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

CHARLES SHEPPARD,

Plaintiff

v.

JOHN & JANE DOES, et al.,

Defendants.

OPINION AND ORDER

17-cv-862-slc

Pro se plaintiff Charles Sheppard has filed a proposed complaint under 42 U.S.C. § 1983, in which he contends that the defendants' handling of his medications violated his rights under the Eighth Amendment, Wisconsin state law, and the Americans with Disabilities Act ("ADA"). The parties consented to magistrate judge jurisdiction, and on November 22, 2017, this case was reassigned to me. (Dkt. 7.) Sheppard's complaint is ready for screening under 28 U.S.C. § 1915A, and as explained below, I will permit Sheppard to proceed on deliberate indifference, failure to train, and negligence claims against some of the named defendants, but I will not grant leave to proceed on an ADA claim.

ALLEGATIONS OF FACT[1]

Charles Sheppard is currently incarcerated at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin, where the events in his lawsuit took place. All of the defendants employed at WSPF: Lee, Anderson, and Kramer (registered nurses); Waterman (health services unit (HSU) manager); Sergeant Bloyer, Slaught, John Doe, and Jane Doe (correctional officers); Captain Hainfield; and Mark Kartman (security director).

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[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, I assume the following facts based on the allegations in plaintiff's complaint and the documents he attached as exhibits to his complaint.

Sheppard suffers from auditory hallucinations and depression, and he takes Wellbutrin, a brand of bupropion, which is a medication used to treat, among other things, depression.

On October 11, 2016, nurse Lee discontinued Sheppard's bupropion without speaking to Sheppard or to a doctor about stopping that medication. This caused Sheppard to suffer"severely painful" withdrawal symptoms, although he does not identify those symptoms. On October 13, Sheppard submitted a health services request ("HSR") stating that he was suffering withdrawal symptoms from not getting the bupropion. Nurse Anderson received that HSR on October 14, and she responded by telling Sheppard that he should have his medications that day. Sheppard alleges that Anderson did not double check to make sure that he was receiving his medications as prescribed, because if she had, then she would have discovered that Sheppard was not receiving the bupropion.

On the evening of October 14, correctional officer Slaught told Sheppard that bupropion was not available during that medication pass. When Sheppard told Slaught that he was in extreme pain and suffering from withdrawal, Slaught told Sheppard that he would not call the HSU on his behalf and told Sheppard that there was no way he was suffering from withdrawal.

On October 15, the withdrawal symptoms worsened. Sheppard's stomach hurt badly, he defecated and urinated on himself, and he was sweating profusely and having difficulty breathing. A third shift officer saw Sheppard and called Captain Hainfield, who came to Sheppard's cell, took away his dirty clothes, helped him shower, and promised that the nurse would come and examine him. However, after Hainfield left, no one came to examine Sheppard, and Sheppard's pain worsened. Sheppard alleges that both nurse Kramer and a Doe nurse knew

what happened to Sheppard that day but failed to check on him or schedule a physical examination.

On October 12, 13, and 14 of 2016, Sheppard's Wellbutrin was not available. John Doe and Jane Doe, the officers who passed out medications during the first and second shifts of October 12, 13, and 14 refused to call the HSU when Sheppard told them that it was not on the medication cart and that he could not miss taking his Wellbutrin/bupropion. Apparently both Does told Sheppard that it was not their problem, and when Sheppard asked for an HSR form, they said no because he would need to get an HSR form from a third shift officer.

In an addendum to his complaint, Sheppard indicates that he pursued a successful inmate complaint after this incident, which caused the Corrections Complaint Examiner (CCE) to send a memorandum to Waterman, Boughton, and Kartman, telling them they needed to better train staff with respect to proper medication distribution. Sheppard attached a copy of the record of the inmate complaint, WSPF-2016-22504. (Dkt. 1-1.) This document shows that on December 13, 2016, Welcome Rose "affirmed with modification" Sheppard's complaint about not receiving medications properly. Specifically, she concluded that the medication record showed that Sheppard missed two of his prescribed medications, one for three consecutive days and another for at least six of ten consecutive days. Rose observed that although Sheppard should have submitted a refill request or submit an HSR, DAI Policy #500.80.11 required staff to notify HSU whenever a medication was not available. Rose therefore recommended that Sheppard's complaint be affirmed, with the modification that a copy of the decision be "provided to Security Director Kartman to review medication delivery expectations with the appropriate staff." (*Id.* at 2.)

Sheppard adds that in February of 2017, his bupropion medication was unavailable for several days, causing him to suffer from painful withdrawal symptoms. He claims that he told "multiple Jane and John Doe WSPF medical staff" about his symptoms, but none of them ever visited or examined him. He adds that Jane and John Doe officers also failed to call HSU or help him in any way when he complained to them about his withdrawal symptoms. It is unclear when, but Sheppard adds that during one of instances when Sheppard was not receiving his medications, he asked Sergeant Bloyer to call the HSU, but she refused, and yelled and cursed at him.

OPINION

Sheppard claims that defendants Boughton, Kartman, Waterman, Anderson, Hainfield, Lee, Slaught, Bloyer and several John and Jane Does were deliberately indifferent and negligent in failing to respond appropriately to his complaints that he was not receiving his bupropion as prescribed. Sheppard would also like to proceed on a failure to train claim against Boughton, Waterman, Kartman, John Doe, and Jane Doe for their alleged failure to properly train staff on how to respond to inmates suffering from withdrawal symptoms. Finally, he would like to proceed on an ADA claim. I will address each type of claim in turn:

I. Eighth Amendment Deliberate Indifference

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). "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). Allegations of delayed care, even a delay of just a few days, may violate the Eighth Amendment if the delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.") (citations omitted); *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011).

Under this standard then, plaintiff's claim of deliberate indifference 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?

For the purposes of screening, I will accept that Sheppard's depression and auditory hallucinations, along with the withdrawal symptoms, qualify as serious medical conditions. The question at this stage, therefore, is whether each defendant both knew about Sheppard's need for care and failed to take reasonable measures in response.

A. Boughton, Waterman, and Kartman

Sheppard may not proceed against Boughton because he has not explicitly identified him as a defendant, either in the caption of his complaint or in his list of the parties to this lawsuit. While normally I would instruct Sheppard to file an amended complaint that explicitly added

Boughton as a defendant, that would be futile here because Sheppard has not stated any facts supporting a claim against Boughton, Kartman or Waterman. As pled, none of these three defendants were involved in the events that took place between October 11 and October 14 of 2016, or even knew that they were occurring and thus in a position to take action. Therefore, Sheppard may not proceed against any of them on a deliberate indifference claim for lack of personal involvement. *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional deprivation.") (internal quotation omitted).

B. Slaught, Bloyer, John Doe, Jane Doe, Hainfield, and nurses Anderson, Kramer, Lee, Jane Doe

Sheppard has alleged sufficient facts to proceed on deliberate indifference claim against the correctional officers and nurses involved in responding to his complaints about his access to bupropion. As to the correctional officers, Sheppard's allegations that Slaught and Bloyer both outright refused to contact HSU when he told them that he wasn't receiving his medication as prescribed permits an inference of deliberate indifference because they failed to take *any* action to address his obvious medical needs. *See Dobbey v. Mitchell-Lawshea*, 806 F.3d 938, 941 (7th Cir. 2015) ("If a prisoner is writhing in agony, the guard cannot ignore him on the ground of not being a doctor; he has to make an effort to find a doctor, or in this case a dentist, or a technician, or a pharmacist—some medical professional."); *Smego v. Mitchell*, 723 F.3d 752, 758 (7th Cir. 2013) ("[E]ven non-medical personnel cannot stand by and ignore a detainee's complaints of serious medical issues.").

Similarly, Sheppard's allegations that the John Doe and Jane Doe officers refused to call HSU on October 12, 13, and 14, permit an inference that these defendants failed to take reasonable measures in response to learning that Sheppard was not receiving his medications as prescribed. Finally, as to Hainfield, while it appears that on October 15, he assisted Sheppard in showering and changing his clothes, Sheppard alleges that Hainfield promised Sheppard that a nurse would examine him, but none ever did. While Hainfield did provide Sheppard with some relief from his distress, his alleged failure to ensure that Sheppard received *medical* attention, not just a change of clothes, permits an inference that his response was clearly inappropriate.

As to the nurses, Sheppard's allegation that Lee, in cancelling his prescription, and Anderson, in failing to ensure that he was receiving his bupropion, permit an inference that they each responded in a wholly inappropriate manner. Likewise as to his allegations that nurses Kramer and Dow learned about Sheppard's worsening withdrawal symptoms on October 15, but failed to either check on him or even schedule him to be seen. Accordingly, because these facts permit an inference that each of them refused to provide Sheppard with any measure of medical care, I will permit him to proceed against them on a deliberate indifference claim.

II. Eighth Amendment Failure to Train

I understand Sheppard to be seeking leave to proceed on failure to train claims related to both the requirement that staff inform HSU about the absence of a medication (DAI Policy #500.80.11), as well as proper identification of withdrawal symptoms. Supervisors may be liable under § 1983 for failing to train their employees, *Kitzman-Kelley v. Warner,* 203 F.3d 454, 459 (7th Cir. 2000), but only when they are personally involved in the conduct and act with

deliberate indifference toward it. *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001). That is, the supervisor must know that his training is so inadequate that employees are likely to violate the constitution as a result. *Ghashiyah v. Frank,* No. 07-C-308. 2007 WL 5517455, at *2 (W.D. Wis. Aug. 1, 2007) (citing *Mombourquette ex rel. Mombourquette v. Amundson,* 469 F. Supp. 2d 624, 651 (W.D. Wis. 2007)).

While Sheppard claims that Boughton, Kartman, Waterman, John Doe, and Jane Doe each failed to properly train staff, he has only pled sufficient fact to state a claim under this theory against Kartman, and only as to the requirement that staff inform HSU when an inmate is out of prescribed medication. Rose's disposition of WSPF 2016-22504, coupled with the February 2017 incident where Sheppard did not receive his medication for multiple days, together permit an inference that Kartman did not properly train staff after learning about the October 2016 instance where staff did not follow up with HSU when Sheppard was not receiving his medications. Accordingly, I will permit Sheppard to proceed on a failure to train claim against Kartman, but only with respect to the failure to train staff about DAI Policy #500.80.11. However, because no facts suggest that Kartman learned about an ongoing issue where staff were not properly identifying withdrawal symptoms, Sheppard may not proceed on a failure to train theory related to identification of withdrawal symptoms.

Sheppard has not pled any facts suggesting that Boughton, Waterman, or the Doe defendants were involved in the apparent failure to train. Indeed, he has not alleged that Kartman communicated Rose's recommendation to any of these defendants or that Sheppard separately informed either Boughton or Waterman about the October 2016 incidents or the results of WSPF-2016-22504. And as to the Doe defendants, Sheppard has not included any

facts suggesting that either of these defendants were a superior or otherwise in a position to have authority over other WSPF staff, much less that they knew about an on-going problem with medication distribution or identification of withdrawal symptoms. Therefore, while I will permit Sheppard to proceed on a failure to train claim against Kartman with respect to training staff about DAI Policy #500.80.11, Sheppard may not proceed on this claim against Waterman, Boughton, or either Doe defendant.

III. Negligence

Sheppard may also proceed on negligence claims against Kartman, Slaught, Bloyer, John Doe, Jane Doe, Hainfield, and nurses Anderson, Kramer, Lee, Jane Doe based on the same allegations that support his Eighth Amendment claims against them. His negligence claims are "so related" to his federal claims against these defendants that "they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). To prevail on a claim for negligence in Wisconsin, Sheppard must prove that defendants breached their duty of care and he suffered injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. While it is reasonable to infer at this stage that these defendants were negligent for the same reasons that support Sheppard's Eighth Amendment claims, this may require expert testimony in order to get to a jury.

IV. ADA Claim

Finally, Sheppard may not proceed on an ADA claim on these facts. The ADA, 42 U.S.C. §§ 12131-12134, prohibits discrimination against qualified persons with disabilities. To

establish a violation of Title II of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (*citing Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). While Congress has abrogated states' Eleventh Amendment sovereign immunity for ADA violations that also constitute federal constitutional violations, the Seventh Circuit has yet to address whether ADA violations that do not implicate constitutional rights may be brought in federal court. *Norfleet v. Walker,* 684 F.3d 688, 690 (7th Cir. 2012). Moreover, in circumstances where an ADA claim is questionable and a pro se plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.,* the Seventh Circuit has suggested reading in a claim under the Rehabilitation Act so as to avoid this tricky abrogation question. *Id.* Accordingly, that is what this court will do. A claim under § 504 of the Rehabilitation Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

While it is not apparent that Sheppard's need for medication to address his hallucinations and depression renders him disabled, I will accept for purposes of screening that the auditory hallucinations and depression are sufficiently serious to create a disability. However, Sheppard's allegations do not satisfy either the second or third elements of the prima facie case. First, although WSPF is a "public entity," Sheppard does not claim to be excluded from any

service, program, or activity offered to other prisoners. 42 U.S.C.A. § 12132. Indeed, in *Bryant v. Madigan*, the Seventh Circuit determined that refusing to accommodate a prisoner's severe leg spasm condition by installing guardrails on his bed did not implicate the ADA or the Rehabilitation Act, because "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.'" 84 F.3d 246, 249 (7th Cir. 1996). *Bryant* clarifies that this special cell accommodation may constitute medical malpractice, but that the plaintiff was "not complaining of being excluded from some prison service, program, or activity, for example an exercise program that his paraplegia would prevent him from taking part in without some modification of the program," and the ADA does not provide any remedy for this failure of medical services. *Id*. Similarly, Sheppard alleges no exclusion from any program or activity as a result of his disability. Accordingly, Sheppard may not proceed on a claim under the ADA or the Rehabilitation Act.

ORDER

IT IS ORDERED that:

1) Plaintiff Charles Sheppard is GRANTED leave to proceed on:

   a) Eighth Amendment deliberate indifference and negligence claims against Slaught, Bloyer, John Doe, Jane Doe, Hainfield, and nurses Anderson, Kramer, Lee, and Jane Doe.

   b) Eighth Amendment failure to train and negligence claims against defendant Mark Kartman.

2) Plaintiff is DENIED leave to proceed on any other claims. Defendants Boughton and Waterman are DISMISSED.

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 60 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 defendants. Summons will not issue for the Doe defendants until plaintiff discovers the real name of this party and amends his complaint accordingly.

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 to defendant's 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 from custody 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 29th day of December, 2017.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge