IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAYNE J. HART, JR.,

Plaintiff,

v.

WARDEN MICHAEL S. THURMAN,
SGT KIMBALL, MARY GORSEK,
P. SUMMIT, and JOHN and JANE DOE 1-50,

Defendants.

ORDER

11-cv-604-slc[1]

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In this proposed civil action, plaintiff Wayne Hart, Jr. contends that several defendants employed at the Columbia Correctional Institution violated his constitutional rights by failing to provide adequate medical care for his abdominal hernia and by withholding pain medications following his hernia surgery. He is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his proposed amended complaint and dismiss any portion that is legally

[1] For the purpose of issuing this order, I am assuming jurisdiction over this case.

frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. 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).

After reviewing the complaint, I conclude that plaintiff may proceed on his claims that defendants Sergeant Kimball, and Jane and John Doe violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment. However, I must dismiss his claims against defendants Mary Gorsek and P. Summit because his complaint contains no allegations regarding these defendants.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Wayne Hart is an inmate at the Waupun Correctional Institution. On July 26, 2010, he informed defendant Sergeant Kimball that he needed to see her about a medical emergency. Kimball was the duty sergeant at the time. Plaintiff was escorted from his cell to the duty sergeant's desk, where plaintiff told Kimball that he felt ill and had been vomiting up his meals. When Kimball denied his request to visit the Health Services Unit, he asked her to send the duty nurse to his cell and lifted up his shirt to show her that his bellybutton was protruding from his abdomen. After looking at plaintiff's abdomen, Kimball

laughed, stated that he had "the flu" and instructed him "to go back upstairs and lock in." (Plaintiff's use of quotations is unclear, so it is not exactly clear what he alleges Kimball actually said.) Another inmate, Arthur L. Foster, overheard this discussion between plaintiff and defendant Kimball.

According to plaintiff, Kimball worked double-shifts for the next five and one-half days. On July 31, 2010, Kimball was finally relieved as duty sergeant by Sergeant Wenzel. At lunch that day, inmate Patterson noticed plaintiff was not looking well and suggested he go see Wenzel. Unable to walk without assistance, plaintiff needed Patterson's help to walk to Wenzel's desk. Plaintiff informed Wenzel about the events of the past week and showed him his protruding bellybutton. Wenzel said that he was definitely not suffering from the flu and sent plaintiff to the Health Services Unit.

At the Health Services Unit, duty nurse Mary-Anne Slinger inspected plaintiff's abdomen. As soon as he lifted his shirt, she asked "How long have you been like this?" After he told her about the events of the week, she said this was an "umbilical hernia," not the flu, and he should have been sent to the Health Services Unit immediately. Slinger called the emergency room of the Waupun Memorial Hospital and informed plaintiff that he would be going to see the doctor at the hospital, where he would likely need surgery.

After arriving at the emergency room, plaintiff was examined by staff and Dr. Mikkelsen. Mikkelsen determined that plaintiff needed surgery, but the surgery was

postponed until the next morning because no operating rooms were available. On August 1, 2010, Dr. Mikkelsen performed surgery on plaintiff to repair the hernia. After the surgery, Dr. Mikkelsen prescribed ten days of pain medication and light duty and told plaintiff that he should receive meals in his cell because of the soreness from his surgery.

Plaintiff was discharged from the hospital around noon the next day. When he returned to the prison, the correctional officers denied his request to eat in his cell and told him that he was required to eat with his tier at meal time. They also insisted that he carry his own meal tray and drink, despite his soreness from the operation. That night, he asked duty sergeant John Doe (the complaint identifies this person only as "duty Sgt.") for his pain medication, but was told there was none. Plaintiff alleges that his pain medication was on hand. The next morning, duty sergeant Jane Doe (again unnamed) called him over to her desk to ask what was wrong, and he replied that he was sore from the surgery and lifted his shirt to show his "bandaged-scar." When he asked her whether the pain medication had arrived, he was told again that it had not. The pain medication finally "arrived" on August 4, 2010, three days after the surgery. On August 7, 2010, the pain medication was cut off for no apparent reason.

DISCUSSION

A. Medical Care

I interpret plaintiff's complaint as alleging that his Eight Amendment right to medical care were violated in three ways: (1) by defendant Kimball when she failed to send plaintiff to the Health Services Unit to obtain adequate treatment for his hernia; (2) by defendants John and Jane Doe when they withheld his pain medication after the surgery; and (3) by several correctional officers when they ordered him to complete ordinary meal activities despite the pain from his surgery. To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A condition qualifies as a "serious medical need" if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994). In addition, a doctor's written prescription for a prescription pain killer is evidence of a serious medical need, Cooper, 97 F.3d. at 917, so withholding a prisoner's pain medication may violate his or her constitutional rights by causing gratuitous pain. Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999).

A prison official shows "deliberate indifference" if he or she is aware that a prisoner needs medical treatment but disregards 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) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

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

Plaintiff's abdominal hernia was a serious medical need that required treatment, as indicated by the responses of Slinger and Mikkelsen. Plaintiff alleges that he told defendant Kimball that he was feeling ill and vomiting and showed her the visible hernia, but she refused to call a nurse or permit him to visit the Health Services Unit. These allegations are sufficient to imply that defendant Kimball knew that plaintiff needed medical care and did not take reasonable measures to address his needs. Thus, plaintiff may proceed on his Eighth Amendment health care claim against defendant Kimball.

In addition, plaintiff alleges that several correctional officers withheld his prescription pain medication after the surgery. He informed two duty sergeants that he was in pain, but they did not provide the medication until three days after the surgery and then stopped providing it three days before the prescription expired. At this stage in the proceedings, I

must accept as true petitioner's allegations that the medication was available and there was no reason to withdraw the medication. Although the complaint is unclear about precisely whom the defendant intends to sue on this second theory, I will construe the complaint as alleging that duty sergeants Jane and John Doe knew about his pain yet withheld his prescription pain medication, causing him unnecessary pain. Thus, plaintiff may proceed on his Eighth Amendment health care claim against defendants Jane and John Doe.

Because Thurman is the warden at the prison where the Doe defendants are employed, petitioner will also be allowed to proceed against Thurman on this claim for the sole purpose of discovering the identities of the two Doe defendants. Once petitioner learns the names of the defendants responsible for withholding his pain medication, he must amend his complaint to name those individuals as defendants. After plaintiff files his supplementary material (as discussed below), Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff should amend his complaint to include the unnamed defendants.

The complaint also names as defendants Health Services Unit Staff Mary Gorsek and P. Summit. However, the complaint never mentions these individuals by name, and it contains no allegations that suggest anyone in the Health Services Unit was deliberately

indifferent to plaintiff's medical care. Accordingly, defendants Mary Gorsek and P. Summit will be dismissed without prejudice.

Finally, although plaintiff's complaint is generally clear, the complaint suffers from two problems under Federal Rules of Civil Procedure, Rule 8. A claim for relief must include (1) "a short and plain statement of the claim showing that the pleader is entitled to relief" and (2) "a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8.

First, the complaint alleges that correctional officers required plaintiff to eat meals with his tier and to carry his own tray, despite knowing about the pain from his surgery and his doctor's order that he should receive meals in his cell. These allegations might be sufficient to state a claim, but the complaint does not identify the individuals who took these alleged actions. If plaintiff desires to proceed with this part of his lawsuit, he must supplement his complaint to identify the individuals who knew about his pain or about the doctor's orders and, nevertheless, ordered him to perform the above actions. If plaintiff does not know the names of the correctional officers, he may identify them as Jane or John Doe as long as he describes each person's conduct and the basis for the defendant's knowledge.

Second, the complaint does not explain what relief plaintiff is seeking. A plaintiff may request monetary damages for violations of his rights, a court order to prevent ongoing or future violations or both. A demand for relief is a necessary element of any lawsuit;

accordingly, the plaintiff must supplement his complaint to identify the type and amount of relief he is seeking. If plaintiff fails to supplement his complaint to include a demand for relief, the entire complaint will be dismissed.

B. Appointment of Counsel

Plaintiff has also filed a motion for appointment of counsel. Plaintiff contends that he has limited knowledge of the law and limited access to the prison law library, that he cannot uncover the relevant evidence without aid and that the issues are too complex for him to argue on his own.

Under 28 U.S.C. § 1915(e)(1), "[t]he court may request an attorney to represent any person unable to afford counsel." However, litigants in civil cases do not have a constitutional right to a lawyer; district courts have discretion to determine whether appointment of counsel is appropriate in a particular case. Pruitt v. Mote, 503 F.3d 647, 654, 656 (7th Cir. 2007). In resolving a motion for appointment of counsel, a district court must consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself. Id. at 654-55.

As an initial matter, a plaintiff asking for appointed counsel must make a showing that he has attempted to obtain a lawyer on his own. Jackson v. County of McLean, 953 F.2d 1070, 1073 (7th Cir. 1992). Plaintiff has submitted the names and addresses for

numerous lawyers who either did not respond to his requests or declined to represent him in this case. Although plaintiff has submitted proof that he tried to find a lawyer on his own and failed, I must deny his motion for appointment of counsel.

In his motion, plaintiff says that he requires the assistance of a lawyer because he has limited knowledge of the law and limited access to the law library. These are not good reasons to appoint counsel in this case; these handicaps are universal among pro se litigants. To help plaintiff in this regard, the court will allow petitioner to ask any questions he has about court procedure and the rules of civil procedure at the preliminary pretrial conference held in this case. In addition, he will be provided with 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.

With respect to the complexity of the case, there is nothing in the record to suggest that this case is factually or legally difficult. Plaintiff's claim is a straightforward Eighth Amendment claim that he was denied medical care and pain medication by the defendants. The law governing this type of claim has been settled since Estelle v. Gamble, 429 U.S. 97 (1976) and is described in this opinion above.

Moreover, the facts about plaintiff's claim will be easy for him to obtain on his own. He should be able to obtain the medical records regarding his hernia surgery and to determine whether defendant Kimball was aware of his illness. He should also be able to

determine whether he had a prescription for pain medication and whether defendants Jane and John Doe knew about his prescription and deliberately withheld available medication, causing him unnecessary pain. I am confident that if evidence exists that defendants denied plaintiff pain medication, plaintiff will be able to obtain it on his own. Accordingly, plaintiff Hart's motion for appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Wayne J. Hart, Jr. is GRANTED leave to proceed on his claim that defendants Sergeant Kimball, Jane Doe and John Doe violated his rights under the Eighth Amendment by failing to provide him adequate medical health care. Petitioner may proceed against defendant Thurman for the purpose of discovering the identities of the responsible prison officials;

2. Plaintiff is DENIED leave to proceed on his claim that defendants Mary Gorsek and P. Summit violated his rights under the Eighth Amendment by failing to provide him adequate medical health care.

3. Plaintiff has until December 16, 2011 to file a supplement to his complaint to indicate the kind and amount of relief he requests and to identify the individuals who knew about his pain but required him to perform ordinary meal activities. If plaintiff fails to

identify the kind and amount of relief he demands, the complaint will be dismissed without prejudice.

4. Plaintiff's motion for appointment of counsel (dkt.# 3) is DENIED.

Entered this 2d day of December, 2011.

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