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

XAVIER HARDIN,

Plaintiff,

v.

WILLIAM MCCREEDY, RICK HAEN, STEVE SCHUELER, KELLY SALINAS, LT. BERG, JAMES LABELLE, WELCOME ROSE and ISMAEL OZANNE,

Defendants.

OPINION AND ORDER

10-cv-22-slc

In this prisoner civil rights suit under 42 U.S.C. § 1983, plaintiff Xavier Hardin contends that defendants violated the Eighth Amendment by failing to protect him from injuring himself on a metal cabinet clasp in his cell when he had a seizure. He also seeks to bring state negligence claims against defendants for the same conduct. Before the court are the parties' cross motions for summary judgment. Dkts. 22 and 33.

Because I find that Hardin has failed to adduce sufficient evidence from which a reasonable jury could find that defendants acted with deliberate indifference to a substantial risk of serious harm, defendants' motion for summary judgment will be granted and Hardin's motion for summary judgment will be denied with respect to the federal claims and all of the state law negligence claims, except those against defendants Lt. Berg and Ismael Ozanne. I find that Hardin failed to provide an adequate notice of his state claims against defendants Steve Schueler, Kelly Salinas, James LaBelle, Welcome Rose, William McCreedy and Rick Haen, as required by Wis. Stat. § 893.82(3). Because the statute is jurisdictional, this court does not have the authority to decide those claims and must dismiss them. I decline to exercise supplemental

jurisdiction over Hardin's remaining negligence claims against Berg and Ozanne under 28 U.S.C. § 1367 because the disposition of those claims is not clear from the court record. Those claims will be dismissed without prejudice to Hardin refiling them in state court.

I find that the following facts proposed by the parties to be material and undisputed.[1]

FACTS

Plaintiff Xavier Hardin has been incarcerated at KMCI since March 24, 2009. He suffers from seizures. All of the defendants were employed by the Wisconsin Department of Corrections (DOC) at Kettle Moraine Correctional Institution (KMCI) during the incidents in question.

Defendant Grant Berg is a lieutenant who supervises correctional officers and correctional sergeants, arranges work schedules, makes rounds, responds to emergencies and ensures that staff and inmates adhere to DOC and institution policies. Defendant Kelly Salinas is an inmate complaint examiner (ICE) and serves as the custodian of inmate complaints. She has access to institutional records related to the inmates. Defendant Rick Haen is the building and grounds superintendent and his responsibilities include planning and directing the buildings and grounds maintenance program; maintaining and repairing all security systems, HVAC systems, electrical locking systems, building systems, telephone system, utilities, equipment and appliances; and supervising construction at the institution. Defendant William McCreedy is the manager of the

[1] I note that many of the following facts are derived from incident reports or progress notes prepared by prison officials who interviewed other staff members. Although some of this evidence may in fact be inadmissible as hearsay, neither party has objected to it. Therefore, for the purposes of summary judgment, I have considered this evidence in making the following factual findings.

Health Services Unit (HSU) who oversees the delivery of medical services to inmates and provides administrative support to physicians and other HSU staff.

During the incidents in question, defendant Steven Schueler was the KMCI Security Director, defendant James LaBelle was an inmate complaint examiner reviewer, defendant Welcome Rose was a corrections complaint examiner and defendant Ismael Ozanne was Deputy Secretary of DOC.

After Hardin's arrival at KMCI, maintenance staff completed multiple repairs and adjustments to his room to ensure his safety. In April 2009, Joe Tischendorf, a KMCI repair worker, prepared the following work orders:

> (1) April 1: A request from a captain that padding be strapped to Hardin's lower bunk bed and television stand. The work was completed on April 2, 2009.
>
> (2) April 12: A request from a sergeant that Hardin's bed posts be padded because he had cut his head on one of them during a seizure. The work was completed on April 14, 2009.

Following 2 meetings in early June 2009 with McCreedy and a security supervisor, Tischendorf prepared a work order to install additional foam padding on Hardin's lower bunk rails and TV stand edges. Also in June 2009, Tischendorf met with McCreedy and a captain and prepared a work order to install padding on Hardin's upper bunk rails and posts, ladder rails and steps. All of this work was completed later in June 2009.

As described in an incident report completed by Berg on July 22, 2009, an inmate told James Gleason, a correctional sergeant, that he had observed Hardin having what appeared to be a seizure on the floor in his room. Upon arrival at Hardin's cell, Gleason saw Hardin lying on the floor with a small cut below his right eye and blood running down his right cheek. When Gleason asked Hardin what he had been doing, Hardin stated that he was standing on a ladder,

cleaning off the top of his wall-mounted locker, even though he was on a low-bunk restriction at the time.

Gleason called for help over his radio and sounded his body alarm button. He also informed control center that HSU would be needed in order to assess Hardin's injury. Berg, four other correctional officers and a nurse arrived to assist. Hardin was escorted to the HSU and was sent to the local hospital for treatment of his injuries. (The parties dispute whether Hardin was wearing his helmet at the time of this accident and the seriousness of the cut that he received.) Following this incident, Schueler advised Haen that he wanted Tischendorf to make some modifications to Hardin's cell.

On August 5, 2009, Hardin filed Inmate Complaint Number KMCI-2009-17356, in which he complained that he was injured on July 22, 2009 as a result of not having an appropriate seizure helmet. Salinas investigated Hardin's allegations. During an interview with McCreedy, she learned that subsequent to Hardin's arrival at KMCI, McCreedy met with him to discuss his current injuries and use of a seizure helmet. Although Hardin had incurred some injuries to his face at Dodge Correctional Institution as a result of not wearing his helmet, he did not want to wear his helmet because he felt it was too tight.

McCreedy informed Salinas that he arranged with laundry to have Hardin's helmet modified so it was not so tight. Later, he met with maintenance staff to ensure that modifications were made in Hardin's room to make sure that all sharp edges were covered. McCreedy showed Hardin a picture of a helmet with a face shield but at that time, he did not wish to wear that type of helmet. Hardin felt that as long as his current helmet was not too

tight, he would wear that one all the time. Together with the room modifications, he felt that would suffice. McCreedy relayed to Salinas that HSU staff had checked with Hardin, who stated his helmet fit was good; he claimed that he was wearing it all the time. (The parties dispute whether McCreedy had maintenance recheck Hardin's room from time-to-time).

On August 5, 2009, Salinas recommended that Hardin's complaint be dismissed with the modification that HSU meet with Hardin regarding a helmet change. On August 7, 2009, Salinas's recommendation was accepted by LaBelle. While Hardin had the opportunity to appeal that decision to the corrections complaint examiner, Salinas's records indicate that he did not do so.

On August 8, 2009, Nurse Robinson was called to the gym after Hardin had a suspected seizure while lifting weights. Upon arrival, she discovered that he was not wearing his helmet. He admitted to not wearing it when he lifted weights.

According to an incident report completed by Berg on August 11, 2009, Sergeant Lefeber was informed by another inmate that Hardin yelled for help from his room. After arriving at Hardin's cell, Lefeber noticed blood on Hardin's right cheekbone, below his eye. She telephoned staff in the control center and advised them that Hardin appeared to have had a seizure and had a cut below his eye. Hardin was coherent and stated that he hit his head on the wall locker clasp. Berg and another officer arrived at the cell and escorted Hardin to the HSU. From there, he was sent to the local hospital for further medical treatment. Berg contacted the KMCI maintenance department and asked them to remove the clasp.

On August 12, 2009, Haen submitted a work order requesting that the lock clasp and latches on the wooden cabinet doors in Hardin's cell be removed. The work was completed that same day. On August 13, 2009, Hardin was seen by McCreedy in the HSU to be fit with a new helmet with a face shield. McCreedy provided him with instructions for use and instructed him to call HSU if the helmet needed adjustment.

On August 19, 2009, Hardin filed Inmate Complaint Number KMCI-2009-18571, in which he complained that KMCI displayed medical negligence as a result of his injuring himself a second time, in a similar manner, while allegedly having a seizure. In the course of her investigation into Hardin's complaint, Salinas again contacted McCreedy, who indicated that he had met with Hardin and maintenance staff in Hardin's room after Hardin's arrival at KMCI. McCreedy said that all areas that needed to be padded or removed were noted, and the lock clasp was not identified by anyone as having to be removed at that time. McCreedy also told Salinas that after Hardin was injured on July 22, 2009, he believed that maintenance was notified by unit staff or a security supervisor to have the lock clasp removed.

After Hardin was seen in HSU on August 11, 2009, McCreedy called maintenance and spoke with Haen, who assured him that it had been removed. McCreedy advised Salinas that every effort had been made to make the environment safe for Hardin. Hardin had been told that if at any time he saw any area that needed to be altered, he should notify unit staff so that they could attend to it as quickly as possible.

On August 25, 2009, Salinas recommended that the complaint be dismissed. LaBelle adopted her recommendation on August 26, 2009. Hardin appealed the decision to Corrections

Complaint Examiner Rose on August 31, 2009. On September 8, 2009, after a review of the relevant incident reports, medical progress notes and information from Haen, Rose recommended that the complaint be dismissed. In her recommendation, Rose stated that it was apparent that institution staff had taken measures to ensure Hardin's safety in his room, including the August 12, 2009 removal of the lock clasp. Ozanne accepted Rose's recommendation on behalf of the secretary on October 24, 2009.

On September 16, 2009, Nurse Robinson was called to Hardin's cell to assess him after a reported seizure. Upon arrival, she reviewed his medical log which revealed that he had not been taking his seizure medication consistently. When asked why, Hardin stated that they made him sick to his stomach. He was directed to inform HSU if he was having problems, not simply stop taking his medications. Nurse Robinson made arrangements to have the medication times adjusted in order to alleviate Hardin's upset stomach.

OPINION

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is appropriate "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Goldstein v. Fidelity & Guaranty Ins. Underwriters, Inc.*, 86 F.3d 749, 750 (7th Cir. 1996) (citing Fed. R. Civ. P. 56); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When deciding a motion for summary judgment, the judge's function is not to weigh the evidence for herself and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477

U.S. at 249. "[I]t is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* at 248. All reasonable inferences from undisputed facts should be drawn in favor of the nonmoving party. *Baron v. City of Highland Park*, 195 F.3d 333, 338 (7th Cir. 1999). However, the nonmoving party cannot simply rest upon the pleadings once the moving party has made a properly supported motion for summary judgment; instead the nonmoving party must submit evidence to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

II. Failure to Protect

Hardin is alleging that defendants were deliberately indifferent to his health and safety when they failed to insure that the clasp on his wall cabinet was removed or properly padded. The Eighth Amendment to the United States Constitution requires prison officials to "'take reasonable measures to guarantee the safety of the inmates'" and protect them from "substantial risk[s] of serious harm," even risks of self-harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)); *see also Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006); *Woodward v. Correctional Medical Services*, 368 F.3d 917, 928 (7th Cir. 2004); *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002). Failure to do so constitutes deliberate indifference and violates an inmate's Eighth Amendment rights. *Cavalieri v. Shepard*, 321 F.3d 616, 620-21 (7th Cir. 2003) (prison officials have duty to protect inmates from self-harm); *Sanville*, 266 F.3d at 734.

In order to prove his claim, plaintiff must show that (1) he faced a substantial risk of serious harm or had a serious medical need; (2) each defendant knew of that risk or was aware of facts from which substantial risk of serious harm could be inferred and drew that inference; and (3) each defendant disregarded that risk nonetheless. *Brown v. Budz*, 398 F.3d 904, 913 (7th Cir. 2005) (citing *Farmer*, 511 U.S. at 838); *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997). Ordinarily, a metal cabinet clasp does not present "an excessive risk to inmate health or safety," *Farmer*, 511 U.S. at 837, but in this case, Hardin suffers from a seizure disorder that the parties appear to agree places him at a greater risk than other inmates. *Frost v. Agnos*, 152 F.3d 1124, 1129 (9th Cir. 1998) (otherwise ordinary slippery surface posed excessive risk of serious harm where prison officials aware prisoner's use of crutches resulted in repeated falls and injuries on shower floor). It also is undisputed that prison officials were aware of Hardin's seizures and the risk of injury they posed.

At issue in this case is whether defendants disregarded the risk to Hardin by failing to take reasonable measures to protect him from harm. The undisputed facts show that prison officials made several adjustments to Hardin's room to reduce the risk that he would injure himself during a seizure. Padding was placed on the rails and posts of his bunk beds and on the hard edges of his TV stand. Hardin also was provided with a helmet. However, they neglected to place padding or remove the clasp on his wall cabinet. After plaintiff injured himself on the clasp during a seizure on July 22, 2009, the clasp was supposed to be removed, but it was not and plaintiff injured himself on it a second time a few weeks later. The clasp was then removed the next day.

Although a reasonable jury could conclude that the clasp should have been removed after Hardin injured himself on it the first time, negligence or even gross negligence is not sufficient for liability. Defendants' actions must be intentional or criminally reckless. *Farmer*, 511 U.S. at 837. "Indeed, an officer who actually knew of a substantial risk to a detainee's safety is free from liability 'if [he] responded reasonably to the risk, even if the harm ultimately was not averted, because in that case it cannot be said that [he was] deliberately indifferent.'" *Fisher v. Lovejoy*, 414 F.3d 659, 662 (7th Cir. 2005) (quoting *Peate*, 294 F.3d at 882). "The test of deliberate indifference ensures that the mere failure of the prison official to choose the best course of action does not amount to a constitutional violation." *Id.*

In this case, a reasonable jury could not find that defendants did not act reasonably in failing to protect Hardin from harm. Over several months, prison officials took care to address the safety concerns that various hard surfaces posed to Hardin. The failure to address the metal clasp seems to have been an oversight. Further, this does not appear to be a situation in which a second injury would have been imminent. It is undisputed that during the first incident, Hardin was standing on a chair, even though he was on restrictions. Unlikely this would happen again. Helmet change. Because Hardin has failed to adduce sufficient evidence showing that any of the defendants acted with deliberate indifference to a serious risk of harm, defendants are entitled to summary judgment on the § 1983 claims against them.

IV. State Law Claims

A. Notice of Claim

Defendants assert that they are entitled to summary judgment on Hardin's state law negligence claims because he has failed to comply with Wisconsin's notice of claim statute, § 893.82. The statute requires a plaintiff to file a notice with the attorney general's office before commencing a civil action "against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties." Wis. Stat. § 893.82(3). The notice must be filed within 120 days of the event causing the alleged injury and must state "the time, date, location and the circumstances of the event giving rise to the claim for the injury" as well as "the names of persons involved, including the name of the state officer, employee or agent involved." *Id.* Strict compliance with the notice of claim statute is a condition precedent to bringing a civil action against a state officer or employee. *Kellner v. Christian*, 197 Wis. 2d 183, 195-96, 539 N.W.2d 685, 690 (1995); *see also* Wis. Stat. § 893.82(2m) ("No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section."); *Newkirk v. Wisconsin Dept. of Transportation*, 228 Wis. 2d 830, 837, 598 N.W.2d 610, 613 (Ct. App. 1999 ("strict compliance with § 893.82(5), stats., is required in all cases"); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984). If a plaintiff fails to comply strictly with the notice of claim requirements, the court must dismiss his or her claims, regardless whether the state employee had actual notice or was prejudiced by the lack of notice. *J.F. Ahern Co. v. Wisconsin State Bldg. Commission*, 114 Wis. 2d 69, 81, 336 N.W.2d 679, 685 (1983); *Carlson v. Pepin County*, 167 Wis. 2d 345, 357, 481 N.W.2d 498, 503 (Ct. App. 1992).

In their summary judgment brief, defendants note that Hardin failed to plead whether he had filed a notice of claim with respect to his state claims. In response, Hardin submitted a

copy of the notice of claim that he had filed on December 2, 2009. Dkt. 36, Exh. 23. Defendants contend that the notice has several deficiencies. First, they assert that only the claim form is sworn and not the attached typewritten sheets entitled "Statement of Claim." *See* § 895.82(5) (requiring sworn statement). However, a review of the claim form shows that Hardin wrote "See Attached Statement!!!" in the box entitled "Statement of Circumstances Giving Rise to the Claim." As such, Hardin has complied with the requirement that his statement be sworn.

Next defendants argue that because Hardin's notice of claim was filed more than 120 days after the July 22, 2009 incident, his notice was untimely with respect to the injury that he sustained as a result of that incident. I agree. Hardin's notice is timely only with respect to the incident that occurred on August 11, 2009.

Finally, defendants point out that the notice fails to identify the specific time that the August incident occurred; does not name defendants Schueler, Salinas, LaBelle and Rose; and does not provide an adequate statement of the circumstances giving rise to the claims against the remaining defendants. Although Hardin's notice does not identify exactly what time on August 11, 2009 that he fell on the metal clasp, he describes the incident in detail, providing defendants ample notice of the actions that he is challenging and enabling the state to investigate the claims. *See West v. Macht*, 235 F. Supp. 2d 966, 972 (E.D. Wis. 2002) (holding same with respect to notice of claim identifying a seclusion period continuing until "October 27 and possibly beyond"). However, Hardin's failure to identify defendants Schueler, Salinas, LaBelle and Rose is fatal to his claims against those individuals. Without that identifying information, it would be impossible for the state to adequately investigate Hardin's claims. Similarly, Hardin's notice is insufficient regarding the circumstances giving rise to his claims against defendants McCreedy

and Haen. In the notice, Hardin states only that "after the second injury on 8-11-09, HSU manager William McCreedy and Superintendent Haen had the [clasp] removed at approximately 10:00a.m." That statement fails to describe how McCreedy and Haen were negligent. In fact, the most plausible inference is that those individuals resolved the safety risk at issue. Therefore, defendants will be granted summary judgment with respect to the state negligence claims against defendants Schueler, Salinas, LaBelle, Rose, McCreedy and Haen.

B. Supplemental Jurisdiction

Because I am dismissing all of Hardin's federal claims, I must consider whether it would be proper to allow him to proceed on his remaining state law negligence claims against Berg and Ozanne. The only ground for jurisdiction would be supplemental jurisdiction under 28 U.S.C. § 1367. Under § 1367(c)(3), a federal district court may decline to exercise supplemental jurisdiction over state law claims once federal claims have been dismissed. "[T]he general rule is that, when all federal-law claims are dismissed before trial, the [supplemental] claims should be left to the state courts." *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994). If judicial economy, convenience, fairness and comity warrant retaining supplemental jurisdiction, a district court may nevertheless do so. *Hansen v. Board of Trustees*, 551 F.3d 599, 607 (7th Cir. 2008). For example, a court may retain jurisdiction when "substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort." *Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1347-48 (7th Cir. 1986). Also, the court may retain jurisdiction if the disposition of the state law claim is

clear. *Khan v. State Oil Co.*, 93 F.3d 1358, 1366 (7th Cir. 1996) (if correct disposition of supplemental claims is clear, considerations of economy favor retaining jurisdiction).

After reviewing the record before the court, I cannot say that the disposition of the state law claims is clear. Hardin has adduced evidence that Berg and Ozanne were aware of the risks posed by the metal clasp following the July 2009 incident and failed to act to correct the problem until after he injured himself a second time on the clasp in August 2009. The negligence standard is significantly easier to satisfy than the Eighth Amendment, *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006), so Hardin's failure to succeed on his Eighth Amendment claims does not necessarily doom his claims for negligence. Although I give no opinion on the likelihood that Hardin could succeed on his state law claims, I conclude that it would be inappropriate to resolve them in this court in light of § 1367(c)(3).

ORDER

IT IS ORDERED that:

(1) The motion for summary judgment filed by defendants (dkt. 22) is GRANTED and plaintiff Xavier Hardin's motion for summary judgment (dkt. 33) is DENIED with respect to Hardin's federal § 1983 claims and state law negligence claims against defendants McCreedy, Haen, Schueler, Salinas, LaBelle and Rose;

(2) The state law negligence claims against McCreedy, Haen, Schueler, Salinas, LaBelle and Rose are DISMISSED WITH PREJUDICE for failure to comply with Wis. Stat. § 893.82;

(3) Defendants' motion is DENIED and Hardin's motion is GRANTED with respect to the negligence claims against defendants Berg and Ozanne because I decline to exercise supplemental jurisdiction over those claims under 28 U.S.C. § 1367(c)(3). Those claims are DISMISSED WITHOUT PREJUDICE to Hardin refiling them in state court; and

(4) The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 25th day of January, 2011.

BY THE COURT:

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STEPHEN L. CROCKER
Magistrate Judge