IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IVORY WADE,

Petitioner,

v.

THE DEPARTMENT OF CORRECTIONS;
RACINE CORRECTIONAL INSTITUTION;
DR. CASTILLO, Psychiatrist;
CHRISTINE APPLE, Chief Psychologist;
LANCE LUEDTKE, Crisis Worker; and
JENNIFER SPOTTS, "Psychologist Assist,"

Respondents.

OPINION and
ORDER

07-C-462-C

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This is a proposed civil action for monetary, declaratory and injunctive relief brought under 42 U.S.C. § 1983. Petitioner Ivory Wade, who is presently confined at the Wisconsin Resource Center in Winnebago, Wisconsin, contends that respondents Department of Corrections, Racine Correctional Institution, Dr. Castillo, Christine Apple, Lance Luedtke and Jennifer Spotts violated his Eighth Amendment rights by their deliberate indifference to his need for mental health care and that respondent Castillo's failure to treat his mental health care needs constituted medical malpractice under Wisconsin law. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial

affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has made the initial partial payment required under § 1915(b)(1).

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). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint 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. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Before setting forth the facts petitioner has alleged in his complaint, I note that he has already filed a supplement to his complaint, in which he names Jennifer Spotts as an additional respondent, sets forth his allegations about her and sets forth facts regarding

respondent Apple's "involvement" in the case. Because petitioner submitted the supplement to his complaint before his original complaint was screened, I will grant petitioner's motion to amend his complaint, attach the supplement to his complaint and screen the documents as one pleading.

In his complaint, petitioner alleges the following facts.

FACTS

At times relevant to this complaint, petitioner was housed at the Racine Correctional Institution in Sturtevant, Wisconsin. Respondents were employed by the Racine Correctional Institution in the following capacities: respondent Castillo was a psychiatrist, respondent Apple was chief psychologist, respondent Spotts was a "psychologist assistant" and respondent Luedtke was a "crisis worker."

On April 29, 2007, petitioner's wife was murdered. Two months later, petitioner began hearing her voice and other voices in his cell at night. On July 1, 2007, petitioner suffered from a hallucination and "slightly" blacked-out. He does not recall what happened, but it was reported by staff that he ran out of the housing unit, naked, while yelling "Fire." He ran towards the tennis court, where he climbed and straddled a fence. When he recognized his surroundings, petitioner began to cry as a result of his confusion about what had happened. Petitioner was placed immediately on observation status.

On July 2, 2007, respondent Spotts interviewed petitioner from the other side of a steel door. She did not appear to be concerned about petitioner's mental health needs, and instead smirked while she asked him questions like "Do you have any gambling debts? Are you running from someone?" Petitioner told respondent Spotts that he was confused about what had happened the day before, that he didn't remember what had happened and that he had a headache. After this interview, respondent Spotts recommended that petitioner be released from observation status, given a disciplinary report for "streaking" and punished. Petitioner was then placed in disciplinary segregation.

On July 6 and 9, 2007, petitioner filled out requests to be seen by a psychiatrist. On July 11, petitioner told respondent Luedtke that he was having thoughts about harming himself. Respondent wrote down on paper everything that petitioner told him, but did not return to see petitioner again that day. On July 12, 2007, petitioner was placed in observation status for cutting his wrist. He was released from observation status on July 16, 2007. Prior to July 19, 2007, petitioner submitted repeated requests to be seen by health services staff. On July 19, 2007, respondent Castillo met with petitioner. Petitioner explained his concerns about his mental health to Castillo, him what was bothering him and that he needed his old medication to help with his problems. Castillo cut the conversation short, denied that petitioner had any problems, did not investigate petitioner's mental health history and refused to provide petitioner with care or prescribe any medications. Later in

the month of July, petitioner was suffering from mental health problems and was placed in observation status on three other occasions and released without any medication. Respondent Castillo saw petitioner again on July 27, 2007 and denied him medical care. On August 7, 2007, petitioner cut his wrist again because he was depressed and hearing voices. On August 8, 2007, petitioner was transferred to the Wisconsin Resource Center, where he was given his old medication to help control his illness.

Petitioner spent nights in a cold room with only a gown and was fed peanut butter sandwiches for breakfast, lunch and dinner. Petitioner begged respondent Castillo for medication, but respondent Castillo refused to prescribe any to him. Petitioner now has two permanent scars where he cut his wrists.

At some point while petitioner was housed at the Racine Correctional Institution, petitioner told Mr. Monar, the security director, about his concerns. Monar told him that "I'm on a 19 million dollar budget and I have 3,500 people to attend to, I don't have the time or money to be wasting on you, I did what I could."

DISCUSSION

A. Proper Respondents

Petitioner brings his federal claims under 42 U.S.C. § 1983, which authorizes actions against any "person" that violates the constitutional rights of another. The Supreme Court

has held that neither states nor state agencies are "persons" that can be sued under § 1983, Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). See also Ryan v. Illinois Dept. of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Rather, petitioners in a civil rights action under § 1983 must seek relief from individual officials, such as respondent Castillo. Therefore, petitioner will be denied leave to proceed against respondent "The Department of Corrections" and the Racine Correctional Institution.

Next, in the supplement to his complaint, petitioner alleges that respondent Apple's liability arises from her "uninvolvement" in his mental health care. He appears to be suing her merely because she holds the position of chief psychologist at the Racine Correctional Institution. However, liability under § 1983 arises only through a defendant's personal involvement in a constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). In an action under there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry, 65 F.3d at 561. Therefore, respondent Apple's alleged "uninvolvement" fails to state a claim under § 1983.

B. Eighth Amendment

The Eighth Amendment to the United States Constitution requires the government

"'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

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 causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim is analyzed in three parts:

(1) Whether petitioner had a serious mental health care need;

(2) Whether respondents knew that petitioner needed care; and

(3) Despite their awareness of the need, whether respondents failed to take reasonable measures to provide the necessary care.

Petitioner does not have to allege the facts necessary to establish each of these elements at the pleading stage, but they provide the framework for determining whether petitioner has alleged enough to give respondents notice of his claims and whether there is a set of facts consistent with petitioner's allegations that would entitle him to relief. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

It is well settled that the Eighth Amendment protects the mental, as well as physical health of prisoners. E.g., Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001); Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987). If it is true, as petitioner alleges, that he is mentally ill to the point of being suicidal, then he has a serious medical condition that may warrant treatment. The remaining question is whether petitioner has alleged facts suggesting that each individual respondent was deliberately indifferent to petitioner's need for treatment.

1. Respondent Castillo

Petitioner alleges that respondent Castillo was aware of his mental illness because petitioner told him about his condition and that respondent Castillo refused to provide petitioner with minimally adequate treatment, in spite of his repeated requests for care. If I accept petitioner's allegations as true, as I must at this early stage of the lawsuit, then

petitioner has stated a claim under the Eighth Amendment. Consequently, I will grant petitioner leave to proceed on his claim that respondent Castillo was deliberately indifferent to his need for mental health treatment.

Petitioner he should be aware that, to prevail ultimately on his Eighth Amendment claim, he will need to prove that respondent Castillo was not simply negligent in his treatment of him or that Castillo's treatment choice was not the one plaintiff would have preferred. To prevail on this claim, petitioner will have to show that respondent Castillo was aware that his failure to treat him posed a substantial risk to his health and that he disregarded this risk. (As discussed below, petitioner will be granted leave to proceed on his alternate theory that respondent Castillo was only negligent in his care of petitioner.)

2. Respondents Luedtke and Spotts

Petitioner's allegations about Luedtke and Spotts relate to individual interactions he had with them. When petitioner told respondent Luedtke that he was having thoughts about harming himself, respondent Luedtke wrote down on paper everything that petitioner told him, but did not return to see petitioner again that day. When respondent Spotts interviewed petitioner after he blacked out and had hallucinations, she was insensitive and smirked while asking him questions. In addition, she recommended that he receive discipline for "streaking." Neither of these interactions gives rise to an Eighth Amendment

claim.

Although it is understandable that petitioner would have preferred sensitive and speedy treatment for his mental health care needs, prison officials are not constitutionally required to provide a particular type of medical care when their failure to do so does not endanger a prisoner's health. The Constitution guarantees care that is minimally adequate in the estimation of medical professionals, not care that comports with a prisoner's own wishes. See, e.g., Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996) (whether or when a particular treatment is warranted is "classic example of a matter for medical judgment"). Because petitioner has pleaded facts that make it clear that his claims against respondents Luedtke and Spott arise from their one-time failures to provide him with the manner of care he desired, petitioner's claims against them will be dismissed.

C. State Law Claim

From petitioner's complaint, it appears that he intends to allege also that respondent Castillo was negligent in his care of him and committed medical malpractice by failing to provide him with proper care. If so, this claim would arise under Wisconsin state law. Generally, federal courts may exercise supplemental jurisdiction over state law causes of action "that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States

Constitution." 28 U.S.C. § 1367(a). This means that a federal court can hear both federal and state law claims when the central facts of the federal claim are also the central facts of the state law claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

In this case, respondent Castillo's alleged medical malpractice in failing to provide petitioner with mental health care is certainly intertwined with his claim that respondent Castillo was deliberately indifferent to his need for mental health care. To prevail ultimately on a claim for medical malpractice or negligence in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. Paul v. Skemp, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (citing Nieuwendorp v. American Family Ins. Co., 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). Therefore, "a claim for medical malpractice requires a negligent act or omission that causes an injury." Id. As discussed above, petitioner has alleged that respondent Castillo failed to provide treatment for his serious mental health care needs. At this early stage, it is possible to infer that this failure may have been negligent; therefore, petitioner will be granted leave to proceed on this claim against respondent Castillo as well.

However, no matter how intertwined a state and federal claim may be, a federal court cannot exercise supplemental jurisdiction if a petitioner has failed to follow state procedures relevant to his state law claim. Wisconsin statute § 893.80(1m) requires a claimant bringing a civil action for medical malpractice against a state officer or employee to serve written

notice of the claim on the Wisconsin attorney general within 180 days of "discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered." Filing a proper notice of claim is a condition precedent to suit. Snopek v. Lakeland Medical Center, 223 Wis. 2d 288, 295, 588 N.W.2d 19, 23 (1999). Unless the notice of claim requirement has been satisfied, the courts lack discretion to decide claims on their merits. Therefore, if petitioner has failed to file a timely notice of claim with respect to his medical malpractice claim, this court will not be able to hear arguments about it. At this early stage, I will grant petitioner leave to proceed on his state law negligence claim. However, I note that it will be dismissed if respondent Castillo moves for dismissal on these grounds and petitioner cannot adduce evidence that he gave proper notice of this claim under Wisconsin law.

D. Appointment of Counsel

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the

legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

The Court of Appeals for the Seventh Circuit has held that before a district court can consider a motion for appointment of counsel made by an indigent plaintiff in a civil action, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, a petitioner is required to submit the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Petitioner has not complied with this preliminary step. Consequently, I must deny his motion. Petitioner remains free to renew his motion after he has sought representation from at least three lawyers without success and the case has progressed sufficiently that an assessment may be made of petitioner's likelihood of success on the merits of his claim in combination with his ability to prosecute the case himself.

ORDER

IT IS ORDERED that

1. Petitioner Ivory Wade's motion for appointment of counsel is DENIED without prejudice.

2. Petitioner is GRANTED leave to proceed in forma pauperis on his claim that respondent Dr. Castillo violated his Eighth Amendment rights when he was deliberately indifferent to petitioner's need for mental health care treatment.

3. Petitioner is GRANTED leave to proceed in forma pauperis on his claim that respondent Castillo was negligent in his treatment of petitioner's mental health care needs in violation of Wisconsin state law.

4. Petitioner is DENIED leave to proceed in forma pauperis with respect to his claims against Department of Corrections, Racine Correctional Institution, Christine Apple, Lance Luedtke and Jennifer Spotts and these respondents are DISMISSED from the case.

5. For the remainder of this lawsuit, petitioner must send respondent Castillo a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

6. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. The unpaid balance of petitioner's filing fee is $342.72; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on respondent.

Entered this 11th day of September, 2007.

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