IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY PORTER,

OPINION AND ORDER

Plaintiff,

11-cv-749-bbc

v.

CYNTHIA M. THORPE, LORI ASLUM, DR. DALIA D. SULIENE, STEVE HELGERSON, DARCI BURRESON and JENNIFER NICKEL,

Defendants.

- -

In this proposed civil action under 42 U.S.C. § 1983, plaintiff Anthony Porter alleges that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by exhibiting deliberate indifference to his serious medical need. Specifically, plaintiff alleges that defendants failed to provide adequate medical treatment for an infection of his eyes and ears. Plaintiff is proceeding under the in forma pauperis statute and has made an initial partial payment as required by 28 U.S.C. § 1915(b)(1). In an order dated February 2, 2012, I dismissed plaintiff's complaint without prejudice under Fed. R. Civ. P. 8, and plaintiff has now filed a proposed amended complaint. Dkt. #13.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his amended complaint and dismiss any portion that is legally 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 amended complaint, I conclude that plaintiff may proceed on his claim under the Eighth Amendment against defendants Dalia D. Suliene, Steve Helgersen, Jennifer Nickel and Cynthia Thorpe. However, his allegations fail to state a claim against defendants Lori Aslum and Darci Burreson, so I will dismiss these defendants.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Anthony Porter is incarcerated at the Waupun Correctional Institution located in Waupun, Wisconsin. At the times relevant to this lawsuit, he was incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. All defendants are employees of the Department of Corrections. Defendant Cynitha M. Thorpe is the Bureau of Health Services regional nursing coordinator and a medical complaint reviewer. Defendant Lori Aslum is the health service unit manager at the Columbia Correctional Institution. Defendant Dr. Dahlia Suliene is a physician at the Columbia Correctional Institution, and defendants Steven Helgersen, Darci Burreson and Jennifer Nickel are registered nurses at the institution.

In January 2010, plaintiff was infected with medically resistant staphylococus aureus in his eyes and ears. The infection developed into painful, open ulcers in his ear that drained

visible fluid. After two health services requests, plaintiff was seen by medical staff. Between February 2, 2010 and May 6, 2010, plaintiff was seen by staff at the health services unit but received no treatment.

On May 10, 2010, Thomas Jackson sent a fax from Divine Savior Healthcare to defendant Nickel, informing her that plaintiff carried the medically resistant infection. Plaintiff was not informed of this information until two weeks later when he met with defendant Suliene. Plaintiff was not given the "the basic antibiotics" to treat his infection.

On June 8, 2010, plaintiff's gastroenterology nurse practitioner from the University of Wisconsin hospital in Madison, Wisconsin, sent defendant Suliene a fax notifying her that plaintiff had medically resistant staphylococus aureus. Suliene ignored the fax. She did not issue plaintiff any antibiotics to treat his infection. She also "refused to implement the contagious infection protocol to evaluate and quarantine Porter, for the safety of the" other inmates and employees.

On June 15, 2010, defendants Suliene and Helgersen finally swabbed and cultured the drainage from plaintiff's ear.

Defendants Thorpe, Aslum, Helgerson, Burreson and Nickel were also aware of plaintiff's infection because he filed health service requests, sent letters and filed institutional complaints However, they failed to treat him or recommend that others treat him.

On July 21, 2010, plaintiff's infection had progressed to the point that he was "in distress and rushed to the [University of Wisconsin] Hospital's emergency room near death." He was hospitalized from July 21 until July 28 and received intravenous antibiotics.

Last, plaintiff alleges generally that the defendants have "failed to implement a medical evaluation process to screen serious medical needs," such as by checking on inmates or doing rounds on units.

OPINION

I. EIGHTH AMENDMENT CLAIM

For a prisoner to state a claim that the denial of medical care constituted cruel and unusual punishment under the Eighth Amendment, the 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 medical need may be serious 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). "Deliberate indifference" means that officials were aware that the prisoner needed medical treatment, but disregarded 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 allegations suggest that his infection is a serious medical need that required treatment. In addition, his allegations would allow an inference that defendants Suliene, Helgersen and Nickel were aware of his infection and his need for treatment yet failed to take reasonable measures to provide it. Defendant Nickel received a fax informing her of plaintiff's infection in early May but took no action for two weeks. Defendant Dr. Suliene knew about plaintiff's infection in early May and was reminded again in early June but did not provide plaintiff appropriate antibiotics. Defendant Helgersen found out about plaintiff's infection from the culture on June 15 and yet took no action. As the medical complaint reviewer, defendant Thorpe reviewed plaintiff's health services requests but took no action to provide medical care.

Plaintiff should know that at future stages of the litigation, he will be required to prove that defendants' treatment "substantially departed from professional judgment." Gonzalez v. Feinerman, 663 F.3d 311, 311 (7th Cir. 2011). It is not enough that plaintiff was dissatisfied with defendant's course of treatment or that defendants were negligent or even grossly negligent. Johnson v. Doughty, 433 F.3d 1001, 1012-1013 (7th Cir. 2006). Plaintiff must show that the treatment was so far afield of accepted professional standards as to imply that it was not actually based on a medical judgment. Estate of Cole v. Fromm, 94 F.3d 254, 262 (7th Cir. 1996).

Plaintiff may meet this standard by proving that defendants significantly delayed in

providing effective medical treatment, especially if the delay results in prolonged and unnecessary pain. Grieveson v. Anderson, 538 F.3d 763, 779 (7th Cir. 2008), citing Gutierrez v. Peters, 111 F.3d 1364, 1371-72 (7th Cir. 1997) (collecting cases). He may also meet this standard by proving that a medical professional adopted or persisted in a course of treatment that he or she knew to be ineffective. Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011). A medical professional may consider the "cost of treatment alternatives in determining what constitutes adequate, minimum-level medical care, but medical personnel cannot simply resort to an easier course of treatment that they know is ineffective." Johnson, 433 F.3d at 1013 (citations omitted). Plaintiff should also know that he may only assert violations of his own constitutional rights. His allegations that defendants did not implement disease protocols to protect others are not relevant to his claims.

With respect to defendant Aslum, plaintiff alleges only that she is the health services unit manager, she knew about his condition because of his complaints and she did not provide medical treatment. These allegations are insufficient to state a claim against defendant Aslum. A defendant is liable under § 1983 only if he or she personally violates the defendant's rights. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). Under § 1983, a supervisor is not liable for her subordinates' conduct simply because the subordinates were acting within the scope of their employment, Monell v. Dept. of Social Services of City of New York, 436 U.S. 658, 691 (1978), or even because her supervision was negligent or grossly negligent. Jones v. Chicago, 856 F.2d 985, 992 (7th Cir. Ill. 1988). A supervisor is liable only if she was "personally involved" in the unconstitutional acts or she

knew about the unconstitutional acts and "facilitated, approved, condoned, or turned a blind eye to [them]." Trentadue v. Redmon, 619 F.3d 648, 652 (7th Cir. 2010). Because plaintiff's does not allege facts to support the inference that defendant Aslum affirmatively approved or condoned violations by the other defendants, I will dismiss her from the case.

The amended complaint contains no allegations that defendants Burreson personally took any actions that violated plaintiff's constitutional rights. Therefore, I will also dismiss defendants Burreson from the case.

II. APPOINTMENT OF COUNSEL

Plaintiff has filed a motion for appointment of counsel. Dkt. #14. In deciding 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). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him and who turned him down.

Plaintiff has not yet complied with this preliminary requirement. He submitted three letters that he sent but only two replies from attorneys declining to take his case. Dkt. #18. One of those letters is from the Federal Defender Services of Wisconsin, Inc., which performs only criminal defense work and does not accept civil lawsuits like plaintiff's § 1983

claim. If plaintiff files another motion for appointment of counsel, he will need to show either by a letter or by a sworn declaration that he was turned down by two additional lawyers who might have taken his case.

The next question is whether plaintiff meets the legal standard for appointment of counsel. Litigants in civil cases do not have a constitutional right to a lawyer; federal judges 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). They exercise that discretion by determining from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Id. at 655.

Plaintiff states that he suffers from post traumatic stress disorder that limits his ability to concentrate and comprehend what he reads. Plaintiff says that he has no knowledge of the law or the methods of legal research and limited law library access. Plaintiff believes that a lawyer would be able to better secure expert testimony, present the evidence and depose and cross examine witnesses.

Although there is no doubt that a lawyer would be able to help plaintiff, at this stage of the proceedings it is simply too early to tell if plaintiff lacks the ability to litigate his case. Plaintiff may lack legal knowledge or skills, but this handicap is almost universal among pro se litigants. His amended complaint was clear and appropriately directed. Nothing in the record suggests that he is incapable of gathering and presenting evidence to prove his claims. Plaintiff is unlikely to need to perform much research about the law. The law governing

plaintiff's claims is not complex and is explained in this order.

The facts of plaintiff's case are fairly straightforward and are within his personal knowledge. After the defendants file their answer, the court will schedule a preliminary pretrial conference. During the conference, the magistrate judge will instruct plaintiff on how to gather any additional evidence he needs to prove his claims and plaintiff may ask questions about this court's procedures. Plaintiff will also be sent a written copy of the procedures, which were written for the very purpose of helping pro se litigants understand how federal civil cases work in this court.

There is no way of knowing yet whether plaintiff's case will go to trial. Many cases are resolved before trial, either on dispositive motions or through settlement. If the case does go to trial, the court will issue an order about two months before the trial date describing how the court conducts a trial and explaining to the parties what written materials they are to submit before trial.

Finally, plaintiff's mental health problems may present a legitimate concern, but he has not yet shown that they have affected his litigation of this case. As this case progresses, it might become clear that appointment of counsel is required, but this is not clear right now, so I will deny plaintiff's motion. Plaintiff may renew his motion at a later date.

ORDER

IT IS ORDERED that

1. Plaintiff Anthony Porter is GRANTED leave to proceed on his claim that defendants Dalia D. Suliene, Steve Helgersen, Jennifer Nickel and Cynthia Thorpe violated his right to be free from cruel and unusual punishment under the Eighth Amendment by exhibiting deliberate indifferent to his severe medical need.

2. Plaintiff is DENIED leave to proceed on his claim against defendants Lori Aslum and Darci Burreson, who are DISMISSED from the case.

3. Plaintiff's motion to appoint counsel, dkt. #14, is DENIED.

4. Along with a copy of this order, the Court will return to plaintiff the various medical and administrative records that plaintiff submitted in connection with his original complaint.

5. For the time being, 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 that plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. 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.

7. 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.

8. 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 21st day of May, 2012.

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