

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

WILLIE J. DAVIS,

Plaintiff,

v.

L. BECHER, C.O. 3 CYEHER
and C. O'DONNELL,

Defendants.

OPINION AND ORDER

17-cv-69-bbc

Pro se plaintiff Willie Davis, who is incarcerated at the Stanley Correctional Institution, alleges that defendants L. Becher, C.O. 3 (or Correctional Officer 3) Cyehar and C. O'Donnell violated his rights under the Eighth Amendment and Wisconsin state law by dispensing the wrong medication to him, causing him to vomit and experience severe headaches and dizziness. Accompanying plaintiff's complaint is a motion for a preliminary injunction in which he asks for a court order enjoining correctional officers from dispensing his prescription medications. Dkt. #2.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by § 1915(b)(1). Because he is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be

granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that plaintiff may proceed on his Eighth Amendment and state negligence law claims against defendants Cyehar and Becher. I am dismissing plaintiff's claims against defendant O'Donnell for failure to state a claim upon which relief may be granted. Also, I am denying plaintiff's motion for a preliminary injunction.

Plaintiff fairly alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Willie Davis is an inmate at the Stanley Correctional Institution, located in Stanley, Wisconsin. Defendant C.O. 3 Cyehar is a correctional officer and defendant L. Becher is the health services unit supervisor at the institution. Defendant C. O'Donnell is a designee of the Secretary of the Wisconsin Department of Corrections who works in Madison, Wisconsin.

The Stanley Correctional Institution has an official policy that allows correctional officers to dispense prescription medications to prisoners. Defendant Becher oversees the correctional staff who dispense the medications. On June 28, 2016, plaintiff was called to the health services unit to take his prescription medication, Tramadol. Defendant Cyehar

dispensed medication to plaintiff under the prison's policy even though he knew that he did not have any training or education that qualified him to do so. The medication that defendant Cyehar gave plaintiff was Citalopram instead of Tramadol. After plaintiff took the Citalopram, defendant Cyehar discovered that he had dispensed the wrong medication and alerted medical staff, who then evaluated plaintiff and scheduled a follow-up appointment for the next day with a physician. Soon after returning to his housing unit, plaintiff experienced vomiting, dizziness and a severe headache. On July 9, 2016, plaintiff saw medical staff who examined him and told him that his symptoms should not recur.

On July 11, 2016, plaintiff filed an inmate complaint about receiving the wrong medication. On August 1, 2016, defendant Becher affirmed the inmate complaint examiner's decision to dismiss the complaint. Plaintiff filed another inmate complaint on October 17, 2016, challenging the policy authorizing correctional officers to dispense prescription medication to state prisoners. On October 28, 2016, defendant Becher accepted the recommendation of the inmate complaint examiner to dismiss the complaint. Plaintiff filed an appeal with the corrections complaint examiner, who affirmed the dismissal. On December 19, 2016, defendant O'Donnell accepted the recommendation of the corrections complaint examiner on behalf of the Secretary of the Department of Corrections.

OPINION

I understand plaintiff to be raising the following claims: (1) defendant Cyehar dispensed plaintiff the wrong medication with conscious disregard for the harm it would

cause plaintiff, in violation of the Eighth Amendment and state negligence law; (2) defendant Becher directed correctional officers to dispense prescription medication to plaintiff without proper training, which resulted in plaintiff's receiving the wrong medication, in violation of the Eighth Amendment, state negligence law and Wis. Stat. § 940.29 (criminal statute related to abuse of prisoners); and (3) defendant O'Donnell accepted the dismissal of plaintiff's inmate complaint related to the harm he suffered as a result of the medication distribution system, in violation of the Eighth Amendment, state negligence law and Wis. Stat. § 940.29. I will address the applicable legal standard and then discuss plaintiff's claims against each defendant.

A. Legal Standard

To prevail on a claim under the Eighth Amendment, a prisoner must show that the defendant was aware that the plaintiff was being subjected to a substantial risk of serious harm, but the defendant was "deliberately indifferent" or consciously refused to take reasonable measures to prevent the harm. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

Plaintiff's negligence claims are governed by Wisconsin state law, which has a more lenient standard than federal law. To prove a claim for negligence, plaintiff must show that defendants breached a duty owed to plaintiff and that the breach caused plaintiff's injuries.

Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. Although plaintiff alleges that defendants' conduct also violates Wis. Stat. § 940.29, he cannot bring a claim under that statute because it governs criminal offenses that only public law enforcement officials can pursue in court. Mosay v. Wall, 2015 WL 128076, at *9 (W.D. Wis. Jan. 8, 2015).

B. Defendant Cyehar

Although the question is a close one, I conclude that plaintiff's allegations against defendant Cyehar are sufficient to state a claim under the Eighth Amendment and state negligence law. Any time a prisoner receives the wrong medication, there is a risk of harm. Robbins v. Waupun Correctional Institution, 2016 WL 5921822, at *3 (E.D. Wis. Oct. 11, 2016) ("Administering the wrong medication may well pose a substantial risk of harm, depending on the circumstances."). If defendant Cyehar simply misread the medication bottle, that conduct would suggest nothing more than negligence at most. Id. ("[O]ne isolated mistake does not allow a plausible inference of deliberate indifference.") (quoting Morrison v. Utz, 2012 WL 293548, at *2 (C.D. Ill. Jan. 31, 2012)). However, if defendant Cyehar intentionally failed to take basic steps to prevent a mistake, this could qualify as a conscious refusal to act reasonably under the Eighth Amendment. Thomas v. Wall, 2016 WL 3006834, at *1-2 (W.D. Wis. May 23, 2016) (allowing plaintiff who received wrong medication to proceed for same reason). Because it is unclear at this stage of the proceedings whether Cyehar's conduct may have been deliberately indifferent or simply negligent, I will

allow plaintiff to proceed on both claims. Although plaintiff's allegations are sufficient to satisfy liberal federal pleading standards, plaintiff will have to come forward with specific evidence on these claims at summary judgment or trial.

C. Defendant Becher

Plaintiff alleges that defendant Becher was responsible for untrained correctional officers distributing medications to inmates and that he knew that this system posed an unreasonable risk of harm to plaintiff but failed to address the problem even after plaintiff filed a complaint. A supervisor can be held liable under § 1983 if “the conduct causing the constitutional deprivation occurs at his direction or with his knowledge and consent.” Wilson v. Warren County, Illinois, 830 F.3d 464, 469 (7th Cir. 2016). Therefore, if defendant Becher knew of a substantial risk that plaintiff would be given the wrong medicine under this system and consciously disregarded that risk, that could violate the Eighth Amendment.

At this stage of the proceedings, I will infer that better training or procedures could have prevented the harm to plaintiff and will allow plaintiff to proceed on a claim against defendant Becher under both the Eighth Amendment and state negligence law. However, at summary judgment or trial, plaintiff will have to come forward with specific evidence showing the existence of a problem with the procedures or training related to medication distribution, that defendant Becher was aware of that problem and refused to take reasonable steps to address it and that there was a causal connection between that problem

and plaintiff's injury. It will not be enough for plaintiff to show generally that Becher knew there were problems with the distribution of medication. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (“[P]risoner’s view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner’s claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can’t be right.”). Similarly, plaintiff will have to show that Becher had the authority to change the medication distribution system. Id. (“Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another’s job.”); Miller v. Harbaugh, 698 F.3d 956, 962 (7th Cir. 2012) (“[D]efendants cannot be [held liable under the Eighth Amendment] if the remedial step was not within their power.”). It is not clear from plaintiff’s complaint what authority Becher had, but it is reasonable to assume at the pleading stage that, as the health services supervisor, Becher could have taken more action than he did. Accordingly, I will allow plaintiff to proceed against Becher under the Eighth Amendment and state negligence law.

D. Defendant O’Donnell

Plaintiff alleges only that defendant O’Donnell accepted the recommendation of the corrections complaint examiner to deny plaintiff’s complaint about medication distribution by correctional officers. He does not explain how he caused or participated in any

constitutional violation or acted with negligence. Although O'Donnell ruled against plaintiff on his inmate grievance, that is not enough to state a claim against him. McGee v. Adams, 721 F.3d 474, 485 (7th Cir. 2013); George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) (“Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation.”). In addition, prison officials are under no obligation to provide an effective grievance procedure, or for that matter, any grievance system at all. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) (“Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens’s grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim.”). Accordingly, plaintiff may not proceed against defendant O'Donnell without properly alleging his personal involvement. Plaintiff may amend his complaint later in the case and address this deficiency if he can.

E. Preliminary Injunction

Accompanying plaintiff's complaint is a “petition” for a “temporary and/or preliminary injunction” in which he asks the court to order defendants not to allow correctional officers to dispense his prescription medications. Dkt. #2. I am denying plaintiff's motion for two reasons.

First, plaintiff's motion does not comply with this court's procedures for obtaining a preliminary injunction, which require a party to submit admissible evidence and proposed

findings of fact to support the motion. (I am including the procedures with this order.)

Second, even if I overlook plaintiff's failure to follow the procedures, plaintiff admits in his complaint that he received the wrong medication only on one occasion and that he is no longer experiencing any adverse side effects. I understand plaintiff to be concerned that he will again receive the wrong medication at some point in the future. However, plaintiff's contention that he is at risk of further medication mix-ups, without more, is too speculative to warrant relief. Michigan v. U.S. Army Corps of Engineers, 667 F.3d 765, 788 (7th Cir. 2011) (preliminary injunction will not be issued simply to prevent the possibility of some remote future injury; presently existing, actual threat must be shown); East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 704-06 (7th Cir. 2005) (“[S]peculative injuries do not justify this extraordinary remedy.”). See also Baird v. Hodge, 605 Fed. Appx. 568, 570 (7th Cir. 2015) (plaintiff's contention that he is generally at risk from attack by over 2,000 other inmates too speculative to warrant preliminary injunctive relief).

A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). See also Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right.”). To obtain a preliminary injunction, plaintiff must show: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm without the injunction; (3) that the harm he would suffer is greater than the harm a

preliminary injunction would inflict on defendants; and (4) that the injunction is in the public interest. Judge v. Quinn, 612 F.3d 537, 546 (7th Cir. 2010) (citing Winter, 555 U.S. at 20). In addition, the scope of a court's authority to enter an injunction in the context of prisoner litigation is limited by the Prison Litigation Reform Act, which requires that preliminary injunctive relief "be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm" because prison officials have broad administrative and discretionary authority over the institutions they manage. Westefer v. Neal, 682 F.3d 679, 683 (7th Cir. 2012) (citing 18 U.S.C. § 3626(a)(2)). Because plaintiff does not allege any facts or adduce any evidence that he is facing any immediate harm or that the harm is likely to occur again, he has not made the necessary showing for preliminary injunctive relief.

ORDER

IT IS ORDERED that

1. Plaintiff is GRANTED leave to proceed on the following claims: (1) defendant C.O. 3 Cyehar dispensed plaintiff the wrong medication with conscious disregard for the harm it would cause plaintiff, in violation of the Eighth Amendment and state negligence law; and (2) defendant L. Becher directed correctional officers to dispense prescription medication to plaintiff without proper training which resulted in plaintiff receiving the wrong medication, in violation of the Eighth Amendment and state negligence law.
2. Plaintiff is DENIED leave to proceed on all other claims and those claims are

DISMISSED for plaintiff's failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to defendant C. O'Donnell.

3. Plaintiff's motion for a preliminary injunction, dkt. #2, is DENIED.

4. 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.

5. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the defendants or to defendants' 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 22d day of May, 2017.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge