IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RODNEY JAMES REDMOND,

Plaintiff,

v.

C/O NEUMAIER, CO WITTERHOLT,
TRACY JOHNSON and STEVE HELGERSON,

Defendants.

OPINION AND ORDER

11-cv-845-slc[1]

- -

Plaintiff Rodney James Redmond has filed a complaint and a proposed amended complaint under 42 U.S.C. § 1983. In a previous order, dkt. #4, the court determined that plaintiff was unable to prepay the full filing fee and assessed an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1), which the court has received.

Because plaintiff is a prisoner, I must screen his allegations to determine whether they state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2) and 1915A. I will focus on the amended complaint, which has replaced the original complaint. Flannery v. Recording Industry Association of America, 354 F.3d 632, 638 (7th Cir. 2004) ("[A]n

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

amended complaint supersedes an original complaint and renders the original complaint void."). Having reviewed the amended complaint, I conclude that plaintiff may proceed on claims that defendants Neumaier and Witterholt failed to protect him from engaging in self harm and that defendant Helgerson intentionally delayed plaintiff's medical treatment, in violation of the Eighth Amendment.

However, I am dismissing plaintiff's claim that defendant Johnson subjected him to unconstitutional conditions of confinement for plaintiff's failure to state a claim upon which relief may be granted. I am dismissing his state law negligence claim against Neumaier because he does not allege that he satisfied Wisconsin's notice of claim requirements.

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 amended complaint, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Rodney James Redmond is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. From November 20, 2011, to November 30, 2011, defendant Neumaier, a correctional officer, delivered plaintiff's morning medication, which included depakote and citalopram. Neumaier never watched plaintiff take his medication, even though he knew that plaintiff had "a history of overdosing." Plaintiff was able to

accumulate approximately 20 pills.

On December 3, 2011, plaintiff told defendant Neumaier that he was going to kill himself. In response, Neumaier laughed and said, "Christmas must be coming early." When plaintiff repeated the statement, Neumaier said, "Don't get my hopes up."

Fifteen minutes later, plaintiff swallowed "a handful of pills" in front of another correctional officer, defendant Witterholt, as Witterholt was walking by plaintiff's cell. Witterholt said, "I didn't see any pills" and walked away.

Thirty minutes later, another officer came to plaintiff's cell and contacted defendant Steve Helgerson, a nurse at the prison. However, Helgerson "waited approximately 30 more minutes before having [plaintiff] sent to the hospital."

After plaintiff returned from the hospital, he was placed in an observation cell, which was "extremely cold," illuminated 24 hours a day and "infested" with insects. Plaintiff "was not given anything to keep warm" or "anything to block some of the light out." The following day, plaintiff told defendant Tracy Johnson, a psychologist at the prison, that he was cold and needed a blanket, but she refused to provide one. When he told her that the conditions of the observation cell were causing "sleep deprivation, paranoia, mental anguish and emotional distress," she said, "Those are the consequences for being on suicide watch."

OPINION

Plaintiff includes four claims in his amended complaint: (1) defendants Neumaier and Witterholt violated his Eighth Amendment rights by failing to protect him from engaging in self harm; (2) defendant Helgerson violated his Eighth Amendment rights by delaying his medical treatment; (3) defendant Tracy Johnson violated his Eighth Amendment rights by subjecting him to severe conditions of confinement in the observation cell; and (4) defendant Neumaier was negligent in failing to monitor his medication usage. I will address each of these claims in turn.

A. Failure to Protect

With respect to plaintiff's claims under the Eighth Amendment against Neumaier and Witterholt, it is well established that prison officials have a duty to protect prisoners from harming themselves as a result of a mental illness. Minix v. Canarecci, 597 F.3d 824, 833 (7th Cir. 2010); Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). The standard is whether a particular official was aware of a substantial risk that the plaintiff would seriously harm himself, but disregarded that risk by failing to take reasonable measures to abate it. Farmer v. Brennan, 511 U.S. 825 (1994).

In this case, plaintiff alleges that neither Neumaier nor Witterholt took any action to help him, even though he told Neumaier that he was going to kill himself and Witterholt

saw him swallow "a handful of pills." A prison official may violate the Eighth Amendment if he fails to take any action after a prisoner states that he is suicidal. Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 926 (7th Cir. 2004); Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003); Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Because that is exactly what plaintiff alleges that defendants did, he has stated a claim under the Eighth Amendment. Although plaintiff does not say how many pills he swallowed, it is reasonable to infer at this stage that his injuries were sufficiently serious to sustain a claim. However, if the facts show at summary judgment or trial that plaintiff was not actually at a serious risk of harm, this claim may be dismissed.

B. Delay in Medical Care

With respect to plaintiff's claim against defendant Helgerson, plaintiff alleges that Helgerson waited 30 minutes after he learned that plaintiff had swallowed pills before sending him to the hospital. Under some circumstances, a delay in providing medical assistance may violate the Eighth Amendment, though usually the delay is significantly longer than 30 minutes. E.g., Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 832 (7th Cir. 2009) (four-day delay in treating prisoner who complained that his IV was causing him serious pain); Grieveson v. Anderson, 538 F.3d 763, 779 (7th Cir. 2008) (day and a

half delay in treating broken nose); Edwards v. Snyder, 478 F.3d 827, 830–31 (7th Cir. 2007) (two-day delay in treating dislocated finger). However, there is no bright line rule for determining an unreasonable delay. "[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment." McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010).

At this early stage, it is reasonable to infer that plaintiff needed immediate treatment, that Helgerson knew that plaintiff needed immediate treatment but refused to provide it despite an ability to do so and that the delay in receiving treatment harmed plaintiff in some way. At summary judgment or trial, plaintiff will have to prove each of these facts with admissible evidence. Knight v. Wiseman, 590 F.3d 458, 466-67 (7th Cir. 2009) (plaintiff must "introduc[e] verifying medical evidence that shows his condition worsened because of the delay").

C. Conditions of Observation Cell

Plaintiff alleges that defendant Johnson refused to help him after he complained to her about his observation cell, which was was "extremely cold," illuminated 24 hours a day and "infested" with insects. The problem with plaintiff's allegations is that he does not identify how long he was subjected to these conditions. In numerous instances, the Court of Appeals for the Seventh Circuit has held that short periods of confinement in conditions

similar to those alleged by plaintiff do not rise to the level of a constitutional violation. E.g., Mays v. Springborn, 575 F.3d 643, 648 (7th Cir. 2009) (dismissing claim for excessive cold because plaintiff "did not show that he was forced to be in the cold for long periods of time or that he suffered anything more than the usual discomforts of winter"); Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (depriving prisoner of toilet paper, soap, toothpaste and toothbrush while keeping him in filthy, roach-infested cell for several days was not constitutional violation); Morissette v. Peters, 45 F.3d 1119, 1122-23, n.6 (7th Cir. 1995) (plaintiff's "filthy" cell and inadequate cleaning supplies did not violate Eighth Amendment).

Plaintiff includes no allegations that allow me to infer reasonably that he was subjected to harsh conditions for a prolonged period of time. He discusses only two days in his amended complaint; in his original complaint he says explicitly that he was in observation for 40 hours, which is not long enough to violate the Eighth Amendment. Accordingly, I am dismissing this claim for plaintiff's failure to state a claim upon which relief may be granted.

D. State Law Claim

Plaintiff says that defendant Neumaier was negligent under state law by failing to insure that plaintiff took his medication each morning, which allowed plaintiff to store up his medication. 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). Because plaintiff alleges that Neumaier's negligence led to his drug overdose, plaintiff has satisfied this standard.

However, I cannot allow plaintiff to proceed on this claim because he has not alleged that he satisfied Wisconsin's notice of claim requirement. Under Wis. Stat. § 893.82(3m), a prisoner may not bring a state law claim against a public official until he files a notice of claim with the attorney general *and* the attorney general has denied the claim or 120 days have passed without receiving an answer. "A complaint that fails to show compliance with § 893.82 fails to state a claim upon which relief can be granted." Weinberger v. State of Wisconsin, 105 F.3d 1182, 1188 (7th Cir. 1997). Accordingly, plaintiff's complaint must be dismissed as to his state law claim.

ORDER

IT IS ORDERED that

1. Plaintiff Rodney Jones Redmond is GRANTED leave to proceed on the following claims:

(a) defendants Neumaier and Witterholt failed to protect him from engaging in self harm, in violation of the Eighth Amendment; and

(b) defendant Steve Helgerson intentionally delayed plaintiff's medical treatment, in violation of the Eighth Amendment.

2. Plaintiff is DENIED leave to proceed on his claims that defendant Tracy Johnson subjected him to dangerous conditions of confinement for plaintiff's failure to state a claim upon which relief may be granted. Plaintiff is DENIED leave to proceed on his state law negligence claim against defendant Neumaier for failing to show that he complied with Wis. Stat. § 893.82. The amended complaint is DISMISSED as to defendant Johnson.

3. 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 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. 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.

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 22d day of March, 2012.

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