IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRIAN PHEIL,

Plaintiff, OPINION and ORDER

v. 10-cv-555-bbc

SGT. BOWE, CO HAND, CO VARLEY,
CO RABUCK, SGT. ANDERSON,
HSU Manager and KIMBERLY RICHARDSON,

Defendants.

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In a previous order I severed this case, leaving the following claims in case no. 10-cv-555-bbc:

(a) defendants Bowe, Hand, Varley, Rabuck, Anderson and Richardson deprived plaintiff of various medications he needed after he was transferred to segregation, in violation of the Eighth Amendment;

(b) defendant Richardson had plaintiff transferred to a different prison because he complained about his medical care;

(c) defendant Richardson rejected plaintiff's grievances, in violation of his right to

have access to the courts.

Because plaintiff is a prisoner, I must screen the complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2). Plaintiff filed a supplement to the complaint, dkt. #5, which I will treat as part of the original complaint. Having reviewed the complaint and the supplement, I conclude that plaintiff may proceed with claim (b) and claim (a) with respect to all defendants, with the exception of defendant Anderson because neither the complaint nor the supplement to the complaint includes any allegations about this defendant other than that he is employed at Jackson Correctional Institution. In addition, plaintiff may not proceed on claim (c) because rejecting a grievance does not violate plaintiff's constitutional rights.

Plaintiff fairly alleges the following facts, which I have construed liberally as required by Haines v. Kerner, 404 U.S. 519, 521 (1972).

ALLEGATIONS OF FACT

Plaintiff Brian Pheil is incarcerated at the Jackson Correctional Institution. In July 2009, he was incarcerated at the Stanley Correctional Institution. He is prescribed medication for diabetes, depression and anxiety.

On July 26, 2009, plaintiff was transferred to temporary lock up without his

medication. (Plaintiff does not say why he was transferred.) Defendants Bowe and Hand, both correctional officers, were responsible for insuring that plaintiff's medications were sent to segregation. However, these defendants left plaintiff's medication with his personal property. Defendant Rabuck, a correctional officer, "was in control of" plaintiff's property while he was segregation, but he failed to send plaintiff's medication.

Plaintiff told defendant Varley, a correctional officer, that he needed his medication, especially the medication for his diabetes, but Varley said that the medication had not "been sent up from the unit yet." At 6:00 p.m. plaintiff was "feeling disoriented, sick and [experiencing] extreme anxiety about not having [his] medications." At 8:00 p.m. Varley gave plaintiff his anxiety and depression medication. When plaintiff told Varley he still needed medication for his diabetes, she said only that there were no other medications in the cart, "leaving [plaintiff] sick."

For the next 3 1/2 days plaintiff suffered from "symptoms of diabetes high blood sugar" as a result of not having his diabetes medication. When plaintiff received his medication, his blood sugar level was 470.

On August 18, plaintiff was transferred to temporary lock up again. Plaintiff was deprived of all of his medications for more than 24 hours, causing him "suffering and undue misery."

On August 28 or 29, 2009 plaintiff complained to defendant Kimberly Richardson,

a complaint examiner, about being without his medication in July. Richardson admitted that there was "a problem with sub par practices concerning inmates receiving their medications on time when being placed in (TLU) 'Temporary Lock Up.'" She later admitted that "she was all too familiar with medication not being given to inmates while housed in" temporary lock up. When plaintiff told her that he was going to file another grievance about the matter, she told him not to do so. Plaintiff was transferred to the Stanley Correctional Institution within the next two days. Richardson later rejected a grievance he filed as untimely.

Defendant Anderson is a sergeant at the Jackson prison.

OPINION

A. Eighth Amendment

I understand plaintiff to contend that defendants Bowe, Hand, Varley and Rabuck violated his right to medical care under the Eighth Amendment by failing to provide him wth medication for his diabetes for several days when he was in temporary lock up. A prison official may violate this right 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 considered 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 aware 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?

I conclude that plaintiff has alleged the minimum facts necessary to state a claim under the Eighth Amendment, if only barely. It is reasonable to infer at this stage that plaintiff had a serious medical need while he was deprived of his medication. It is a much closer question whether plaintiff has alleged that each defendant knew about that need and had the ability to correct it.

With respect to defendants Bowe, Hand and Rabuck, plaintiff alleges that they failed

in their duty to insure that plaintiff's medications were delivered to him after he was transferred to temporary lock up. Although it is not clear whether these defendants knew that plaintiff was not receiving needed medication, I will infer at this stage that Bowe, Hand and Rabuck had such knowledge. It may be that plaintiff cannot be any more specific in his complaint because he does not have access to the relevant information. Plaintiff cannot be required to plead facts he cannot obtain without discovery. Riley v. Vilsack, 665 F. Supp. 2d 994, 1005 (W.D. Wis. 2009) (pleading rules should be interpreted in light of fact that "only the defendant knows why he took a particular action and generally the plaintiff will not have access to a significant amount of circumstantial evidence proving his claim without discovery"). However, at summary judgment or trial, it will not be enough for plaintiff to prove that Bowe, Hand or Rabuck "should have known" that they were withholding needed medication; he must show they did know of a substantial risk to plaintiff's health. Grieveson v. Anderson, 538 F.3d 763, 775 (7th Cir. 2008) ("[T]he inquiry is not whether individual officers should have known about risks to [the prisoner's] safety, but rather whether they did know of such risks.")

Plaintiff alleges that he told defendant Varley that he did not have his medication. Although the extent to which plaintiff communicated the urgency of the situation is not clear, it is reasonable to infer from the allegations in the complaint that Varley knew that plaintiff had a serious medical need. It is also unclear what defendant Varley was authorized

to do when a prisoner complained that his prescribed medication was missing, but I will assume at this stage that Varley could have obtained plaintiff's medications or found another staff member who could. Again, these are matters that plaintiff will have to prove at summary judgment or trial.

Finally, plaintiff alleges that defendant Richardson failed to correct systemic problems with transferring medication to temporary lock up. Plaintiff does not allege that Richardson knew that plaintiff in particular was in need of care, but that is not required. It does not "matter whether a prisoner faces an excessive risk . . . for reasons personal to him or because all prisoners in his situation face such a risk." Farmer, 511 U.S. at 843. Thus, if defendant Richardson knew of repeated problems at the Jackson prison involving prisoners in segregation not receiving their medication *and* Richardson had the authority to take steps to correct the problem, she could be held liable. Accordingly, I will allow plaintiff to go forward on this claim. However, at summary judgment or trial, plaintiff will have to come forward with specific evidence showing that systemic problems existed at the Jackson prison regarding lapses in needed medication after a transfer to segregation, that Richardson knew about this problem before plaintiff was transferred to segregation and that it was feasible for her to prevent the lapse in medication that plaintiff experienced. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job. . . .That is equally true for an inmate complaint

examiner.")

B. Other Claims Against Defendant Richardson

Plaintiff raises two other claims against defendant Richardson. First, he alleges that she had him transferred to a different prison because he complained about his medical care. Prison officials may not discipline a prisoner or take other adverse action against him because he complained about his prison conditions. E.g., Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009). Because plaintiff is alleging that defendant Richardson had him transferred because he complained about his treatment in prison, plaintiff has satisfied this circuit's requirements for pleading a retaliation claim. Thomson v. Washington, 362 F.3d 969, 970-71 (7th Cir. 2004) (plaintiff may state claim for retaliation by identifying the protected conduct and the alleged acts of retaliation). Further, because plaintiff has alleged that Richardson had him transferred almost immediately after he complained, that is enough "factual context" to raise his claim above the level of mere speculation. Bell Atlantic, Inc. v. Twombly, 550 U.S. 540, 555 (2007). However, to prevail on this claim at summary judgment or trial, plaintiff will have to overcome at least three hurdles.

First, he will have to show that Richardson was personally involved in his transfer, that is, she actually made the decision to transfer him or influenced those who did. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (to be held liable under § 1983, official

"must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye"). Second, he will have to show that the transfer from Stanley to Jackson would deter a "person of ordinary firmness" from exercising his constitutional rights. Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989); see also Higgason v. Farley, 83 F.3d 807, 810 (7th Cir. 1996) (assuming that prisoner could bring claim for retaliatory transfer). Third, he will have to show that Richardson had him transferred because of his complaint of inadequate medical care.

Plaintiff's other claim is that defendant Richardson rejected a grievance wrongly. That allegation does not state a claim upon which relief may be granted. If Richardson erred in rejecting plaintiff's grievance, this may mean that plaintiff's claim will not be subject to dismissal for his failure to complete the grievance process, but it does not violate plaintiff's constitutional rights. Burks, 555 F.3d at 595-96 (complaint examiner's rejection of grievance cannot be ground for liability under Eighth Amendment unless she prevented prisoner from getting needed care); George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("a guard who rejects an administrative complaint about a completed act of misconduct does not" violate prisoner's constitutional rights).

C. Note on § 1915(g)

Under 28 U.S.C. § 1915(g), a prisoner may not proceed in forma pauperis when he

"has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." In other words, § 1915(g) is a "three strikes and you're out" provision. For many years, I interpreted § 1915(g) to mean that a prisoner did not receive a "strike" unless an entire lawsuit was dismissed for one of the reasons stated in the statute. For example, in Zach v. Stacey, 2007 WL 3165738, *4 (W.D. Wis. 2007), I stated:

> 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Because I am dismissing one of plaintiff's claims on the ground that this court lacks subject matter jurisdiction, and not for one of the reasons enumerated in 1915(g), a strike will not be recorded against him under § 1915(g).

See also Ferguson v. Pulver, 2006 WL 2289212, *4 (W.D. Wis. 2006); DeKalb v. State of Wisconsin, 2005 WL 2740926, *2 (W.D. Wis. 2005); Faulkner v. Litschner, 2004 WL 1688199, *2 (W.D. Wis. 2004); Keys v. Semler, 2001 WL 34381110, *3 (W.D. Wis. 2001).

In George v. Smith, 507 F.3d 605 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit seemed to take a different view: "When a prisoner does file a multi-claim, multi-defendant suit, the district court should evaluate each *claim* for the purpose of §

1915(g)." (emphasis added). After George, I assessed a strike in any prisoner case in which I dismissed one or more claims for failure to state a claim upon which relief may be granted. E.g., Uhde v. Wallace, 2008 WL 4643351, *9 (W.D. Wis. 2008) ("Under George v. Smith, 507 F.3d 605 (7th Cir. 2007), a strike is counted for the purpose of barring prisoners from seeking pauper status under 28 U.S.C. § 1915(g) for any case in which any claim is dismissed as legally meritless or failing to state a claim upon which relief may be granted."). Many other district courts in this circuit adopted the same approach. E.g., Jackson v. Gaetz, 2010 WL 3894010, *2 (S.D. Ill. 2010); Lemon v. Joyce, 2010 WL 3168311, 4-5 (N.D. Ill. 2010); Hughes v. Correctional Medical Services, 2008 WL 4099259, *1 (N.D. Ind. 2008); Tate v. Frank, 2007 WL 4561117, *1 (E.D. Wis. 2007).

On October 14, 2010, the Court of Appeals for the Seventh Circuit issued an opinion in Turley v. Gaetz, 09-3847, 2010 WL 4008727, in which the court stated that George did *not* require district courts to assess strikes anytime a single claim was dismissed. Rather, the court stated that "a strike is incurred under § 1915(g) when an inmate's case is dismissed *in its entirety* based on the grounds listed in § 1915(g)." However, the next day, the court withdrew the October 14 opinion and stated that the appeal "remains under advisement."

Until Turley is resolved, the rule in this circuit regarding assessment of strikes remains unclear. That could raise a problem in this case because I am dismissing several claims. Such a partial dismissal would require a strike under my interpretation of George, but not

under Turley. Because the law is unsettled, I will not assess a strike at this time. However, plaintiff is on notice that it may be necessary to assess a strike at a later date, depending on the resolution of Turley.

ORDER

IT IS ORDERED that

1. Plaintiff Brian Pheil is GRANTED leave to proceed on the following claims:

(a) defendants Bowe, Hand, Varley, Rabuck and Richardson deprived plaintiff of various medications he needed after he was transferred to segregation, in violation of the Eighth Amendment;

(b) defendant Richardson had plaintiff transferred to a different prison because he complained his medical care.

2. Plaintiff is DENIED leave to proceed against defendant Anderson and on his claim that defendant Richardson rejected his grievance wrongfully. The complaint is DISMISSED as to defendant Anderson.

3. 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 who 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.

4. 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 documents.

5. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 2d day of November, 2010.

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