

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

STEPHFAN G. ROBINSON,

Plaintiff,

OPINION and ORDER

v.

12-cv-503-bbc

WISCONSIN DEPARTMENT OF CORRECTIONS,
GARY H. HAMBLIN, DEIRDRE A. MORGAN,
DR. TIMOTHY CORRELL and
KELLY WEATHERFORD,

Defendants.

Plaintiff Stepfhan Robinson, a prisoner at the Oakhill Correctional Institution, has submitted a proposed complaint alleging that poor medical treatment at the prison resulted in the amputation of one of his toes. Plaintiff is proceeding in forma pauperis and has made the initial partial payment previously assessed by this court. The next step in the case is to screen the complaint under 28 U.S.C. § 1915 to determine whether any portion 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. Plaintiff is a pro se litigant, which means his complaint will be construed liberally as it is reviewed for these potential defects. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After examining plaintiff's complaint, I conclude that he may proceed on Eighth Amendment deliberate indifference claims against defendants Timothy Correll and Kelly

Weatherford. I will stay a decision regarding his state court medical negligence claims until he submits a supplement to the complaint indicating whether he has complied with the Wisconsin notice of claim statute.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Stephan Robinson is a prisoner at the Oakhill Correctional Institution, located in Oregon, Wisconsin. On October 31, 2011, plaintiff met with defendant Dr. Timothy Correll about problems with one of his toenails. After being advised that the toenail “would not grow back,” plaintiff agreed to have it removed. Plaintiff was told to return to the Health Services Unit the next day for a dressing change.

On November 1, 2011, plaintiff returned, noting an increase in pain and swelling. Defendant Nurse Kelly Weatherford told plaintiff to elevate his foot and return the next day. On November 2, 2011, plaintiff was seen by Weatherford. Plaintiff said that the pain had initially decreased but then returned, causing him to wake up throughout the night. An exam was scheduled with defendant Correll, and plaintiff was given pain medication.

Plaintiff saw health services staff several times over the next month for a variety of treatments, including removing dead skin and soaking the toe. However, plaintiff was not given antibiotics. In early December 2011, plaintiff reported that a bad smell was coming from his toe. Plaintiff was sent to the emergency room, and his toe was eventually amputated.

OPINION

I understand plaintiff to be attempting to bring Eighth Amendment deliberate indifference and state law medical negligence claims against the defendants Wisconsin Department of Corrections, Timothy Correll, Kelly Weatherford, Deirdre Morgan and Gary Hamblin. I will address each legal theory in turn.

A. Deliberate Indifference

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). 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. Id. at 104.

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). 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, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), “significantly affects an individual's daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), 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 defendant was 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). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). However, inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence are insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) ("[E]ven admitted medical malpractice does not give rise to a constitutional violation.").

Plaintiff's allegations indicate that his toe problems constituted a serious medical need. Plaintiff alleges that defendants Correll and Weatherford failed to provide him with antibiotics, with the result that his toe had to be amputated. At this early stage in the proceedings, I conclude that plaintiff states a deliberate indifference claim against these defendants because it is possible to infer that these defendants recklessly failed to provide him with antibiotics even following plaintiff repeated reports of discomfort following the removal of his toenail. However, at summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with Correll's or Weatherford's conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that

they made a mistake. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by Correll and Weatherford 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).

Turning to the other named defendants, I conclude that plaintiff fails to state a claim upon which relief may be granted against any of them. The Wisconsin Department of Corrections is not an entity that can be sued under 42 U.S.C. § 1983. Billman v. Indiana Department of Corrections, 56 F.3d 785, 788 (7th Cir. 1995) (state Department of Corrections is immune from suit under the Eleventh Amendment to the Constitution). Nor can plaintiff maintain an Eighth Amendment claim against defendants Secretary Gary Hamblin or Warden Deirdre Morgan, because he does not allege that these defendants were personally involved in his medical treatment. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) (personal liability under 42 U.S.C. § 1983 must be based on defendant's personal involvement in constitutional violation).

B. Medical Negligence

Plaintiff argues also that defendants' actions constitute medical negligence under Wisconsin law. However, when an individual intends to sue a government official acting in his official capacity, Wisconsin law requires the individual to file a notice of claim with the attorney general's office. The individual cannot bring suit until the claim has been

disallowed or rejected. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554, 558 (1984) (“The notice of injury statute ‘is not a statute of limitation but imposes a condition precedent to the right to maintain an action.’”). Wis. Stat. § 893.82(3m) states:

If the claimant is a prisoner, as defined in s. 801.02 (7)(a)2., the prisoner may not commence the civil action or proceeding until the attorney general denies the claim or until 120 days after the written notice under sub. (3) is served upon the attorney general, whichever is earlier.

In his complaint, plaintiff does not say whether he has filed a notice of claim that has been disallowed. Because this is a threshold requirement for filing a state law claim against defendant, I will stay a decision on whether to grant plaintiff leave to proceed on his state law claims for medical negligence and give him an opportunity to supplement his complaint with this information. Upon receiving plaintiff’s supplement, I will screen his negligence claims and arrange for service of the complaint and supplement on defendants. If plaintiff fails to supplement his complaint by November 27, 2012, I will dismiss those claims.

ORDER

IT IS ORDERED that

1. Plaintiff Stepfhan Robinson is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Timothy Correll and Kelly Weatherford.

2. Plaintiff is DENIED leave to proceed on his deliberate indifference claims against defendants Wisconsin Department of Corrections, Deirdre Morgan and Gary Hamblin.

3. A decision on plaintiff's request for leave to proceed on his state law medical

negligence claims is STAYED. Plaintiff may have until November 27, 2012, in which to supplement his complaint with information about his compliance with notice requirements under Wis. Stat. § 893.82. If plaintiff does not submit a supplement to his complaint by that date, his state law claims against defendants will be dismissed.

4. Service of the complaint on defendants is STAYED pending receipt and screening of plaintiff's supplement to his complaint.

Entered this 14th day of November, 2012.

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