IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES M. UPTHEGROVE,

OPINION and ORDER

Petitioner,

07-cv-0596-bbc

v.

HEALTH PROFESSIONALS, LTD; DR. CULLINAN; DR. ROMANO; STACY ROSE, RN,

Respondents.

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In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, petitioner James Upthegrove contends that respondents Health Professionals, Ltd., Dr. Cullinan, Dr. Romano and Stacy Rose, RN are violating his constitutional rights by denying him necessary, prescribed psychiatric medications. Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915.

Because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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 and

1915A.

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). In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

At times relevant to this complaint, petitioner James Upthegrove was an inmate housed at the Eau Claire County jail. Respondent Health Professionals, Ltd. provides health care to inmates at the jail. Respondent Dr. Culliman is the director of respondent Health Professionals at the Eau Claire County jail. Respondents Dr. Romano and Stacy Rose work for respondent Health Professionals at the Eau Claire County jail; respondent Dr. Romano is a general practitioner and respondent Rose is a nurse.

Petitioner is required by court order to take all psychotropic medicines that were prescribed to him by his psychiatrist. When he arrived at the Eau Claire County jail on September 16, 2007, staff working for respondent Health Professionals refused to let him have his medications. Petitioner was not examined by a doctor or nurse before this determination was made.

Respondent Health Professionals does not have a psychiatrist on staff at the Eau Claire County jail. Therefore, petitioner has to rely on treatment from respondents Cullinan

and Romano, who are general practitioners, for mental health treatment.

Petitioner suffers from symptoms of withdrawal as a result of the denial of his psychiatric medication. These symptoms include: high blood pressure as a result of anxiety and panic attacks, insomnia, audio and visual hallucinations, manic episodes and lack of appetite. Petitioner complained several times to respondent Rose about his withdrawal symptoms. In spite of his complaints, respondent Rose refused to see petitioner in person for a week after he arrived at the jail.

DISCUSSION

Petitioner has named as a respondent Health Professionals, Ltd.; all of the individual respondents are Health Professionals, Ltd. employees. To state a claim under § 1983, a plaintiff must alleged that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such a right. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Respondent Health Professionals Ltd. appears to be a private company. Ordinarily, only government entities and employees may be sued for constitutional violations under 42 U.S.C. § 1983. Johnson v. LaRabida Children's Hospital, 372 F.3d 894, 896 (7th Cir. 2004). However, I have held consistently that employees of companies like Health Professionals Ltd. that provide services in prisons and jails may be treated as government employees for the purpose of § 1983 liability because Health Professionals Ltd. is performing

a function and exercising authority that is generally reserved for the state. E.g., Henderson v. Brush, No. 06-C-12-C, 2006 WL 561236, *8 (W.D. Wis. March 6, 2006). See also Wilson v. McRae's, Inc., 413 F.3d 692, 693 (7th Cir. 2005) ("Private entities may be treated as state actors when the state effectively transfers authority to them."). It follows necessarily that Health Professionals Ltd. itself may be sued under § 1983. Rosborough v. Management & Training Corp., 350 F.3d 459 (5th Cir. 2003). Private entities may not assume the power of the government without also assuming the corresponding responsibilities. To conclude otherwise would create a disturbing gap in accountability in an area of the law in which it is greatly needed.

Next, I note that petitioner's status at the Eau Claire County jail is not clear from his complaint. If he is a pre-trial detainee, his constitutional rights arise under the Fourteenth Amendment's due process clause. Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003). If he is serving a sentence following a conviction, the protection arises under the Eighth Amendment. Id. ("The Eighth Amendment does not apply to pretrial detainees, but as a pretrial detainee, [plaintiff] was entitled to at least the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment.") In this case, this distinction matters very little, because pretrial detainees' claims of inadequate medical care under the due process clause are regularly analyzed using Eighth Amendment standards. Williams v. Rodriguez, — F.3d — , No. 06-4126 (7th Cir.

Dec. 6, 2007) (noting that standards under Fourteenth Amendment and Eighth Amendment are analogous).

Under the Eighth Amendment, a prisoner is protected from deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 103 (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 causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it 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 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.

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). Petitioner has alleged that he has been prescribed medication for his psychiatric condition and that he was under a court order to continue taking this medication. These allegations suggest strongly that petitioner's mental health needs were sufficiently severe to constitute a serious health care need.

Therefore, I must consider which respondents, if any, were allegedly aware of petitioner's need for treatment and failed to take reasonable steps to provide the necessary care. This is somewhat difficult to do, because petitioner has provided very little specific information about his care at the Eau Claire County jail. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the 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); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869.

Petitioner has alleged that his medications were withdrawn from him by staff before he saw a doctor or a nurse and that this withdrawal constitutes deliberate indifference to his serious medical needs. It is difficult to square this allegation with petitioner's assertion that respondents Cullinan and Romano themselves were deliberately indifferent to his serious medical needs, when, according to his own allegations, they did not see him until after his

medications were withdrawn. In addition, petitioner appears to argue that it is problematic that the doctors assigned to care for him are general practitioners and not psychiatrists. This allegation cannot support a claim of deliberate indifference against them either; even if failure to assign a psychiatrist to examine a prisoner could support a claim for deliberate indifference against someone, the general practitioners who did see him would not be responsible for this failure. Therefore, petitioner will be denied leave to proceed on his claims against respondents Cullinan and Romano.

Next, petitioner's claim against respondent Rose is also difficult to evaluate. Petitioner alleges that he complained to her several times that he was experiencing symptoms of withdrawal from his psychiatric medications. In spite of his complaints, she did not "physically see" petitioner until a week after he had entered the jail. In some circumstances, delay in treating a non-life threatening condition may give rise to a claim under the Eighth Amendment. Edwards v. Snyder, 478 F.3d 827, 831 (7th Cir. 2007). However, isolated incidents of delay in treatment do not necessarily constitute deliberate indifference. Gutierrez v. Peters, 11 F.3d 1364, 1374 (7th Cir. 1997).

Given the very limited allegations included in petitioner's complaint, it is not clear on which side of this divide petitioner's claim against respondent Rose falls. Petitioner has alleged that he was experiencing severe withdrawal symptoms. If petitioner told respondent Rose about these symptoms several times, she had the ability examine him and refer him to

a doctor who could prescribe medications and she did nothing, it is possible that this response was not reasonable under the circumstances. At this early stage, these allegations are sufficient for petitioner to proceed on his claim against Rose.

Finally, petitioner alleges that "Health Professionals Ltd. staff refused to let [him] have his prescribed medications." Although respondent Health Professionals Inc. cannot be liable for the actions of its staff simply because of its employment relationship with them, White v. City of Markham, 310 F.3d 989, 998 (7th Cir. 2002), it is possible to infer from petitioner's allegations that the staff's refusal to provide petitioner with his prescribed medications was the result of a policy of respondent Health Professionals Ltd. to withhold certain medications from inmates. Under these circumstances, it may be possible for petitioner to show that respondent Health Professionals Ltd. is responsible for the withholding of his medications and is liable under the Eighth Amendment. To succeed ultimately on this claim, petitioner will need to establish that respondent Health Professionals Ltd. has a policy, custom or widespread practice that caused the unconstitutional conduct. Davis v. Carter, 452 F.3d 686, 691 (7th Cir. 2006). However, he need not do so at this early stage, and will be granted leave to proceed against respondent Health Professionals Ltd.

One final matter requires discussion. Petitioner will be granted leave to proceed in this action on his claims against respondents Health Professionals, Ltd. and Stacy Rose.

Therefore, the clerk of court has prepared a Marshals Service and summons forms for respondents, and is forwarding a copy of the complaint and the completed forms to the United States Marshal for service on them.

In completing the Marshals Service form for respondent Rose, the clerk has not provided a forwarding address because this information is unknown. It will be up to the marshal to make a reasonable effort to locate respondent Rose by contacting her employer (in this case, respondent Health Professionals Ltd.) or conducting an internet search of public records for her current address or both. Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990) (once defendant is identified, marshal to make reasonable effort to obtain current address). Reasonable efforts do not require the marshal to be a private investigator for civil litigants or to use software available only to law enforcement officers to discover addresses for defendants whose whereabouts are not discoverable through public records.

Also, for petitioner's information, in Sellers, 902 F.2d at 602, the court of appeals recognized the security concerns that arise when prisoners have access to the personal addresses of former or current prison employees. For this reason prison employees often take steps to insure that their personal addresses are not available in public records accessible through the internet. If the marshal is successful in obtaining respondent Rose's personal address, he is to maintain that address in confidence rather than reveal it on the marshals service form, because the form is filed in the court's public file and mailed to the petitioner

after service is effected.

ORDER

IT IS ORDERED that

1. Petitioner James Upthegrove's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Health Professionals, Ltd. is violating his constitutional rights by implementing a policy under which petitioner's prescribed mental health medications have been withheld from him.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claims that respondent Stacy Rose was deliberately indifferent to his serious medical need for his prescribed mental health medications.

3. Petitioner's request leave to proceed in forma pauperis is DENIED on his claims that respondents Dr. Cullinan and Dr. Romano were deliberately indifferent to his serious medical needs. These respondents are DISMISSED from this lawsuit.

4. For the remainder of this lawsuit, petitioner must send respondents 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 respondent. 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.

5. 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.

6. The unpaid balance of petitioner's filing fee is $249.87; 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).

7. Because petitioner is proceeding in this action in forma pauperis, the court will make arrangements with the United States Marshal to complete service of process on the respondents.

Entered this 26th day of December, 2007

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