IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MACK D. HILL,

ORDER

Plaintiff,

04-C-162-C

v.

JON E. LITSCHER; CINDY O'DONNELL;
GERALD A. BERGE; MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS; SHARON ZUNKER;
RENAE WALTZ; and G. BROUGHTON,

Defendants.

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In response to this court's order of March 15, 2004, which severed the claims of the several prisoner plaintiffs in Cole v. Litscher, 04-C-116-C, plaintiff Mack D. Hill has filed an amended pleading setting forth those claims that relate only to him. In addition, plaintiff has moved for appointment of counsel.

With respect to the amended complaint, plaintiff has followed this court's instruction to limit his claims to those on which he was allowed to proceed when the District Court for the Eastern District of Wisconsin screened the group complaint nearly two years ago. In addition, he has identified a number of new defendants in the caption of his amended

complaint, in response to this court's directive that unless the John Doe defendants were named, the claims against them would be dismissed. However, now that plaintiff has amended his pleading, I will screen it again under 28 U.S.C. § 1915A to determine whether plaintiff states a legal claim against the named defendants.

I conclude that a decision whether plaintiff may proceed with his complaint must be delayed once again, because plaintiff has not indicated who the now named defendants are, for example, whether they are corrections officials or individuals hired by Prison Health Services, Inc., and he has not alleged in the body of his complaint what each one of the named defendants did to violate his constitutional rights.

The factual allegations in plaintiff's complaint are sparse. Plaintiff alleges that sometime after May 16, 2001, he was supposed to receive radioactive iodine therapy for hyperthyroidism at the University of Wisconsin Hospital/Endocrine Clinic. He never received the treatment. Plaintiff asked "Prison Health Services, Inc." about the lack of treatment and made inquiries of Prison Health Services "staff." Although he does not say so expressly, I liberally construe the amended complaint to include an allegation that plaintiff never received a response to his inquiries or the treatment he was supposed to have.

Also, plaintiff alleges that for some unspecified period of time, he was subjected to a "constantly illuminated" cell. He alleges that when he could not sleep, "corrections officers" kicked on the cell door and turned on the "high beam" lights. He alleges that as

result of these actions, he was deprived of sleep, experienced chronic headaches, and suffered other ill physical effects.

As an initial matter, I note that plaintiff is presently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin. However, his complaint concerns conditions to which he was allegedly subjected while he was an inmate at the Wisconsin Secure Program Facility. (Plaintiffs' Amended Complaint, ¶ 6, Cole v. Litscher, 04-C-116-C)

OPINION

I turn first to plaintiff's cell illumination claim. In another lawsuit brought in this court by an inmate challenging the Wisconsin Secure Program Facility's constant illumination, Pozo v. Hompe, 02-C-12-C, slip op. April 8, 2003 (W.D. Wis.), defendants put in evidence to prove that during 1999, 2000 and most of 2001, the nightlight at the facility consisted of a 7- watt, twin tube fluorescent light mounted in the center of the ceiling; that near the end of 2001, prison officials began replacing the 7-watt bulbs with 5-watt bulbs; and that now all bulbs are 5 watts. I concluded that such constant low-light illumination, by itself, does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Moreover, in Horton v. Berge, 02-C-470-C (W.D. Wis. Mar. 12, 2003), I concluded that defendants were entitled to qualified immunity on plaintiff's claim for money damages for alleged sleep deprivation based on this same lighting.

Under the liberal construction I must give allegations in a complaint at its initial stage, I will allow plaintiff to proceed on his cell illumination claim against defendants Litscher and Berge, who are the former Secretary of the Department of Corrections for the State of Wisconsin and the warden of the Wisconsin Secure Program Facility, respectively, on the remote chance that he can prove that the lighting in his cell was more severe than the 7-watt bulbs already proved to have been in use and that his prolonged exposure to the more intense lighting caused him physical or emotional harm. However, to the extent that plaintiff is contending that "corrections officers" kicked his cell door, causing him sleep deprivation, I will not allow him to proceed on this claim unless he identifies from among the defendants he has named in the caption of his amended complaint who the officers are that engaged in such conduct.

Likewise, plaintiff's allegations regarding the denial of medical care fail to include allegations suggesting which of the defendants he names in the caption of his complaint were responsible for denying him medical care. He alleges only that "defendants" acted with deliberate indifference to his serious medical needs. At this stage, however, he must identify the defendants who were personally responsible for failing to arrange for the treatment of his serious medical needs.

Next, I turn to plaintiff's motion for appointment of counsel. The motion will be denied. Plaintiff has not shown that he has made a reasonable attempt to find a lawyer on

his own as he must. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). A reasonable attempt means that plaintiff has contacted three lawyers whose practices include civil litigation who have declined to represent him. Even if he had made such a showing, appointment of counsel is not required if the plaintiff is competent to represent himself given the complexity of the case, and if he is not, then I must find that the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to permit the court to assess plaintiff's abilities, but the claims raised in his lawsuit are straightforward.

The law is settled that to show deliberate indifference to his serious medical needs, plaintiff will have to prove that one or more of the defendants were aware of facts from which the inference could be drawn that a substantial risk of serious harm to plaintiff existed if he was not provided the particular treatment he needed for hyperthyroidism, and that the defendants drew the inference. Farmer v. Brennan, 511 U.S. at 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice will not suffice to succeed on an Eighth Amendment claim. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

With respect to the cell illumination claim, plaintiff is capable of writing interrogatories or requesting production of documents to learn what wattage bulbs were in

place in his cell at the time of his incarceration at the facility. If he learns that the bulbs were not significantly greater than 7 watts, his claim of sleep deprivation relating to the lighting is doomed. Furthermore, if plaintiff fails to identify the officers who persistently kicked his cell doors to keep him awake, plaintiff will not be allowed to proceed on this claim of sleep deprivation.

I understand that plaintiff will not be able to prove an injury with respect to either of his claims unless he obtains the testimony of experts to make a scientific connection between his alleged ill effects and the lighting in his cell and his alleged lack of a particular medical treatment. However, plaintiff's need for expert testimony is not a ground for appointing him counsel.

Ordinarily, a claim of medical mistreatment is the kind of case that is likely to generate interest among members of the bar. However, because the cost of medical experts is so great, most individuals suing for medical mistreatment of the serious nature required to state a claim under the Eighth Amendment seek out a lawyer who would be willing to take the case on a contingent fee basis. This means that if the plaintiff wins, the cost of the experts will be recovered and the lawyer will be paid for his or her time and expenses in pursuing the case. The contingent fee system serves as a reality check for litigants. If no lawyer with a background in medical mistreatment cases is willing to take plaintiff's case, chances are high that the case is one the lawyers have assessed either as not likely to succeed

or as not likely to result in a damage award large enough to recoup the expense of prosecuting the case. The same may be said for plaintiff's sleep deprivation claim. If the factual allegations are not seriously egregious, a lawyer may well determine that the cost of an expert cannot be recouped by a damage award.

As I noted earlier, plaintiff has not indicated that he has asked any lawyer to take his case. Once he begins this process, he will either find a lawyer willing to take the case or he will discover that no lawyer is willing to do so. It is difficult for lawyers to decline to take a case when the court asks them to do so. Therefore, in cases such as this one, it is inappropriate for a court to select a lawyer to take the case without regard for his or her assessment of the risks of incurring the expense of the lawsuit against the probability of succeeding on the merits of the claims. If plaintiff is to be represented by counsel, he will have to find counsel on his own. If he wishes, he may contact the Wisconsin State Bar Lawyer Referral and Information Service at P.O. Box 7158, Madison, Wisconsin, 53707, 1-800-362-8096, to obtain the names and phone numbers or addresses of lawyers whose practices include medical malpractice or Eighth Amendment cases.

ORDER

IT IS ORDERED that

1. Plaintiff may proceed on his claim against defendants Jon E. Litscher and Gerald

Berge on his claim that these defendants caused him to suffer the effects of sleep deprivation by subjecting him to prolonged exposure to intense lighting.

2. A decision is stayed whether plaintiff may proceed on his claim that one or more of the defendants caused him to suffer the effects of sleep deprivation by repeatedly kicking his cell door. Plaintiff may have until April 23, 2004, in which to identify who kicked his cell door. If, by April 23, 2004, plaintiff fails to identify the person or persons who kicked his cell door, this claim of sleep deprivation will be dismissed.

3. A decision is stayed whether plaintiff may proceed on his claim of denial of medical care. Plaintiff may have until April 23, 2004, in which to identify who knew about his serious medical need and deliberately refused to allow him treatment for it. If, by April 23, 2004, plaintiff fails to identify the person or persons who refused him medical treatment, this claim will be dismissed.

4. Plaintiff's motion for appointment of counsel is DENIED.

Entered this 8th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge