

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

CURTIS DAUER,

Plaintiff,

v.

STATE OF WISCONSIN, DEPARTMENT
OF CORRECTIONS; RICK RAEMISCH;
TIM LUNDQUIST; ROMAN KAPLAN, M.D.; and
BETH A. DITTMANN,

Defendants.

ORDER

09-cv-635-slc¹

In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Curtis Dauer, represented by counsel, contends that defendants Wisconsin Department of Corrections, Rick Raemisch, Tim Lundquist, Roman Kaplan and Beth Dittmann violated his rights under the Eighth and Fourteenth Amendments by their deliberate indifference to his need for medical care. Also, plaintiff contends that defendants Kaplan's and Dittmann's failure to treat his medical needs constituted medical malpractice

¹ While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. For the purpose of issuing this order only, I am assuming jurisdiction over this case.

under Wisconsin law. Originally, plaintiff filed this case in the Circuit Court for Dane County. Defendants removed the case to this court. Because plaintiff is a prisoner, his complaint must be screened to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915A. (Defendants filed a “motion for screening of the complaint,” dkt. #2, which will be denied as unnecessary. District courts have an independent obligation to screen complaints filed by prisoners against public officials regardless whether defendants request such a screening.) 28 U.S.C. § 1915A(b).

After examining plaintiff’s complaint, I conclude that plaintiff may proceed on his claims against defendants Kaplan and Dittmann in their individual capacities. However, plaintiff cannot proceed against defendants Kaplan and Dittmann in their official capacities or on any of his claims against Raemisch, Lundquist and the Wisconsin Department of Corrections.

ALLEGATIONS OF FACT

Plaintiff Curtis Dauer is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. At times relevant to this case, he was housed at the Dodge Correctional Institution in Waupun, Wisconsin. Defendant Rick Raemisch is Secretary of the Department of Corrections. Defendant Tim Lundquist is the warden at the Dodge Correctional Institution. Defendant Roman Kaplan is a licensed physician at Dodge and

Beth Dittmann is a nursing supervisor at Dodge.

Sometime before September 19, 2006, plaintiff was placed in a cell with Sheldon Gainer at the Dodge Correctional Institution. Defendant Department of Corrections knew that Gainer was a violent person with a history of assaultive behavior. Plaintiff complained about Gainer's attitude and comments but no action was taken.

On or around September 19, 2006, Gainer attacked plaintiff and inflicted serious injuries to plaintiff's ankle. Plaintiff was transferred by ambulance to the Waupun Memorial Hospital for medical care. At the hospital, plaintiff's ankle was temporarily stabilized; he was given crutches; and arrangements were made for future surgery.

Upon his return to Dodge, plaintiff was put on temporary lock-up status and placed in a segregation cell because of his involvement in the altercation with Gainer. He was not charged with violating any prison rules. In segregation, plaintiff was not allowed to use the crutches he had received at the hospital. Because he was not provided any other means of distributing his weight, he was forced to hop around on one foot. He asked for ice and the pain medication that had been prescribed at the hospital, but his requests were denied.

Plaintiff reported his pain and lack of treatment to defendants Dittmann and Kaplan. They looked at plaintiff's ankle through a panel on plaintiff's cell door, but did not examine it closely. When plaintiff went to the Waupun Memorial Hospital for a checkup several days later, his ankle was blistered and smelled "foul." The hospital doctors made further

recommendations for plaintiff's treatment, but had to cancel his surgery. After plaintiff returned to Dodge, he was placed back in segregation.

On September 25, 2006, a Department of Corrections employee examined plaintiff. He was rushed to the University Hospitals in Madison, where his ankle had to be re-broken. The blisters on his ankle were so extensive that most forms of surgery were not an option. Extraordinary measures saved plaintiff's foot, but his ankle is permanently injured.

DISCUSSION

As an initial matter, plaintiff's federal claims under 42 U.S.C. § 1983 cannot be asserted against defendant Wisconsin Department of Corrections. 42 U.S.C. § 1983 authorizes actions against any "person" that violates the constitutional rights of another. Neither states nor state agencies are "persons" that can be sued under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 64 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Further, the Eleventh Amendment bars suits by private citizens against a state entity in federal court. Edelman v. Jordan, 415 U.S. 651, 663 (1973).

A. Eighth Amendment

The Eighth Amendment requires prison officials to take reasonable measures to treat

a prisoner's serious medical needs. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997); Whiting v. Marathon County Sheriff's Department, 382 F.3d 700, 703 (7th Cir. 2004). (Plaintiff attempts to bring a deliberate indifference claim under both the Eighth and Fourteenth Amendments. Although the standard is the same under either provision, the Fourteenth Amendment covers pre-trial detainees while the Eighth Amendment covers sentenced inmates such as plaintiff. Therefore, I will construe his deliberate indifference claim as one under the Eighth Amendment.)

Plaintiff's allegations that he suffered a serious injury to his ankle that required medical treatment, that he did not receive adequate treatment and suffered permanent injury are sufficient to state a claim under the Eighth Amendment. Whether he can maintain this claim against all of the defendants is another question.

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). Plaintiff has alleged that defendants Kaplan and Dittmann were personally involved in his medical treatment and may proceed on his Eighth Amendment claim against Kaplan and Dittmann in their individual capacities.

Also, plaintiff contends that defendants Raemisch, Lundquist, Kaplan and Dittmann are liable under the Eighth Amendment in their official capacities because plaintiff was placed in segregation rather than in the hospital unit after he returned from Waupun

Memorial Hospital. Plaintiff alleges that he was placed in segregation because of a Department of Corrections “blanket rule” that requires inmates involved in altercations to be placed in segregation without regard to their individual medical needs.

This claim fails for two reasons. First, official capacity suits are actions against the government entity of which the official is a part. Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001). Filing suit against the defendants in their official capacities means that plaintiff is really suing state entities, in this case, the Wisconsin Department of Corrections and the Dodge Correctional Institution. Id. Any relief in an official capacity suit would be provided by these state entities. Id. However, plaintiff is seeking monetary relief, and claims for monetary relief against state entities are barred by the Eleventh Amendment. Edelman, 415 U.S. at 663 (federal court’s remedial power in official capacity suits under § 1983 limited to prospective injunctive relief). Therefore, plaintiff’s claims against defendants in their official capacities must be dismissed.

Second, even if plaintiff brought this claim against defendants in their individual capacities, he has not alleged their personal involvement as required by Gentry, 65 F.3d at 561. Plaintiff does not allege that any of the defendants were responsible for creating, implementing or enforcing the “blanket rule” that requires inmates involved in altercations to be placed in segregation.

B. State Medical Malpractice

Federal courts may exercise supplemental jurisdiction over a state law claim that is “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). In this case, plaintiff’s medical malpractice claims against defendants Kaplan and Dittmann are part of the same case or controversy as his federal claims.

To prevail ultimately on a claim for medical malpractice in Wisconsin, plaintiff will have to prove that Kaplan and Dittmann breached their duty of care and that plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001). Plaintiff alleges that defendants Kaplan and Dittmann failed to provide treatment for his serious ankle injury. At this stage, it is possible to infer that defendants’ failure may have been negligent. Therefore, plaintiff may proceed on his state medical negligence claim.

ORDER

IT IS ORDERED that

1. Plaintiff Curtis Dauer is GRANTED leave to proceed on his claims that defendants Roman Kaplan and Beth Dittmann, acting in their individual capacities, violated his rights under the Eighth Amendment by acting deliberately indifferent to plaintiff’s

serious medical needs, and committed medical negligence under Wisconsin law.

2. Plaintiff is DENIED leave to proceed on his claims that defendants Wisconsin Department of Corrections, Rick Raemisch, Tim Lundquist, Roman Kaplan and Beth Dittmann, acting in their official capacities, violated plaintiff's rights under the Eighth Amendment because the Eleventh Amendment bars such suits.

3. The complaint is DISMISSED as to plaintiff's claims against Wisconsin Department of Corrections, Rick Raemisch and Tim Lundquist.

4. Defendants' motion for screening, dkt. #2, is DENIED as unnecessary.

5. It appears from the record that defendant Dittmann has already been served with the complaint. Plaintiff should now take steps to serve defendant Kaplan.

6. Because I have dismissed claims asserted in plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff.

Entered this 12th day of November, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge