

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

ERIC L. TOLONEN,

Plaintiff,

OPINION and ORDER

v.

12-cv-782-bbc

DR. RICHARD HEIDORN, JEANETTE GREENWOOD,
DR. DAVID BURNETT and DR. KENNETH ADLER,

Defendants.

Plaintiff Eric Tolonen, a prisoner at the Jackson Correctional Institution, located in Black River Falls, Wisconsin, has submitted a complaint under 42 U.S.C. § 1983, alleging that the Wisconsin Department of Corrections medical staff is failing to treat his severe cystic acne and dermatitis. 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 Richard Heidorn, Jeanette Greenwood, David Burnett and Kenneth Adler.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Eric Tolonen is currently a prisoner at the Jackson Correctional Institution. He suffers from “cystic acne,” on his face, scalp, neck and back, which causes significant pain as well as scarring and what plaintiff calls “deformit[ies] of his face.” He also has dermatitis.

Prior to the events of this lawsuit, plaintiff had received several different types of treatment for his conditions. In June 2004, while plaintiff was incarcerated at the Green Bay Correctional Institution, he met with defendant Dr. Richard Heidorn. Heidorn allowed plaintiff to continue with a prescription drug, Minocycline, even though it had been ineffective in treating plaintiff’s condition. Heidorn also referred plaintiff for a psychological evaluation. (Plaintiff has been diagnosed with adjustment disorder, anxiety disorder and depressive disorder as a result of his struggles with the cystic acne.) Over the next three years, plaintiff met with both defendants Heidorn and Jeanette Greenwood, the health services unit manager. Heidorn tried several different types of medications, but none were effective. On several occasions, plaintiff requested to be referred to a dermatologist, but both Heidorn and Greenwood have rejected his requests, stating that his acne is not severe enough.

In October 2007, plaintiff was transferred to the Stanley Correctional Institution. Plaintiff met with Dr. Braunstein, who agreed with plaintiff that he should be put on the “Class III referral list” to see a dermatologist. However, this request was denied by

defendant Dr. David Burnett , the medical director of the Department of Corrections Bureau of Health Services. Burnett denied a second request in December 2008.

In September 2010, plaintiff was transferred to the Jackson Correctional Institution. Plaintiff had a “flare up” of acne in January 2011. Plaintiff was seen by defendant Dr. Kenneth Adler, who prescribed Doxycycline. Since then, plaintiff has had repeated flare ups of acne and dermatitis, including one occasion in which he developed two-inch-long cysts on his cheeks. Adler has tried several different treatments, none of which have been effective. Plaintiff has requested treatment from a dermatologist, but Adler does not approve his requests or even note them in the medical record.

OPINION

Plaintiff is bringing Eighth Amendment deliberate indifference claims against defendants Richard Heidorn, Jeanette Greenwood, David Burnett and Kenneth Adler. 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.”).

At this early stage in the proceedings, I conclude that plaintiff’s allegations that he suffers pain and severe emotional distress from his medical conditions suffice to show that he has a serious medical need. In addition, although it is clear from plaintiff’s allegations

that defendants have not ignored plaintiff's conditions (indeed, plaintiff concedes that they have tried many different medications), and that generally, prisoners are not entitled to the specific medical treatment of their choice, Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005), plaintiff's allegations, generously construed, are sufficient to show that defendants have acted with deliberate indifference by denying his requests for a dermatology referral because all of the treatments they have tried him have been ineffective. Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011) ("physicians were obligated not to persist in ineffective treatment"). Accordingly, I conclude that plaintiff may proceed on deliberate indifference claims against defendants.

However, plaintiff should be aware that at summary judgment or trial, it will not be enough to show that he disagrees with defendants' 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 defendants 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).

ORDER

IT IS ORDERED that

1. Plaintiff Eric Tolonen is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Richard Heidorn, Jeanette Greenwood,

David Burnett and Kenneth Adler.

2. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, supplement to the 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 if it accepts service on behalf of the state defendants.

3. 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 or lawyers will be representing defendants, he should serve the lawyers 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 defendants or to defendants' attorney.

4. 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.

5. Plaintiff is obligated to pay the balance of his unpaid 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 13th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge