations are simply background information. Although plaintiff does not divide his complaint into separate claims, at the end he provides a summary of sorts regarding how he believes defendants have violated his rights. Cpt. ¶¶ 49-60, dkt. #1. From that summary, I understand plaintiff to be raising the following claims:

(1) defendant Burton Cox (a doctor at the prison), defendant Sutchin Patel (a doctor employed by University of Wisconsin Hospital and Clinics) and defendant Sriharan Sivalingam (another UW doctor) consciously failed to diagnose his hypercalcemia and hyperparathyroidism and make reasonable efforts to cure it before 2013, in violation of the Eighth Amendment and the Wisconsin common law of negligence;

(2) defendants Cox and Sivalingam failed to treat the symptoms that plaintiff experienced because of his hypercalcemia and hyperparathyroidism, in violation of the Eighth Amendment and the Wisconsin common law of negligence;

(3) defendant UW Hospital and Clinics may be held liable for the negligence of defendants Patel and Sivalingam under the doctrine of respondent superior;

(4) defendant UW Hospital and Clinics was negligent in hiring and then failing to properly train and supervise defendants Patel and Sivalingam; and

(5) after plaintiff had surgery in 2013 to remove a kidney stone, defendant Cox failed to give plaintiff adequate pain medication, in violation of the Eighth Amendment and the common law of negligence.

I understand plaintiff to be suing defendants Wisconsin Health Care Liability Plan and Injured Patients and Family Compensation Fund for procedural reasons. Under Wis. Stat. § 632.24, a plaintiff may sue an insurer such as the Plan directly. Estate of Otto v. Physicians Insurance Co. of Wisconsin, 2008 WI 78, ¶ 32, 311 Wis. 2d 84, 99, 751 N.W.2d 805, 812 ("The direct action statute provides that any liability policy covering negligence makes the insurance company liable to the person entitled to recover against the insured up to the policy limits."). Under Wis. Stat. § 655.27(5), a party may sue the fund to recover a portion of his claim not covered by insurance. Martin by Scoptur v. Richards, 192 Wis. 2d 156, 199, 531 N.W.2d 70, 88 (1995).

Plaintiff does not identify any reason for suing the Wisconsin Commissioner of Insurance, so I am dismissing the complaint as to the commissioner. In addition, I have not included in the caption what plaintiff calls "ABC Insurance Co." and "XYZ Anonymous Individuals" because he does not include any specific allegations against them in the body of his complaint. If plaintiff learns the name of a relevant insurer or an individual who he believes violated his rights, he may file a motion for leave to amend his complaint under Fed. R. Civ. P. 15.

With respect to the merits of plaintiff's claims, a prison official may be held liable under the Eighth Amendment if he or she was "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 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 a negligent hiring, training or supervision claim are the same, except that the plaintiff must show that the failure to screen, train or supervise caused the harm. Miller v. Wal-Mart

Stores, Inc., 219 Wis. 2d 250, 262, 580 N.W.2d 233, 238–39 (1998).

With respect to his claims that defendants failed to diagnose and cure his conditions, plaintiff alleges that each of the individual defendants knew what hypercalcemia and hyperparathyroidism were and knew that he had many symptoms caused by those conditions, including some that were very painful, but they refused to test him for the conditions or provide treatment that could cure them. Instead, defendants attempted to explain away the symptoms as normal or untreatable. Those allegations are sufficient to state a claim upon which relief may be granted under both the Eighth Amendment and the common law of negligence. Of course, to prevail on his Eighth Amendment claim at summary judgment or trial, it will not be enough for plaintiff to show that defendants "may have been careless in not appreciating that [they] should investigate several possible explanations for [plaintiff's] symptoms." Steele v. Choi, 82 F.3d 175, 178-79 (7th Cir. 1996). Rather, plaintiff will have to show that defendants' actions were "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

With respect to the alleged failure of defendants Cox and Sivalingam to treat the symptoms of his conditions, plaintiff does not provide examples of those failures in his summary. In my review of the complaint, I uncovered only one allegation of a specific treatment of a symptom that plaintiff believes he should have received but did not. Plaintiff alleges that, in November 2010, defendant Patel recommended that plaintiff receive citrate,

or lemon juice, to help the prevention of kidney stones, but defendant Cox refused to prescribe the treatment until more than two years later in December 2012. Cpt. ¶¶ 21 and 38, dkt. #1. At the pleading stage, it is reasonable to infer that Cox knew that the citrate treatment could be helpful, but refused to prescribe it without a medical justification. Accordingly, I will allow plaintiff to proceed on this claim against defendant Cox, both under the Eighth Amendment and the common law of negligence. However, because plaintiff does not identify any particular way that defendant Sivalingam failed to treat his symptoms, I am dismissing this claim as to that defendant.

Next, plaintiff alleges that defendant Cox did not prescribe adequate pain medication for him after his surgery. Doctors have considerable discretion in determining the appropriate medication to prescribe, particularly when it comes to pain medication. 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."). At the same time, doctors cannot prescribe medication that they know will be ineffective if there are safe and reasonable alternatives. 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."). At this stage, it is impossible to determine why defendant Cox acted as he did, so I will allow plaintiff to proceed on this claim as well.

Finally, I understand plaintiff to contend that University of Wisconsin Hospital and Clinics may be held liable under the doctrine of respondeat superior and because the entity was negligent in hiring defendants Patel and Sivalingam and in failing to train and supervise them. Because plaintiff alleges that Patel and Sivalingam were employees of the hospital, it is reasonable to infer at the screening stage that the doctrine of respondeat superior applies. Lamoreux v. Oreck, 2004 WI App 160, ¶ 19, 275 Wis. 2d 801, 813, 686 N.W.2d 722, 728 (setting forth test for applying respondeat superior). However, plaintiff includes no facts in his complaint suggesting that the hospital was negligent in any way, so I am dismissing the negligence claim against the hospital.

At the end of his complaint, plaintiff includes a request for injunctive relief regarding dental care for correcting damage that he says was caused by his hypercalcemia and hyperparathyroidism. However, plaintiff includes no allegations in his complaint that any prison official, let alone of any of the defendants, has denied a request for dental care. As I explained to plaintiff in one of his other cases, a request for injunctive relief is premature if the plaintiff has not given the appropriate official an opportunity to provide the relief before filing the lawsuit. Ajala v. West, No. 13-cv-544-bbc, 2014 WL 6607428, at *4 (W.D. Wis. Nov. 19, 2014) (citing Farmer, 511 U.S. 825). Thus, plaintiff is free to request

monetary relief for damage to his teeth caused by defendants' alleged violation of his rights, but he cannot obtain an injunction.

In closing, I note that I have made two assumptions not discussed above in screening plaintiff's complaint. The first assumption is that defendants Patel and Sivalingam may be sued under 42 U.S.C. § 1983 because they were acting "under color of law." Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 671-73 (7th Cir. 2012) (noting various factors to consider when determining whether health care providers are acting under color of law). The second assumption is that the continuing violation doctrine allows plaintiff to sue for injuries that would otherwise be barred by the six-year statute of limitations for constitutional claims. Heard v. Sheahan, 253 F.3d 316 (7th Cir. 2001) (applying continuing violation to claim of inadequate medical care over multiple years). However, neither side should construe the court's silence on these issues as the law of the case. If defendants wish to challenge either assumption at a later stage in the case, they are free to do so.

ORDER

IT IS ORDERED that

1. Plaintiff Mustafa-El Ajala, formerly known as Dennis Jones-El, is GRANTED leave to proceed on the following claims:

> (1) defendants Burton Cox, Sutchin Patel and Sriharan Sivalingam consciously failed to diagnose plaintiff's hypercalcemia and hyperparathyroidism and make reasonable efforts to cure his conditions before 2013, in violation of the Eighth Amendment and the Wisconsin common law of negligence;

(2) defendant Cox refused to prescribe citrate for plaintiff for more than two years, in violation of the Eighth Amendment and the Wisconsin common law of negligence;

(3) after plaintiff had surgery in 2013 to remove a kidney stone, defendant Cox refused to give plaintiff adequate pain medication, in violation of the Eighth Amendment and the common law of negligence;

(4) defendant University of Wisconsin Hospital and Clinics may be held liable for the negligence of defendants Patel and Sivalingam under the doctrine of respondent superior; and

(5) if defendants Patel, Sivalingam or University of Wisconsin Hospital and Clinics is found liable on one or more of plaintiff's state law claims, Wisconsin Health Care Liability Plan and Injured Patients and Family Compensation Fund may be required to pay all or a portion of the judgment pursuant to Wis. Stat. §§ 632.24 and 655.27.

2. Plaintiff is DENIED leave to proceed on all other claims. The complaint is DISMISSED as to the Wisconsin Commissioner of Insurance and as to plaintiff's request for an injunction for corrective dental care.

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 defendant Burton Cox. 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 defendant Cox.

4. Because the informal service agreement applies to employees of the Department of Corrections only, summonses and copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendants Sutchin Patel, Sriharan

Sivalingam, University of Wisconsin Hospital and Clinics, Wisconsin Health Care Liability Plan and Injured Patients and Family Compensation Fund. The marshals must make reasonable efforts to locate and serve each of these defendants. Williams v. Werlinger, 795 F.3d 759 (7th Cir. 2015).

5. 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.

6. 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.

7. 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.

8. 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 21st day of November, 2016.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge