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

JEFFREY M. DAVIS, JR.,

Plaintiff,

v.

DIVINE SAVIOR HOSPITAL, DR. JACKSON, DR. CHARLES BOURSIER, and DR. GERALD KRUMPOS,

Defendants.

OPINION AND ORDER

13-cv-101-wmc

Plaintiff Jeffrey Davis alleges claims against defendant Divine Savior Hospital under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, as well as medical malpractice and battery claims under Wisconsin law, against three emergency room doctors on its staff, all for ignoring Davis's sever injuries because they had been self-inflicted. Davis is an inmate at the Columbia Correctional Institution, who asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Davis has provided, the court concludes that he is unable to prepay the full fee for filing this lawsuit. Since he has made the initial partial payment of $6.69 required of him under § 1915(b)(1), the next step is determining whether his proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). After examining the complaint, the court concludes that he may proceed on his claims. Davis also asks the court to recruit counsel for him and to issue a preliminary injunction against defendants. The request for counsel will be denied

without prejudice and the motion for preliminary injunction will be set for briefing by both sides.

ALLEGATIONS OF FACT

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). In his complaint, Davis alleges, and the court assumes for purposes of this screening order, the following facts.

A. Parties

Plaintiff Jeffrey Davis is a prisoner residing at the Columbia Correctional Institution ("CCI"), which is located in Portage, Wisconsin. Davis is afflicted with mental illness. The defendants, Drs. Jackson, Boursier and Krumpos, are all emergency medicine physicians at Divine Savior Hospital ("DSH") in Portage, WI.

B. Events of September 27, 2012

On September 27, 2012, Davis attempted suicide by swallowing pens and a toothbrush. He was taken to DSH, where the responding nurse indicated that Dr. Boursier "did not have time for prisoners who harm themselves." Dr. Boursier examined Davis and criticized him for "doing this to yourself." Dr. Boursier ordered an x-ray but did not otherwise treat Davis. Feeling ignored, Davis threatened to harm himself further, but was merely given a laxative and sent back to the prison.

Over the next week, he suffered severe pain, vomiting, coughing up blood and weight loss. Ten days after his initial visit he was treated with gastroenterological

endoscopic surgery to remove the pens and toothbrush. He was consequently diagnosed with Gastroesophageal reflux disease (GERD).

C. Events of December 26, 2012

On December 26, 2012, Davis overdosed on Tylenol and was taken the Emergency Room at DSH. Upon arrival, he refused medical treatment. Becoming angry with Davis for refusing treatment, Dr. Jackson called CCI security staff, who used threats of force to make Davis submit to liquid charcoal treatment. An intern nurse then administered the charcoal via an intranasal gastric tube. It was her first procedure and she caused Davis considerable pain and bleeding. By the time the charcoal and other medicine had been administered, the Tylenol had been in Davis's stomach for several hours, so the treatment was largely ineffective.

After the charcoal was administered, Davis was denied his request to see a psychologist or psychiatrist, and was left to cope with his suicidal feelings without professional assistance. Eventually, Davis was transferred from the Emergency Room to the DSH intensive care unit. There, Dr. Krumpos ordered that all of Davis's psychiatric medications be discontinued, in spite of the known side effects of abrupt stoppage of such medication. Davis complained that his suicidal thoughts would get worse without medication, but Krumpos not only ignored him, but eventually discharged him on December 28 without any medication.

D. Events of January 7, 2013

Davis ingested a pen and a pair of glasses in another suicide attempt. His attending nurse remarked that Dr. Jackson "has no heart for you [suicidal] guys. . . he

likely won't help you tonight." Ultimately, Dr. Jackson ordered an x-ray but did not otherwise make any attempt to remove the swallowed objects through gastroenterological endoscopic surgery. Dr. Jackson also refused to send Davis to see a psychologist or psychiatrist to address his suicidal thoughts. Instead, he, too, discharged Davis back to CCI.

Three hours later, Davis attempted another suicide by lacerating his right wrist. Two days later, the pain from the swallowed objects was so intense that he fainted and suffered a head injury. Two days after that, Davis was finally admitted to Waupun Memorial Hospital for another gastroenterological endoscopic surgery to remove the swallowed items.

OPINION

I. EMTALA Claims

The Emergency Medical Treatment and Active Labor Act (EMTALA) was passed to combat the problem of "patient dumping;" that is, the practice of transferring or discharging indigent or non-insured patients while their emergency conditions worsen. *Johnson v. Univ. of Chi. Hosps.*, 982 F.2d 230, 233 n.7 (7th Cir. 1993). The statute imposes two requirements upon federally-funded hospitals.[1] First, a hospital "must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . . to determine whether or not an emergency medical

[1] Only "participating hospitals" -- hospitals that accept federal funds from the Centers for Medicare and Medicaid -- are subject to civil liability under EMTALA. *See* 42 U.S.C. § 1395dd (e)(2)). However, most hospitals fall into this category and the court infers that DSH is one of them for purposes of screening only.

condition . . . exists." 42 U.S.C. § 1395dd(a). Second, if this screening detects an emergency medical condition, the patient may *not* be discharged until he or she has received a stabilizing treatment, and may not be transferred until certain criteria are met. *See* § 1395dd(b)(1), (c). EMTALA authorizes a patient harmed by a hospital's failure to adhere to either requirement to sue the hospital. *See* § 1395dd(d)(2).

For purposes of this screening order, the court finds that Davis has asserted a legally cognizable claim against Divine Savior Hospital under EMTALA.[2] The success of his claim that the hospital discharged him without stabilizing his stomach condition or his suicidal urges will ultimately hinge on whether (1) his ailments actually meet the statutory definition of "emergency medical condition" and (2) the hospital "stabilized" him before sending him back to prison. For screening purposes, however, the court finds that Davis has alleged enough to proceed.

The term "emergency medical condition" is defined as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--
> (i) placing the health of the individual . . . in serious jeopardy,
> (ii) serious impairment to bodily functions, or
> (iii) serious dysfunction of any bodily organ or part . . . .

42 U.S.C. § 1395dd(e)(1).

The term "to stabilize" is defined as:

> with respect to an emergency medical condition . . . to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability,

[2] Davis initially asserted EMTALA claims against his physicians but subsequently moved to withdraw them. (Dkt. #17.)

> that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility.

42 U.S.C. § 1395dd(e)(3)(A). Both of these definitions are refined by relevant Department of Health and Human Services implementing regulations. *E.g.* 42 CFR § 489.24(d), (e).

Given the gastrointestinal and psychological ailments Davis claims to have presented and suffered, as well as the subsequent worsening of his condition and need for surgery after being returned to prison, it appears that Davis at least arguably had an "emergency medical condition" and was not "stabilized." Again, the court does not hold as a matter of law that the alleged facts state an EMTALA violation, only that the claim is at least arguable and worthy of being allowed to proceed beyond the screening stage. See *Kelley v. McGinnis*, 899 F.2d 612, 616, n7 (7th Cir. 1990) ("The standard applied to an IFP motion . . . is not as rigorous as that applied to the pro se complaint itself. . . . [A plaintiff] could be entitled to proceed IFP but still fail to state a cognizable claim for relief." (internal citations omitted)).

II. Medical Malpractice Claims

Davis alleges that doctors Jackson, Boursier and Krumpos committed medical malpractice by failing to provide him with proper care. Because these claims are related to the EMTALA action, they can be heard under this court's supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). To prevail on a claim for medical malpractice in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that

results in (4) injury or injuries, or damages. *Paul v. Skemp*, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (*citing Nieuwendorp v. Am. Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). All doctors have a duty of care to their patients, and Davis adequately alleges a breach of this duty by alleging facts that at least suggest the three doctors ignored his need for stomach surgery and psychiatric medication, although ultimately his claim may require that Davis present expert medical opinion to meet his burden to *prove* malpractice.

III. Battery Claims

Davis also asserts a claim for battery under Wisconsin common law against Dr. Jackson for assisting in the forcible administration of liquid charcoal. Although Dr. Jackson likely has a strong affirmative defense given the exigent circumstances, Davis has at least stated a prima facie tort claim. "The right to refuse medical treatment . . . comes from the common law torts of assault and battery." *State v. Payano-Roman*, 2006 WI 47, ¶75, 290 Wis.2d 380, 714 N.W.2d 548 (2006).

IV. Request for a Preliminary Injunction

Davis next asks for a preliminary injunction ordering Divine Savior Hospital to comply with its duties under EMTALA. There seems to be no urgent need for an injunction because even taking all of Davis's allegations are true, he does not now appear to be in any life-threatening danger. To the extent that Davis anticipates that he will continue to harm himself, the real risk may lie not with the Hospital's discharge

practices, but rather with the basic ability of Columbia Correctional Institution to prevent and respond to suicide attempts.

The court will, nevertheless, treat Davis's motion as an expedited, but not an urgent matter, accepting written briefs from both sides on the merits of his preliminary injunction and may ultimately elect to convene a hearing, but only if the preliminary injunction motion cannot be decided on the briefs.

V. Motion to Appoint Counsel

Davis has submitted two motions asking the court to appoint a guardian ad litem or to recruit legal counsel for him. The first motion is ostensibly authored by another inmate, Erick Peterson, who says he has been preparing many of the submissions sent to this court in Davis's name because Davis is mentally ill and lacks the skills to litigate on his own behalf. (*See* dkt. #2.) The second motion, authored by Davis himself on March 18, 2013, claims that prison officials are now preventing him from seeking legal assistance from other inmates. (*See* dkt. #14.)

In deciding whether to enlist counsel, the court must first find that a plaintiff has made reasonable efforts 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, 1072-73 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, a plaintiff must normally 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. Davis has met this requirement.

The next question is whether Davis meets the legal standard for appointment of counsel, in the sense that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654, 655 (7th Cir. 2007). Davis easily qualifies under this standard as long as the court accepts at face value the representations made about his mental incapacity. However, the court must consider the "litigant's *demonstrated* ability -- or inability -- to meet th[e] demands" of litigation. *Id.* at 663 (emphasis added). Judging by all the submissions provided to date, Davis appears quite capable with or without Mr. Peterson's assistance. Davis's April 17, 2013 "Motion to withdraw EMTALA claims," drafted without anyone's assistance, is quite lucid and well-written, demonstrating that Davis may be able to litigate on his own, despite Mr. Peterson's contrary assertions. Accordingly, the court finds Davis has not, at least at this time, met his burden of showing that this is one of the extraordinary times where recruitment of counsel is necessary even in the early stages of the case. His motion will be denied, therefore, without prejudice, subject to reconsideration when the disputed issues in this case become more distinct and/or plaintiff's limitations as an advocate starkly present themselves.

ORDER

IT IS ORDERED that:

(1) Plaintiff Jeffrey Davis's request to proceed (dkt. #4) is GRANTED.

(2) Plaintiff's motion to withdraw his EMTALA claims against the defendant doctors (dkt. #17) is GRANTED.

(3) Plaintiff's motions for assistance recruiting counsel or for appointment of a

guardian ad litem (dkt. ##2, 14) are DENIED without prejudice.

(4) Plaintiff's informal request for a preliminary injunction (dkt. # 4) is set for briefing. Plaintiff is ordered to submit a brief in support of his motion by October 30, 2013. Defendants are ordered to submit a response to plaintiff's motion by November 29, 2013. Plaintiff may file a brief in reply by December 16, 2013.

(5) The summons and complaint are being delivered to the U.S. Marshal for service on defendants; plaintiff's motion to serve defendants individually (dkt. #7) is MOOT.

(6) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's 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 unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 24th day of September, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge