IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEON IRBY,

Plaintiff,

OPINION and ORDER

09-cv-136-bbc

v.

PAUL SUMNICHT, BELINDA STRUBBLE
and CYNTHIA THORPE,

Defendants.

- -

In this prisoner civil rights lawsuit, plaintiff Leon Irby contends that defendants are violating his rights under the Eighth Amendment, the Americans with Disabilities Act and state law by refusing to provide him with a hearing aid. Plaintiff has paid the full $350 filing fee. Because plaintiff 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 ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

In his complaint, plaintiff alleges that he is a prisoner at the Waupun Correctional Institution and suffers from "deteriorating bilateral sensory neural hearing loss with

asymmetric word discrimination." Although he has a prescription for a hearing aid in both ears, defendant Paul Sumnicht (a doctor at the prison) has authorized a hearing aid for plaintiff's left ear only. Plaintiff complained to defendants Belinda Strubble (the heath services unit manager) and Cynthia Thorpe (the regional nursing coordinator) about not having two hearing aids, but neither has taken any action to help him. Without both hearing aids, plaintiff is unable to distinguish between competing sounds, which inhibits his ability to have conversations and watch television. In addition, plaintiff suffers from headaches, dizziness and "disorientation."

I conclude that plaintiff has alleged the minimum facts necessary to state a claim upon which relief may be granted. With respect to his Eighth Amendment claim, a prison official may violate a prisoner's right to medical care 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). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate

indifference" means that the officials are that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Does plaintiff need medical treatment?

(2) Do defendants know that plaintiff needs treatment?

(3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

In this case, plaintiff alleges that he has a prescription for hearing aids in both ears, he cannot engage in basic daily activities such as carrying on a conversation with only one hearing aid and he suffers from physical symptoms such as headaches. These allegations support a view that he has a serious medical need. Gil v. Reed, 535 F.3d 551, 556 (7th Cir. 2008) (prescription is evidence of serious medical need); Chance, 143 F.3d at 702. Plaintiff's allegation that defendants are refusing to help him is sufficient at the screening stage to show that they are acting with deliberate indifference to his health.

At summary judgment or at trial, plaintiff will have to prove with admissible evidence that a second hearing aid is more than just a convenience and that he suffers serious health consequences without it. Further, he will have to show that each of the defendants *knows* that he needs a second hearing aid and is refusing to provide one, despite an ability to do so.

It will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that a second hearing aid might be beneficial, Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by defendants is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996) (internal quotations omitted).

Next, plaintiff contends that defendants are violating his rights under the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, which prohibits discrimination against qualified persons with disabilities. Title II of the Americans with Disabilities Act states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . ." 42 U.S.C. § 12132. State prisons are considered public entities under the ADA. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)). Although plaintiff did not name "a public entity" such as the Wisconsin Department of Corrections as a defendant, he may sue individuals in their official capacity for injunctive relief under Title II. Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003).

A person is disabled under the ADA if he has a "physical or mental impairment that

substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). In general, being "substantially limited" means that "a person must be 'either unable to perform a major life function, or [be] significantly restricted in the duration, manner, or condition under which the [person] can perform a particular major life activity, as compared to the average person in the general population.'" Peters v. City of Mauston, 311 F.3d 835, 843 (7th Cir. 2002) (alterations in original) (quoting Contreras v. Suncast Corp., 237 F.3d 756, 762 (7th Cir. 2001)). A person is "qualified" if he is able to participate in the program, activity or service with a reasonable accommodation. 42 U.S.C. § 12131(2). A reasonable accommodation is one that is effective in allowing the plaintiff to participate, but prison officials are not obligated to provide whatever accommodation a prisoner requests. Mobley, 531 F.3d at 546-47.

Courts uniformly recognize "hearing" as a major life activity. Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996); Burks v. Wisconsin Dept. of Transportation, 464 F.3d 744, 755 (7th Cir. 2006); see also 29 C.F.R. § 1630.2(i) ("Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, *hearing*, speaking, breathing, learning, and working.") (emphasis added). For the purpose of screening, it is reasonable to infer that (1) plaintiff is "substantially limited" in his ability to hear; (2) television is a "service" or "activity" within the meaning of § 12132, e.g., Chisolm v. McManimon, 275 F.3d 315, 330 (3d Cir. 2001) (assuming that prison television was covered by Title II); and

a second hearing aid is a reasonable accommodation for plaintiff's impairment, 28 C.F.R. § 35.160(b)(1) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."). At summary judgment or trial, plaintiff will have to prove both that he is substantially limited in a major life activity and that the hearing aid is a reasonable accommodation. Mobley v. Allstate Ins. Co., 531 F.3d 539, 547 (7th Cir. 2008).

Defendants are free to challenge at a later stage the assumption that television is covered by Title II, if they can do so persuasively. E.g., Aswegan v. Bruhl, 113 F.3d 109, 110 (8th Cir. 1997) (concluding without explanation that "cable television sought by [a prisoner] is not a public service, program, or activity within the contemplation of the ADA"). If plaintiff believes that he has been denied access to any particular "program," "service" or "activity" other than television because of his hearing impairment, he should file a supplement to his complaint. Although an ability to engage in meaningful conversation may be necessary to participate in a number of programs, activities or services, "conversation" is not covered in and of itself because it is not something created or provided by the prison.

Finally, plaintiff alleges that defendants have been negligent in denying him a hearing aid. Because this claim arises out of the same set of facts as plaintiff's federal claims, an exercise of supplemental jurisdiction is appropriate. 28 U.S.C. § 1367. Further, plaintiff

alleges that he filed a notice of claim more than six months ago, making it reasonable to infer that his claim has been denied. Wis. Stat. § 893.82(3m) ("[A] prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice . . . is served upon the attorney general, whichever is earlier.") To prevail on this claim, plaintiff will have to 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)).

Plaintiff cites two criminal statutes in his complaint, Wis. Stat. § 940.29 (abuse of residents of penal facilities), Wis. Stat. § 940.295 (abuse and neglect of patients and residents), but these may not be enforced in the context of a civil action. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Because these are not "claims" but only legal theories, I will not issue a strike under 28 U.S.C. § 1915(g).

ORDER

IT IS ORDERED that

1. Plaintiff Leon Irby is GRANTED leave to proceed on his claims that defendants Paul Sumnicht, Belinda Strubble and Cynthia Thorpe are refusing to provide him with a hearing aid, in violation of the Eighth Amendment, the Americans with Disabilities Act and

state law.

2. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

3. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

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

Entered this 20th day of March, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge