IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEROME ANTHONY THEUS,

OPINION AND ORDER

Plaintiff,

13-cv-681-bbc

v.

RACINE CORRECTIONAL, MS. WIGAND,
MR. KEMPER, MR. HOWARD and
MR. MALONE,

Defendants.

- -

Pro se prisoner Jerome Theus has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that various prison officials at the Racine Correctional Institution have violated the Eighth Amendment by (1) refusing him medical care despite his bloody vomit, saliva and stool and his migraines; (2) depriving him of clean conditions of confinement by refusing to give him fresh linens; and (3) bullying him. Plaintiff further says that he has been denied access to his medical records and information.

Plaintiff has made an initial partial payment of the filing fee as required by 28 U.S.C. § 1915(b)(1). The next step is to screen the 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 a pro se complaint, the court must read the

allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After screening the complaint, I conclude that plaintiff may proceed on his claim against defendant Kemper, but I will dismiss the complaint as to defendants Wigand, Howard and Malone because plaintiff has failed to state a claim against them upon which relief may be granted. I will also dismiss plaintiff's medical records claim and give plaintiff an opportunity to amend his complaint as to these claims. I will dismiss with prejudice plaintiff's claims against defendant Racine Correctional Institution because it is not a "person" suable under 42 U.S.C. § 1983.

ALLEGATIONS OF FACT

Plaintiff says that defendant Kemper, warden of the Racine Correctional Institution, refused to allow him to go to the hospital, despite the facts that he was "throwing up blood, drooling blood and [having] blood in [his] stool." Dkt. #1, at 5. Plaintiff also alleges that he has suffered from "[b]ad migrain[e]s from high blood pressure." Id. Plaintiff says that he has bloody linens in his cell and that defendant Wigand instructed staff not to give him fresh linens. He also alleges that unnamed prison officials will not tell him about his test results, "won't give [him his] medical file" and will not give his wife his medical information, even though he signed permission forms telling them to do so. Id. at 6. Finally, plaintiff says that he is bullied by defendants Howard and Malone, who are correctional officers. Id. at 5.

OPINION

A. Claim against Kemper

A prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (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). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

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

1. Did plaintiff need medical treatment?
2. Did defendants know that plaintiff needed treatment?
3. Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

It is plausible that plaintiff had a serious medical need that was evidenced by his bloody vomiting, drooling and stool, as well as his migraines and high blood pressure. It is also

plausible that plaintiff needed to go to the hospital for these conditions. Plaintiff says that Kemper refused to allow him to go to the hospital, so Kemper may have ignored an obvious risk to plaintiff's health.

Plaintiff leaves out of his complaint many details that he will have to prove if the case proceeds to trial or if Kemper moves for summary judgment. For example, with respect to the question whether he had a serious medical need, plaintiff will have to prove that Kemper's actions caused him to suffer an adverse health consequence. Jackson v. Pollion, — F.3d —, 2013 WL 5778991 (7th Cir. Oct. 28, 2013) ("No matter how serious a medical condition is, the sufferer from it cannot prove tortious misconduct (including misconduct constituting a constitutional tort) as a result of failure to treat the condition without providing evidence that the failure caused injury or a serious risk of injury."). Plaintiff must show more than that he could have gotten better treatment if Kemper had allowed him to go to the hospital. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Plaintiff will have to show that Kemper's judgment in refusing to allow him to go to the hospital 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). Nevertheless, I will grant plaintiff leave to proceed on this claim.

B. Claim against Wigand

Plaintiff says that he has bloody linens in his cell and that defendant Wigand instructed staff not to give him clean linens. Under the Eighth Amendment, prisoners are

guaranteed humane levels of healthy and sanitary conditions. Among other things, "prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care and 'take reasonable measures to guarantee the safety of inmates.'" Farmer, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). The Constitution does not mandate comfortable prisons. Rhodes v. Chapman, 452 U.S. 337, 349 (1981). Regularly cleaned linens may be required to insure safe and clean conditions under the Eighth Amendment. Jones v. Wittenberg, 330 F. Supp. 707, 717-18 (N.D. Ohio 1971) aff'd sub nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

Plaintiff provides no details about the length of time he was deprived of clean linens or how unsanitary his "bloody" linens were. Without these details, it is impossible to know whether defendant Wigand's instructions resulted in a mere inconvenience to plaintiff or something more serious and actionable. Therefore, plaintiff has failed to state a claim upon which relief may be granted, a violation of Rule 8 of the Federal Rules of Civil Procedure. I will give plaintiff a short time to amend his complaint to state a claim. In doing so, he should answer the following questions:

1. How long did plaintiff go without clean linens?
2. How dirty were his bloody linens?
3. Did he suffer an injury as a result of using the dirty linens? If so, what type of injury did he suffer, and did he seek or receive medical attention?

If plaintiff chooses not to amend his complaint, his claim against defendant Wigand will be dismissed.

C. Claims against Howard and Malone

Plaintiff says that defendants Howard and Malone "bullied" him, but he does not provide any details about the circumstances of the alleged bullying. To state an Eighth Amendment excessive force claim, a plaintiff must allege that the defendant applied force "maliciously and sadistically for the very purpose of causing harm," rather than "in a good faith effort to maintain or restore discipline." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). Without more details, I cannot tell whether what plaintiff calls bullying is merely a "good faith effort" at discipline or an actionable claim. Id.

Plaintiff will be given a short time to amend his complaint to state claims against Howard and Malone upon which relief may be granted. If plaintiff chooses to amend his complaint, he should answer the following:

1. What act or acts did Howard commit against plaintiff?
2. What act or acts did Malone commit against plaintiff?
3. Did Howard or Malone have any reason for committing those acts? If so, what reason?
4. Did plaintiff suffer any injuries as a result of those acts? If so, what kind of injuries did plaintiff suffer, and did he seek or receive medical attention?

Furthermore, if plaintiff chooses to amend his complaint, his claims against Howard and Malone may present Rule 20 problems. Rule 20 of the Federal Rules of Civil Procedure requires claims that involve different defendants with no common group of facts to be

brought as different lawsuits. Fed. R. Civ. P. 20. If plaintiff's claims for bullying by Howard and Malone do not relate to the medical claims he is bringing against Kemper and Wigand, plaintiff will have to pursue those claims in a separate lawsuit and pay separate filing fees for each lawsuit. He has already been assessed fees for one lawsuit, so if his claims against Howard and Malone must be brought in a second suit, he will have to decide whether he wants to pursue both complaints or just one. If he decides to proceed with only case, he will have to decide which one. He should consider carefully the merits and relative importance of his potential lawsuits when deciding how he wants to proceed. If he does not amend his complaint, his claims against Howard and Malone will be dismissed.

D. Medical Records Claim

Plaintiff says that unnamed prison officials prevented him and his wife from viewing his medical file and from learning his medical test results. He says that he signed papers giving his wife access to his medical information. Plaintiff's complaint is lacking details, but he appears to be attempting to bring a claim for denial of access to medical information. Although the Health Insurance Portability and Accountability Act states that individuals have the right to obtain access to their medical records (with exceptions for prisoners based on health and safety), I am aware of no court that has found a private right of action under this law. Many courts have found to the contrary. Franklin v. Wall, 12-CV-614-WMC, 2013 WL 1399611 (W.D. Wis. Apr. 5, 2013) ("[C]ourts have uniformly held that HIPAA did not create a private cause of action or an enforceable right for purposes of a suit under

42 U.S.C. § 1983." (citing Carpenter v. Phillips, 419 Fed. App'x 658, 659 (7th Cir. 2011); Dodd v. Jones, 623 F.3d 563, 569 (8th Cir. 2010); Seaton v. Mayberg, 610 F.3d 530, 533 (9th Cir. 2010); Wilkerson v. Shinseki, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); Sneed v. Pan American Hospital, 370 F. App'x 47, 50 (11th Cir. 2010); Acara v. Banks, 470 F.3d 569, 570–72 (5th Cir. 2006)). I will dismiss this claim.

E. Claims against Racine Correctional

Plaintiff has listed as defendant "Racine Correctional" in this complaint brought under 42 U.S.C. § 1983. However, a building, such as the Racine Correctional Institution, is not a "person" suable under § 1983. Rowan v. Pierce County Jail, 09-cv-224-slc, 2009 WL 3270179 (W.D. Wis. Oct. 9, 2009); Larry v. Goetz, 06-C-197-C, 2006 WL 1495784 (W.D. Wis. May 18, 2006). Accordingly, the complaint will be dismissed as to this defendant.

ORDER

IT IS ORDERED that

1. Plaintiff Jerome Theus is GRANTED leave to proceed on his claim that defendant Kemper refused to allow him to go to the hospital despite his medical conditions, in violation of the Eighth Amendment.

2. The following claims are DISMISSED WITHOUT PREJUDICE for plaintiff's failure to state a claim under Fed. R. Civ. P. 8: (1) the claim against defendant Wigand for

instructing staff not to give plaintiff clean linens; (2) the claims against defendants Howard and Malone for bullying; and (3) the claim against unnamed defendants for denial of access to plaintiff's medical records. Plaintiff may have until December 9, 2013, to file a proposed amended complaint that gives defendants proper notice of his claims, as outlined in this order. If plaintiff fails to respond by that date, the case will go forward only on the claim against defendant Kemper; the remainder of the case will be dismissed.

3. Plaintiff is DENIED leave to proceed on his claims against defendant Racine Correctional because this defendant is not a suable entity. The complaint is DISMISSED with prejudice as to this defendant.

4. For the time being, plaintiff must send defendant Kemper 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 defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

5. 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 his documents.

6. 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 defendant. Plaintiff should not attempt to serve defendant on his own at this time. 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 defendant.

7. Plaintiff is obligated to pay the unpaid balance of his filing fees 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 accounts until the filing fee has been paid in full.

Entered this 20th day of November, 2013.

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