

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

ROBERT L. COLLINS BEY,

Plaintiff,

v.

TIM HAINES, PETER HUIBREGTSE,
MICHAEL MEISNER, TONY ASHWORTH,
SARA MASON, MARY MILLER,
CINDY SAWINSKI, KAREN ANDERSON,
CYNTHIA M. THORPE, DR. STEVEN,
DR. JAMES THORPE, DR. JAMES WOMMACK,
DR. WILLIAM GISWOLD and
DR. JOHN DOE,

Defendants.

OPINION and ORDER

13-cv-618-bbc

Plaintiff Robert Collins Bey has filed this lawsuit raising claims against prison officials for failing to adequately treat his dental problems and he has been found financially qualified for in forma pauperis status. The next step is to screen plaintiff's 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. §§ 1915 & 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). Having reviewed the complaint, I conclude that plaintiff may proceed on Eighth Amendment deliberate

indifference claims as well as state law medical malpractice claims. I will set briefing on plaintiff's motion for preliminary injunctive relief, but deny plaintiff's motion for the court's assistance in recruiting counsel.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

In 2007, while plaintiff Robert Collins Bey was incarcerated at the Wisconsin Secure Program Facility, his partial dentures needed repair or replacement because of a broken clasp and one of his teeth had lost its filling. Plaintiff had difficulty eating without pain because of these problems. From April to July 2007, plaintiff submitted at least five dental service request forms, but it took more than three months for plaintiff to be seen for these problems. At this point, the Wisconsin Secure Program Facility did not have a permanent staff dentist. During this wait, plaintiff wrote to defendant Cindy Sawinski, the Health Services Unit manager at the time, and then-Warden Peter Huibregste, but neither of these defendants responded.

On August 5, 2007, plaintiff wrote defendant Dr. Steven (whom I understand to be a dentist) in response to a previous comment by Steven stating that the dentures could be fixed with crazy glue. Steven replied that he had not forgotten about plaintiff came to the prison only four days a month and had a long list of patients. He said, "Maybe you need a whole new partial." However, Steven did not order plaintiff a new partial or order the old one to be fixed. Further, Steven never examined plaintiff for periodontitis or gingivitis.

On June 11, 2008, Dr. Burton Cox (a medical doctor) examined plaintiff and saw that

he had sore and painful gums and needed dental treatment. Cox referred plaintiff to the dental service, but neither defendant Sawinski nor defendant Steven provided him dental treatment. The only treatment plaintiff received was acetaminophen for the pain.

Plaintiff informed dental staff that three teeth that defendant Steven had worked on were causing plaintiff “even greater pain,” because a filling had fallen out of one of the teeth and “the exposed nerve of the tooth was affecting the other two (2) teeth.” Plaintiff was receiving Tylenol but this was not effective in eliminating his pain. On October 28, 2009, plaintiff filled out a dental request form regarding his tooth pain.

On November 2, 2009, nurse Pat Reid told plaintiff that the dentist was scheduled to be in the institution that day so she would try to get the dentist to see him. Reid told plaintiff that the dental assistant told her the dentist could see him that day, but plaintiff was not seen that day. Instead he was seen on November 17, 2009 by defendant Dr. James Thorpe. Thorpe repaired the tooth with the exposed nerve. Also, Thorpe told plaintiff that tooth no. 3 was broken down to the gum line, but said that he was not going to remove the tooth because plaintiff had previously had a root canal on that tooth so it would not cause him any more pain. Plaintiff believes that this “dead and decaying” tooth could give him gum disease and that he could not have partial dentures made until the tooth was removed. Dr. Thorpe never diagnosed gum disease, even though he was aware that plaintiff had sore and bleeding gums. Plaintiff asked him, “What is it that he . . . must [do] to get them to fix his partial dentures, file an inmate complaint?” Dr. Thorpe responded “Yes” and told plaintiff he was paid only for routine fillings and extractions.

On November 30, plaintiff filed an inmate complaint regarding the lack of proper

dental treatment. The institution complaint examiner recommended dismissal because plaintiff was receiving Tylenol while waiting to be seen by a dentist. The complaint was reviewed by defendant Cynthia Thorpe, who plaintiff believes is related to defendant Dr. Thorpe. Cynthia Thorpe did not recommend that plaintiff should receive a new partial denture.

On August 17, 2011, plaintiff was transferred to the Columbia Correctional Institution. Upon arriving, plaintiff filled out a dental service request about the need to have tooth no. 3 removed and to get new partial dentures. Dental staff responded that plaintiff was on the “essential wait list” and that a \$7.50 co-pay applied.

Plaintiff was not seen until September 29, 2011 because the Columbia Correctional Institution did not have a full-time dentist. Plaintiff was examined by either defendant Dr. William Giswold or defendant “Dr. John Doe.” X-rays were taken and one of plaintiff’s bottom teeth was pulled because it had an abscess. The dentist told plaintiff that partial dentures could not be made until tooth no. 3 was pulled and told plaintiff to file another dental service request. The dentist did not diagnose gum disease.

On October 2, 2011, plaintiff submitted another dental service request to get tooth no. 3 removed and for partial dentures. On October 27, plaintiff finally received the surgery to remove tooth no. 3. Either defendant Giswold or defendant Doe performed the surgery. The dentist told plaintiff that once his gums were healed, a mold could be made for new partial dentures. The dentist thought that would take two to three weeks.

On November 24, 2011, plaintiff submitted another dental service request because he needed another surgery to remove a piece of bone or tooth left in the wound from the

previous surgery. The leftover piece of bone or tooth caused plaintiff pain. Plaintiff did not have this surgery until December 2, 2011.

On March 29, 2012, plaintiff sent a memorandum to defendant Karen Anderson, the health services manager, stating that he had not yet received partial dentures. Anderson responded by stating that plaintiff was seen in December, but that his March 16 appointment was canceled because plaintiff was in segregation and there was no escort. On March 31, plaintiff wrote to defendant Tony Ashworth regarding the lack of escort for plaintiff's March 16 dental appointment. Ashworth came to plaintiff's cell and told him, "You're going to learn to keep your mouth shut." The next day plaintiff was sent back to the Wisconsin Secure Program Facility. Plaintiff wrote to defendant Warden Michael Meisner at the Columbia Correctional Institution about this treatment but never received a response.

On October 12, 2012, plaintiff wrote to defendant Warden Haines at the Wisconsin Secure Program Facility about his need for partial dentures, but Haines did not respond.

Defendant Dr. James Wommack also treated plaintiff at some point (plaintiff does not explain when) and was aware of his dental problems but did not fix them. Plaintiff states that he alerted defendant Mary Miler, health services manager at the Wisconsin Secure Program Facility, of his need for surgery at some point, but she did nothing. Defendants Haines, Huibregtse, Meisner, Ashworth, Mason, Miller, Sawinski, Anderson and Cynthia Thorpe are employed in various supervisory capacities responsible for the health of prisoners.

Plaintiff's gum line is receding, his tongue has "what appears like small cuts on both

sides” and has “what appears to be some kind [of] white-like-fungus.”

OPINION

A. Three-Strike Status

Previously, this court has noted that plaintiff is not eligible to proceed in forma pauperis in cases because he has “struck out” under 28 U.S.C. § 1915(g), which states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Plaintiff has been assigned strikes under this provision because at least one of his claims in each of three cases was dismissed as legally frivolous. Collins-Bey v. Frank, no. 05-cv-453-bbc (W.D. Wis. Sept. 2, 2005); Collins Bey v. Frank, no. 05-4051 (7th Cir. Dec. 19, 2005); and Collins Bey v. Berge, no. 08-cv-747-bbc (W.D. Wis. Jan. 30, 2009). However, in 2010, the Court of Appeals for the Seventh Circuit held that “a strike is incurred under § 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g),” rather than when one claim out of several is dismissed under § 1915(g). Turley v. Gaetz, 625 F.3d 1005, 1012 (7th Cir. 2010). Under this ruling, plaintiff should not have been assessed a strike in case no. 08-cv-747-bbc because several claims survived initial screening. Accordingly, plaintiff has not struck out under § 1915(g) and is not limited to bringing only claims that he is in imminent danger of serious physical harm.

B. Plaintiff's Claims

1. Eighth amendment medical care

I understand plaintiff to be alleging that defendants have violated his Eighth Amendment right to adequate medical care by failing to provide him partial dentures and delaying the extraction of his broken tooth and replacement of the filling in his tooth. that lost a filling. 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 defendants were “deliberately indifferent” to this need. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

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, significantly affects an individual’s daily activities, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), 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 the 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). 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). 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.

Thus, under this standard, plaintiff's claim has three elements:

(1) Does plaintiff need medical treatment?

(2) Do defendants know that plaintiff needs treatment?

(3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

I understand plaintiff to be stating that each of these dental problems has been causing him significant pain and perhaps contributed to gum disease as well. I conclude that these dental problems are sufficient serious medical needs to state a possible claim under the Eighth Amendment. I note, however, that if plaintiff hopes to prove that defendants violated his rights when they did not respond to his complaints of gum disease, he will have to present medical evidence showing that he is suffering from gum disease or is at increased risk for it as a result of defendants' actions; it is highly unlikely that his own lay testimony will be admissible to prove that he has gum disease.

Plaintiff alleges that defendant dentists Steven, James Thorpe, Giswold, Doe and Wommack have treated plaintiff yet delayed or outright refused to provide plaintiff with the treatment he needs, so he has stated deliberate indifference claims against these defendants. Also, to the extent that he has contacted supervisory officials Sawinski, Huibregtse, Cynthia Thorpe, Anderson, Ashworth, Meisner, Haines and Miller and they have failed to assist plaintiff in getting the proper treatment, I will allow him to proceed on deliberate indifference claims against these officials as well. However, I will not allow him to proceed against defendant Mason. All that plaintiff says about this defendant is that he was a

supervisor. He does not allege that this defendant had any personal involvement in refusing to assist plaintiff in getting treatment. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.").

Additionally, I understand plaintiff to be suing defendants in their official capacities for injunctive relief, asserting that the prisons' policy of not having a full-time dentist on staff violates his Eighth Amendment rights. I will allow plaintiff to proceed on this claim against defendants Haines (the warden of the institution currently housing plaintiff) and Miller (the health services manager).

At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to identify the name of the John Doe dentist defendant and to amend the complaint to include the name of this dentist.

2. State law medical malpractice

I understand plaintiff to be attempting to bring state law medical malpractice claims against the dentists (defendants Steven, James Thorpe, Giswold, Doe and Wommack) who failed to treat him. 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). Plaintiff's medical malpractice claims are part of the same case or controversy as his federal claims for violation of his Eighth Amendment rights.

To prevail on a claim for medical malpractice in Wisconsin, plaintiff must prove that

defendant dentists breached their duty of care to him and that he suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis.2d 507, 625 N.W.2d 860. At this point, I conclude that plaintiff's allegations state malpractice claims against defendants so I will allow him to proceed on these claims.

C. Preliminary Injunctive Relief

Plaintiff's complaint includes requests for immediate injunctive relief. Under this court's procedures for obtaining a preliminary injunction, a copy of which is attached to this order, plaintiff must file with the court and serve on defendants a brief supporting his claims, proposed findings of fact and any evidence he has to support his request for relief. He may have until November 11, 2013 to submit these documents. Defendants may have until the day their answer is due in which to file a response. I will review the parties' preliminary injunction submissions before deciding whether a hearing will be necessary.

Plaintiff should be aware that the bar for obtaining a preliminary injunction is significantly higher than it is for obtaining leave to proceed. In his proposed findings of fact, plaintiff will have to lay out the facts of his case in detail, identifying the problems he is suffering from, when and how he sought help and how defendants responded. Plaintiff will have to show that he has some likelihood of success on the merits of his claim and that irreparable harm will result if the requested relief is denied. If he makes both showings, the court will move on to consider the balance of hardships between plaintiff and defendants and whether an injunction would be in the public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir.

1997).

D. Motion for Appointment of Counsel

In addition to his complaint, plaintiff has filed a motion for appointment of counsel. However, the word “appoint” is a bit of a misnomer. Ray v. Wexford Health Sources, Inc., 706 F.3d 864, 866 (7th Cir. 2013). Unlike indigent criminal defendants, civil litigants have no automatic right to court-appointed counsel. Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997). The federal in forma pauperis statute provides that “[a] court may request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). Absent any mandatory language, this statute merely confers discretion “to recruit a lawyer to represent an indigent civil litigant pro bono publico[.]” Pruitt v. Mote, 503 F.3d 647, 653-54 (7th Cir. 2007) (en banc). In other words, it authorizes the court to recruit a volunteer. Id.

The question is whether recruiting pro bono counsel makes sense in this case. In deciding whether to recruit 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 on the issues on which he has been allowed to proceed and who turned him down. Plaintiff has submitted the names of several attorneys who he states have turned him down, but he does not provide any documentation proving this. This alone might be reason to deny his motion.

In any case, I conclude that it is too early to tell whether it is necessary to find counsel for plaintiff in this case. The case has not progressed sufficiently to allow a determination of the true complexity of the claims; defendants have not yet been served with the complaint, and the case has not even progressed to the phase in which defendants often move for summary judgement based on plaintiff's failure to exhaust his administrative remedies. Plaintiff does not need counsel's assistance in litigating this question. I will deny plaintiff's motion as premature but he is free to renew it at a later date.

ORDER

1. Plaintiff Robert Collins Bey is GRANTED leave to proceed on the following claims:

- a. Eighth Amendment deliberate indifference claims against defendants Dr. Steven, James Thorpe, William Giswold, Dr. John Doe, James Wommack, Cindy Sawinski, Peter Huibregtse, Cynthia Thorpe, Karen Anderson, Tony Ashworth, Michael Meisner, Tim Haines and Mary Miller for failing to adequately treat his dental problems.
- b. A claim for injunctive relief under the Eighth Amendment against defendants Haines and Miller in their official capacities for maintaining a policy failing to require a full-time dentist.
- c. Wisconsin medical malpractice claims against defendants Steven, James Thorpe, Giswold, Doe and Wommack for failing to adequately treat his dental problems.

2. Plaintiff is DENIED leave to proceed on any claims against defendant Sara Mason and defendant Mason is DISMISSED from the case.

3. Plaintiff may have until November 11, 2013, in which to file a brief, proposed findings of fact and evidentiary materials in support of his motion for a preliminary injunction. Defendants may have until the date their answer is due to file materials in

response.

4. Plaintiff's motion for assistance in the recruitment of counsel, dkt. #3, is DENIED without prejudice.

5. Under 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 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.

6. 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 will be representing defendants, he should serve their lawyer 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.

7. 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.

8. 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 22d day of October, 2013.

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