IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PARKER OSTRANDER,

OPINION AND ORDER

Plaintiff,

11-cv-228-slc[1]

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,
GARY H. HAMBLIN, Secretary,
JAMES GREER, Health Services Bureau,
WILLIAM POLLARD, Warden, Green Bay Correctional Institution,
DOCTOR HEIDOR, Green Bay Correctional Institution,
CATHY JESS, Warden, Dodge Correctional Institution,
JOHN DOE, Nurse, Dodge Correctional Institution,
JOHN DOE, Unit-17, Sergeant, Dodge Correctional Institution
and JOHN DOE,

Defendants.

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Pro se plaintiff Parker Ostrander has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that he has received inadequate medical care while housed in Wisconsin prisons, in violation of the Eighth Amendment. Now that plaintiff has made an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1), I may screen his

[1] I am exercising jurisdiction over this case for the purpose of this order.

complaint to determine whether it states a claim upon which relief may be granted.

Having reviewed plaintiff's complaint, I conclude that he may proceed on a claim that defendant Heidor violated his Eighth Amendment rights by failing to discover his tumor. Plaintiff's complaint must be dismissed as to the remaining defendants because he does not allege enough facts about them to suggest that they violated his rights.

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, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

While plaintiff was housed at the Green Bay Correctional Institution in 2010, he complained "repeatedly" to defendant Heidor, a doctor at the prison, about "sever[e]" back pain. Heidor had x-rays taken of plaintiff, but they were "inconclusive," so he gave plaintiff a lower bunk restriction.

Two weeks later, on April 26, 2010, plaintiff was transferred to the Dodge Correctional Institution, where a sergeant "forced" plaintiff to take an upper bunk. Plaintiff fell off the bunk when trying to climb down it, but the "medical staff" did not help him.

On April 29, 2010 plaintiff "could not walk," but was forced to walk up a flight of stairs, then sit on a bus for four to five hours while being shackled and cuffed. (Plaintiff does

not say why he was moved and he does not identify anyone who required him to walk up stairs.) When he arrived at Stanley Correctional Institution, he was "suffering from blinding pain." Staff transported him to the hospital and then to the Marshfield Clinic, where he had X-rays, an MRI, a CT scan and a PET scan. The doctor at the clinic discovered that plaintiff had fractured his back and that he had "a large, cancerous tumor on his spine."

Over the next fifteen weeks, plaintiff received chemotherapy and radiation treatment. His cancer is now in remission.

OPINION

Medical claims brought by state prisoners are governed by the Eighth Amendment. 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 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).

Under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

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

A. Defendant Heidor

Although plaintiff does not identify explicitly in his complaint what he believes defendant Heidor did wrong, I understand his claim to be that Heidor violated his rights by failing to discover his tumor. A doctor's negligence is not enough to give rise to a claim under the Eighth Amendment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), so even if a better doctor would have found the tumor, it does not follow necessarily that Heidor violated plaintiff's constitutional rights. Rather, a prisoner must show that the doctor's medical judgment was "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).

In this case, plaintiff's allegations suggest negligence more than deliberate indifference. Plaintiff admits that defendant Heidor had x-rays taken and gave him a lower bunk restriction when the results of the x-rays were "inconclusive." These allegations certainly do not suggest intentional mistreatment. However, Heidor is not necessarily immune from liability simply because he took *some* action in response to plaintiff's complaints. Edwards v. Snyder, 478 F.3d 827, 831 (7th Cir. 2007) ("[A] plaintiffs receipt of some medical care does not automatically defeat a claim of deliberate indifference."). Plaintiff might be able to prove his claim if evidence exists that Heidor knew of a substantial risk that plaintiff had a serious, undiagnosed condition, but he refused to dig further. Because this is information that plaintiff might not have access to without discovery, I will allow him to proceed with this claim. Bausch v. Stryker Corp., 630 F.3d 546, 560 (7th Cir, 2010) (in determining whether plaintiff states claim upon which relief may be granted, court should not require plaintiff to plead facts that he "may not be able to determine without discovery"). However, at summary judgment or trial, plaintiff will have to prove each element of his claim with specific evidence.

B. John Doe, Unit-17, Sergeant

Plaintiff's only allegation against this defendant is that he "forced" plaintiff to take an upper bunk rather than a lower bunk. Presumably, plaintiff's claim is that the sergeant

caused plaintiff's fall off the top bunk. The problem with this claim is that plaintiff includes no allegations about what the sergeant knew about plaintiff's condition.

Prisoners do not have a right under the Eighth Amendment to the bunk of their choice. Even if I assume that plaintiff had a serious medical need that required him to sleep on a lower bunk, the sergeant cannot be held liable for disregarding that need if he was not aware of it. For example, plaintiff does not allege that he told the sergeant about his condition or that the sergeant was otherwise aware of it.

Accordingly, I must dismiss plaintiff's complaint as to his claim against the sergeant. If plaintiff has additional facts that would support a claim against the sergeant, he may file an amended complaint.

C. Remaining Defendants

Plaintiff does not discuss any of the remaining defendants in the body of his complaint. Most of these are high-ranking officials, but plaintiff is wrong if he believes that he may sue the warden or the Secretary of the Department of Corrections simply because they supervise the doctor and the sergeant or they are in some way responsible for providing health care to prisoners. The Court of Appeals for the Seventh Circuit explained this in a recent opinion:

The assumption underlying this choice of defendants—that anyone who knew

> or should have known of his [medical] condition, and everyone higher up the bureaucratic chain, must be liable—is a bad one. Section 1983 does not establish a system of vicarious responsibility. See Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.

Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009). In other words, if the defendant was not personally involved in the decisions that harmed plaintiff, that defendant cannot be held liable for violating plaintiff's constitutional rights. Therefore, if plaintiff wishes to sue any particular defendant, he must include allegations in his complaint regarding the actions of that defendant.

If plaintiff chooses to file an amended complaint, he should not include the Wisconsin Department of Corrections. Lawsuits like plaintiff's for constitutional violations must be brought under 42 U.S.C. § 1983, a statute that applies only to "persons." Because the Supreme Court has concluded that state agencies like the Wisconsin Department of Corrections are not "persons" within the meaning of the statute, the department may not be sued. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66 (1989).

ORDER

IT IS ORDERED that

1. Plaintiff Parker Ostrander is GRANTED leave to proceed on his claim that

defendant Heidor failed to discover the tumor in his spine, in violation of the Eighth Amendment.

2. Plaintiff's complaint is DISMISSED as to all other defendants.

3. If plaintiff wishes to file an amended complaint with additional allegations about any of the defendants I have dismissed, he may have until May 9, 2011, to do so.

4. Service of the complaint on defendant Heidor is STAYED until May 9, 2011. If plaintiff files an amended complaint by then, the court will screen the amended complaint and send it to the Attorney General for service on the defendant in accordance with an informal service agreement between the Wisconsin Department of Justice and this court. 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 defendant.

5. If plaintiff chooses not to file an amended complaint by May 9, the Department of Justice will have 40 days from May 9 to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant Heidor.

6. Plaintiff is obligated to pay the unpaid balance of his filing fee 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 fee has been paid in full.

Entered this 26th day of April, 2011.

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