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

ERIC HOLTON,

Plaintiff,

ORDER

v.

11-cv-246-slc

THE STATE OF WISCONSIN, GARY H. HAMBLIN, DAVID BURNETT, CATHY JESS, CATHERINE J. FARREY, WILLIAM POLLARD, MICHAEL THURMER, T.H. WILLIAMS, DR. HEINZL, RICHARD SCHNEITER, BURTON COX, RICHARD HEIDORN and DR. P. SUMNICHT,[1]

Defendants.

This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Eric Holton, a prisoner at the Waupun Correctional Institution, alleges that medical staff at several different prisons have failed to treat medical symptoms stemming from shotgun pellets lodged in his body and his compromised immune system, resulting in him suffering from a host of allergic reactions and causing him severe pain. Because plaintiff has struck out under 28 U.S.C. § 1915(g), he cannot obtain indigent status under § 1915 unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury.

In a December 29, 2011 order, I concluded that plaintiff's claims about his current treatment at the Waupun prison satisfied the imminent danger standard but that his claims about past treatment at previous prisons did not. I gave plaintiff a chance to choose to voluntarily to dismiss his claims for past harm, in which case the court would proceed to screen his imminent danger claims; or to submit the remainder of the filing fee for this case, in which case the court would screen both his imminent danger claims and his claims for past harm.

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[1] I have amended the caption to reflect plaintiff's corrected spelling of defendant Sumnicht's last name.

Plaintiff has responded to the December 29, 2011 order, arguing that he should able allowed to proceed on all of his claims because his treatment at each prison is the result of a custom or practice by medical staff employed by the Wisconsin Department of Corrections, and that even if it is not, the imminent danger provision of § 1915 does not explicitly forbid allowing an inmate to proceed with non-imminent-danger claims if he is allowed to proceed on at least one imminent danger claim.

Treating plaintiff's response as a motion for reconsideration, I will deny the motion because plaintiff's allegations regarding custom or practice are conclusory and unsupported by anything beyond speculation. Nor does plaintiff persuade me that this court's policy of splitting imminent danger claims from non-imminent danger claims is incorrect in light of § 1915's clear purpose to limit a prisoner's ability to litigate *in forma pauperis* once he has accrued three strikes. Reading § 1915 otherwise would provide a plaintiff who happens to have one imminent danger claim to lard his complaint with other unrelated claims—the very claims that he would be unable to bring if they existed as a stand-alone complaint.

In the alternative, plaintiff states that he is willing to have his claims for past harm dismissed so that he can pursue his imminent danger claims. Accordingly, all of his claims for past harm will be dismissed without prejudice. Because defendants Cathy Jess, Catherine Farrey, Richard Schneiter, Burton Cox, T.H. Willliams, Dr. Heinzl and Richard Heidorn are part of plaintiff's past claims, they will be dismissed from the case as well. After screening plaintiff's claims of present harm, I conclude that he may proceed on Eighth Amendment deliberate indifference and medical negligence claims against defendant Sumnicht, but will deny him leave to proceed on the rest of his claims.

ALLEGATIONS OF FACT

Since the court's December 29, 2011 order, plaintiff has modified his complaint. He first filed a proposed amended complaint, dkt. 17, which contains slightly more detail but does not radically change plaintiff's factual allegations. Under Fed. R. Civ. P. 15, plaintiff has the right to amend his complaint once as a matter of course at this stage in the proceedings, so I will treat the amended complaint as the operative pleading in this case. He has also filed a motion for leave to amend the section of his complaint referring to his current treatment at the Waupun Correctional Institution, dkt. 19. I understand plaintiff's new allegations about the Waupun prison to supersede that section of allegations in his first amended complaint and will grant plaintiff's request to amend that portion of his complaint.

Plaintiff alleges that after he was transferred to the Waupun Correctional Institution in May 2010, he complained about symptoms such as swollen lymph nodes, night sweats, difficulty breathing, flu-like symptoms and chest, stomach and back pain. He informed defendant Dr. Sumnicht of his entire medical history, including that doctors in the Montana prison system concluded that plaintiff's allergy-like symptoms were being caused by the shotgun pellets lodged in his body. Plaintiff asked Sumnicht to have the pellets removed and to be seen by an outside specialist. Sumnicht told plaintiff that he "would have to be half dead" before he would refer plaintiff to a specialist, and that a specialist would not be covered by the insurance budget.

In December 2011, defendant Sumnicht told plaintiff that he had previously been misdiagnosed with tuberculosis and instead should have been diagnosed with "MAC disease" (which I understand to be mycobacterium avium complex lung disease) and adenopathy. Even with this new diagnosis, Sumnicht only provided plaintiff with palliative care rather than

attempting to cure his condition. (Plaintiff states that Sumnicht told him that he would be seen by a pulmonary specialist, but apparently this has not happened.)

DISCUSSION

In screening plaintiff's claims, the court must construe the complaint liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, I must 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(e)(2)(B).

I understand plaintiff to be attempting to bring several different types of claims against the remaining defendants, the state of Wisconsin, Gary Hamblin (the secretary of the DOC), David Burnett (the "statewide medical director" for the DOC), William Pollard (warden of the Waupun Correctional Institution, Michael Thurmer (former warden of the Waupun prison) and Dr. Sumnicht (a physician at the Waupun prison). He sues defendants Burnett, Pollard, Thurmer and Sumnicht in their individual capacities as well as Hamblin and Burnett in their official capacities.

I. Eighth Amendment Deliberate Indifference

Plaintiff's first claim is that his treatment at the Waupun prison violated his Eighth Amendment right against cruel and unusual punishment. A prison official may violate a prisoner's right to adequate medical care under the Eighth Amendment 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).

Based on plaintiff's allegations, at this point I conclude that he has stated a claim against defendant Sumnicht for failing to adequately treat plaintiff's current symptoms or attempt to cure his condition. Also, plaintiff may proceed against defendants Hamblin and Burnett to the extent he seeks injunctive relief against these defendants in their official capacities, if only to ensure that defendants with the power to enforce an injunction stay in the case.

However, plaintiff may not proceed on damages claims against the state of Wisconsin or Hamblin and Burnett in their official capacities because these parties are not "persons" capable of being sued under 42 U.S.C. § 1983. *Will v. Michigan Dept.of State Police*, 491 U.S. 58 (1989). Nor may plaintiff proceed against defendants Pollard, Thurmer and Burnett in their individual capacities because plaintiff does not include any allegations suggesting that they made decisions regarding plaintiff's care; liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003).

II. State Law Medical Malpractice

Plaintiff also asserts that he has state law claims, which I interpret as negligence claims. 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). Plaintiff's negligence claims are part of the same case or controversy as his federal claims for violation of his Eighth Amendment rights.

To prevail on a claim for negligence or medical malpractice in Wisconsin, plaintiff must prove defendants breached their duty of care to him and that he suffered injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Considering plaintiff's allegations that defendant Sumnicht repeatedly failed to treat his illnesses, it is possible to infer at this stage that he was negligent. Plaintiff should be aware that to establish a prima facie claim under state law for medical negligence against Sumnicht, he must show that Sumnicht failed to use the required degree of skill exercised by an average physician. Wis J-I Civil 1023. Unless the situation is one in which common knowledge affords a basis for finding negligence, medical malpractice cases require expert testimony to establish the standard of care. *Carney-Hayes v. Northwest Wisconsin Home Care, Inc.*, 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524.

Plaintiff cannot maintain a malpractice or negligence claim against the state of Wisconsin because it has not waived sovereign immunity over tort claims. *Brown v. State*, 230 Wis. 2d 355, 363, 602 N.W.2d 79, 84 (Ct. App.1999). Plaintiff does not provide any concrete allegations concerning defendants Hamblin, Burnett, Pollard or Thurmer. Instead, he makes conclusory allegations that Sumnicht was not trained properly or that there was a state custom of denying prisoners medical care, but these bare assertions do not sufficiently "state a claim to relief that

is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Accordingly, plaintiff's malpractice or negligence claims will be dismissed as to all defendants but Sumnicht.

III. Other State Law Claims

I understand plaintiff to be attempting to bring several other state law claims. Plaintiff states that defendants have acted "contrary to all Wisconsin health services, policies and procedures," have violated Wis. Stat. § 302.08, which states, "The wardens and the superintendents and all prison officials shall uniformly treat the inmates with kindness. There shall be no corporal or other painful and unusual punishment inflicted upon inmates," and have violated Article 1, Section 6 of the Wisconsin Constitution, which states that "cruel and unusual punishments [shall not be] inflicted."

However, none of these provisions is the source of any claim. Plaintiff cannot sue under Wis. Stat. § 302.08 because it does not create a private right of action. *See Grube v. Daun*, 210 Wis. 2d 681, 689, 563 N.W.2d 523, 526 (1997) (noting that a statute will be deemed to create a private right of action only where "there is a clear indication of the legislature's intent to create such a right"). Nor does the state constitution authorize suits for money damages, except in the context of a takings claim. *W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787, 792-93 (1990) (holding that plaintiff could sue state for money damages arising from unconstitutional taking of property because article I, section 13 of the Wisconsin Constitution requires that state provide "just compensation" when property is taken); *Jackson v. Gerl*, 2008 WL 753919, *6 (W.D. Wis. 2008) ("Other than one very limited exception inapplicable to this case, I am not aware of any state law provision that allows an individual to sue state officials for

money damages arising from a violation of the Wisconsin Constitution.") Plaintiff does not provide any other specific provision allowing for recovery under Wisconsin law, and I am unaware of any such provision. With respect to injunctive relief, sovereign immunity principles prohibit federal courts from enjoining state officials under state law or procedures. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Therefore plaintiff's claims regarding Wisconsin statutory or constitutional provisions must be dismissed.

PRELIMINARY INJUNCTIVE RELIEF

Plaintiff's complaint includes a request for preliminary injunctive relief. Under this court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendants a brief supporting his claim, proposed findings of fact and any evidence he has to support his request for relief. He may have until September 13, 2012 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Despite the fact that I have allowed plaintiff to proceed on claims against defendant Sumnicht, I wish to make it clear to him that the bar is significantly higher for ultimately prevailing on his claims than it is on his request for leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, explaining how Sumnicht violated his rights. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that irreparable harm will result if the requested relief is denied. If he makes both showings, the court will move on to consider the balance of hardships between plaintiff and defendant Sumnicht and whether an injunction would be in the public interest,

considering all four factors under a "sliding scale" approach. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997).

Finally, I warn plaintiff about the ramifications facing litigants who abuse the imminent danger exception to their three-strike status. The only reason that plaintiff has been allowed to proceed *in forma pauperis* in this case is that his allegations suggest that he was under imminent danger of serious physical injury at the time that he filed his complaint. The "imminent danger" exception under 28 U.S.C. § 1915(g) is available "for genuine emergencies," where "time is pressing" and "a threat . . . is real and proximate." *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002). In certain cases it may become clear from the preliminary injunction proceedings that a plaintiff who has already received three strikes under § 1915(g) for bringing frivolous claims has exaggerated or even fabricated the existence of a genuine emergency in order to circumvent the three-strikes bar. In such a case, this court may revoke its grant of leave to proceed *in forma pauperis* once it is clear that plaintiff was never in imminent danger of serious physical harm. Plaintiff would then be forced to pay the full $350 filing fee or have his case dismissed.

MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff has filed a motion for appointment of counsel. Federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. In considering whether to appoint counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). Plaintiff states that he and a friend have contacted numerous lawyers but have not been able to hire counsel. I conclude that plaintiff has made a reasonable effort to find a lawyer.

This court would appoint counsel in virtually every prisoner lawsuit if it had enough lawyers, but hundreds of new prisoner lawsuits get filed in this court every year and only about 10 attorneys are willing to accept pro bono appointments. This means that the court must determine in each case whether appointment of counsel is necessary and appropriate. *Pruitt v. Mote*, 503 F. 3d 657, 654, 656 (7th Cir. 2007). This requires the court to determine from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Id*. at 655. It may well be that as the case progresses, it will be come clear that the medical issues in this case are too complex for plaintiff to litigate himself, but at this very early stage of the proceedings, the court does not have enough information to determine whether appointment of counsel is warranted in this case. Therefore, I will deny plaintiff's motion without prejudice to him renewing his motion should he run into difficulties in litigating the case himself.

To help plaintiff represent himself effectively, this court instructs pro se litigants at the preliminary pretrial conference about how to use the discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. Plaintiff's preliminary pretrial conference will be scheduled once the court receives an answer from defendants. At the conference, I will set the schedule for the case, explain generally the way we handle prisoner lawsuits in this court, then answer any procedural questions plaintiff may have. After the conference, we will mail to plaintiff a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

ORDER

It is ORDERED that:

(1) Plaintiff Eric Holton's motion for reconsideration of the court's December 29, 2011 order, dkt. 16, is DENIED.

(2) Plaintiff's first amended complaint, dkt. 17, will be treated as the operative complaint in this action. Plaintiff's motion for leave to supplement the operative pleading with further allegations about his treatment at the Waupun Correctional Institution, dkt. 19, is GRANTED.

(3) Plaintiff is GRANTED leave to proceed on the following claims:

(a) an Eighth Amendment claim for damages against defendant P. Sumnicht for failing to adequately treat plaintiff's illnesses, as well as a claim for injunctive relief against defendants Hamblin and Burnett in their official capacities.

(b) a state law medical negligence claim against defendant Sumnicht.

(4) Plaintiff is DENIED leave to proceed on the remainder of his claims for present harm.

(5) Plaintiff's non-imminent danger claims are DISMISSED without prejudice to plaintiff bringing those claims in a new lawsuit.

(6) Defendants Cathy Jess, Catherine Farrey, Richard Schneiter, Burton Cox, T.H. Willliams, Dr. Heinzl, Richard Heidorn, William Pollard, Michael Thurmer and the state of Wisconsin are DISMISSED from the case.

(7) Plaintiff may have until September 13, 2012, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendants may have until the date their answer is due to file materials in response.

(8) Plaintiff's motion for appointment of counsel, dkt. 18, is DENIED without prejudice.

(9) For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

(10) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

(11) 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). This court will notify the warden at plaintiff's institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

(12) 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 state 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 for the defendants on whose behalf it accepts service. Although it is usual for defendants to have 40 days under this agreement to file an answer, in light of the urgency of plaintiff's allegations, I would expect that every effort will be made to file the answer in advance of that deadline.

Entered this 30th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge