

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

LADERIAN McGHEE,

Plaintiff,

v.

DALIA SULIENE, KAREN ANDERSON,
LON BECHER and JOHN DOE(S),

Defendants.

OPINION AND ORDER

13-cv-67-bbc

In this proposed civil action, plaintiff Laderian McGhee contends that defendants Dalia Suliene, Karen Anderson, Lon Becher and John Doe(s) violated his rights under the Eighth Amendment by depriving him of adequate medical care for his shoulder injury while he was incarcerated. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by § 1915(b)(1).

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his 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). Having reviewed the complaint, I conclude that plaintiff may proceed on his Eighth Amendment claims.

Plaintiff has alleged the following facts.

ALLEGATIONS OF FACT

Plaintiff Laderian McGhee is incarcerated at the Columbia Correctional Institution, located in Portage, Wisconsin. Defendants Dalia Suliene and Karen Anderson are employed in the health services unit at the Columbia Correctional Institution. Suliene is a physician and Anderson is the manager of the health services unit. Defendant Lon Becher is employed as a regional nursing coordinator for the Bureau of Health Services and is responsible for supervising all medical staff at the Columbia Correctional Institution. The John Doe defendants are members of the “Review Committee” for the Columbia Correctional Institution, which determines whether and when an inmate receives surgery.

Plaintiff suffers from a degenerative shoulder injury that began causing him increased pain in early 2012. Plaintiff had a magnetic resonance imaging scan on his shoulder from University of Wisconsin Health Hospital on July 18, 2012. The radiologist, Dr. Kenneth S. Lee, determined that plaintiff would need surgery and prescribed him 400 milligrams of ibuprofen for the pain.

On July 27, 2012, plaintiff visited Dr. Eller O’Brien to discuss the results of the MRI. O’Brien determined that plaintiff needed surgery as soon as possible so that he would not lose mobility and the use of his right arm. O’Brien made “an official recommendation to arrange an outside surgical orthopedic consult for McGhee.” Defendant Suliene was made aware of the recommendation that day.

On July 30, 2012, plaintiff informed Suliene that the ibuprofen was not working for his shoulder pain and requested stronger pain medication. Suliene prescribed 500 milligrams of Mapap, but plaintiff told her that he was already taking that dosage of Mapap. Suliene responded that she would not prescribe anything stronger and there was nothing she could do. On August 1, 2012, plaintiff submitted a health services request asking for pain medication and was again issued 500 milligrams of Mapap. He took the prescribed medications, but the pain continued and began to disrupt his sleep, affect his appetite and bring on migraine headaches.

On August 14, 2012, plaintiff submitted another health services request about his shoulder pain. The next day, health services staff responded that his “UW appt. is scheduled.” (Plaintiff says nothing more about this appointment.) The ibuprofen and Mapap became completely ineffective after August 15, 2012, but Suliene began to treat plaintiff as a mere nuisance when he complained about the pain. On several occasions after July 2012, the pain and affected joint rendered plaintiff’s right arm useless. “Unit staff” have recognized the severity of plaintiff’s pain and alerted defendants Suliene and Anderson, but defendants refused to provide plaintiff effective medication or a sling and have impeded and delayed his needed surgery. Suliene continued to treat the shoulder with ineffective pain medication for six months.

After unsuccessfully attempting to resolve the matter with Suliene, plaintiff wrote to defendant Anderson on at least six occasions, informing her of the severity of his injury and pain and the ineffectiveness of the pain medication, but she approved the existing treatment

and the continued delay of his surgery. In October or November 2012, defendant Becher became aware of plaintiff's complaints and approved Suliene's existing course of treatment and the delay in plaintiff's shoulder surgery. The John Doe defendants, members of the "review committee" responsible for determining when and if prisoners receive surgery, also "participated in delaying" plaintiff's surgery for undeclared reasons.

OPINION

Plaintiff contends that defendants violated his rights under the Eighth Amendment by refusing to approve his shoulder surgery. 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, 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). 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). 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). 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. Deliberate indifference may be inferred only when "the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

Plaintiff alleges that his shoulder injury causes him ongoing pain that is not relieved by the prison's prescribed pain medication and that a physician at University of Wisconsin Health recommended surgery for the shoulder as soon as possible to avoid the loss of mobility or the use of his arm. These allegations are sufficient to imply a serious medical need. Gayton, 593 F.3d at 619; Grieverson v. Anderson, 538 F.3d 763, 779 (7th Cir. 2008) ("A delay in the provision of medical treatment for painful conditions—even non-life-threatening conditions—can support a deliberate-indifference claim so long as the medical condition is 'sufficiently serious or painful.'"). Plaintiff also alleges that the

physician he saw at the University of Wisconsin Hospitals officially recommended surgery but defendants Suliene, Anderson, Becher and the John Doe defendants refused to approve it. In addition, he alleges that defendants knew that the prescribed pain medication were not working but refused to consider an alternative course of treatment. These allegations are sufficient to suggest that defendants acted with deliberate indifference. Arnett v. Webster, 658 F.3d 742, 753 (7th Cir. 2011) (refusal to follow prescribed treatment can state claim for deliberate indifference); Gonzalez v. Fienerman, 663 F.3d 311, 314-15 (7th Cir. 2011) (physicians are obligated not to persist in ineffective treatment of pain while condition worsens).

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).

Although plaintiff does not know the names of the John Doe staff members, "when the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996). In the early stages of this lawsuit,

Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At that conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include them.

ORDER

IT IS ORDERED that

1. Plaintiff Laderian McGhee is GRANTED leave to proceed on his Eighth Amendment deliberate indifference claims against defendants Dalia Suliene, Karen Anderson, Lon Becher and John Doe(s).

2. 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.

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 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.

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 27th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge