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

JOHN L. DYE, JR.,

Plaintiff,

v.

BRYAN BARTOW, MARY KLEMZ, CATHY A. JESS, LARRY JENKINS, ROBERT HUMPHREYS, GAANAN, BARBARA WAEDEKIN, THERESA BARWELL, THOMAS MICHLOWSKI, STEVE SPANBAUER, MARY VANDE SLUNT, CHARLES FACKTOR, CINDY O'DONNELL, EDWARD F. WALL, LOYDA LORIA, AND JOHN DOES,

Defendants.[2]

OPINION and ORDER

13-cv-284-jdp[1]

Plaintiff John Dye, a prisoner currently incarcerated at the Waupun Correctional Institution, brings this civil action under 42 U.S.C. § 1983 alleging that officials at the Wisconsin Resource Center ("WRC") have forced him to use a short-handled toothbrush despite having a "chronic mallet deformed right thumb" and suffering from arthritis in both hands.

In a July 15, 2013 screening order, Judge Barbara Crabb dismissed the case for plaintiff's failure to state a claim on which relief may be granted. Dkt. 8. More specifically, she concluded that plaintiff's Eighth Amendment rights were not being violated by his being forced to use a short-handled toothbrush because there was no reason to believe that plaintiff needed to use his right hand to brush his teeth. *Id.* Plaintiff responded by filing a motion to

[1] This case was reassigned to me pursuant to a May 16, 2014 administrative order. Dkt. 30.

[2] The caption has been amended to correct the spelling of defendant Spanbauer's name.

alter or amend judgment under Federal Rule of Civil Procedure 59, arguing that he had additional allegations regarding his arthritis that would support a proper Eighth Amendment claim. He also filed a notice of appeal. In a September 19, 2013 order, Judge Crabb granted the Rule 59 motion and vacated the judgment, stating that "it now seems possible that, with a properly amended complaint, plaintiff may be able to state claims upon which relief may be granted." Dkt. 18. The court of appeals dismissed plaintiff's appeal on January 10, 2014, and plaintiff has now submitted an amended complaint containing his expanded allegations that is ready for the court's review.

Plaintiff seeks leave to proceed *in forma pauperis* on his claims. However, he has "struck out" under 28 U.S.C. § 1915(g) because on three different occasions he has filed lawsuits that were dismissed as frivolous. This means that he cannot qualify for indigent status under § 1915 in any suit he files during the period of his incarceration unless he alleges facts in his complaint from which an inference may be drawn that he is in imminent danger of serious physical injury at the time he filed his complaint.

After reviewing plaintiff's complaint, I conclude that he may proceed on Eighth Amendment medical care claims against defendants Dr. Gaanan, Mary Klemz, and Thomas Michlowski, as well as a claim under the Rehabilitation Act for staff's failure to accommodate his arthritis. The remainder of plaintiff's complaint will be dismissed, although I will give him a short time to pay the remainder of his filing fee if he wishes to proceed on additional Eighth Amendment claims for past harm against defendants Dr. Loyda Loria and Steve Spanbauer.

ALLEGATIONS OF FACT

The following facts are drawn from plaintiff's amended complaint and inmate grievance materials attached to his original complaint. Plaintiff John Dye is currently confined at the Waupun Correctional Institution. However, the events giving rise to his complaint occurred while he was incarcerated at the Wisconsin Resource Center, located in Winnebago, Wisconsin. Plaintiff has served at least two different stints at this facility.

Plaintiff has a deformed right thumb; he states that "medical documentation support[s] a diagnosis of a 'chronic mallet deformed right thumb'; with a surgical clip at the base of the distal phalanx of the thumb, suspected incomplete cortical break at the base of the proximal phalanx, with possible traumatic arthritis." Plaintiff also has severe arthritis in both of his hands and wrists.

During plaintiff's stints at WRC, he was not allowed to use a normal-sized toothbrush. Instead, for safety reasons he was given a "pinkey size" toothbrush. Because of his medical condition, brushing his teeth with the small toothbrush caused plaintiff severe pain.

During his first stint at the facility, encompassing at least parts of 2008 and 2009, plaintiff was examined by defendant Dr. Loyda Loria twice, who conducted extremely cursory exams of plaintiff's hands; she asked plaintiff to hold out his hands, turn them over and make a fist. Loria falsely diagnosed that plaintiff had full range of motion in his hands and no inflammation or deformities that would limit his hand or wrist movement. Although plaintiff's allegations are somewhat difficult to follow, I understand plaintiff to be saying that both in his past stint and most current stint at WRC, defendant institution complaint

examiner Steve Spanbauer denied grievances filed by plaintiff about the thoroughness of the exam and denial of a long-handled toothbrush, relying on Loria's medical determinations.

Plaintiff arrived for a second stint at WRC on January 23, 2013. On January 28, 2013, plaintiff was seen by defendant Dr. Gaanan. Plaintiff informed Gaanan about his medical conditions. Gaanan said that he would talk to other medical staff about plaintiff's request for a long-handled toothbrush. Over the next month, plaintiff had several medical appointments, including with Gaanan, but he received no news about his toothbrush request.

Plaintiff sent letters about the toothbrush issue to various prison staff, including the following defendants named in the caption: Barbara Waedekin (a psychiatrist); Larry Jenkins and Robert Humphreys (assistant Division of Adult Institutions administrators); Cathy Jess (Division of Adult Institutions administrator); Mary Klemz (deputy director of the facility); Thomas Michlowski (the facility's medical director) and Bryan Bartow (the warden). He also sent letters to the following officials who are not defendants in this case: Walrath (the director of nursing); Symdon (assistant Division of Adult Institutions administrator); Becher and Gunderson (nursing coordinators); and Thorp (a nurse).[3]

On February 26, 2013, plaintiff received a response from defendant Klemz, the WRC deputy director, stating in relevant part:

> This letter is in response to your correspondence sent to the Director Bryan Bartow, Assistant DAI Administrator Larry Jenkins and Robert Humphreys, and DAI Administrator Cathy Jess. The WRC Medical Director has been contacted regarding your many stated concerns, who indicated these issues will be reviewed and addressed. The medical department has not indicated that you require a full size toothbrush. Each individual's case is evaluated separately based on current assessments. If you disagree with the decision made by your

[3] Although plaintiff refers to at least some of these officials as defendants within the body of his complaint, he does not name them as defendants in the caption of the complaint, so I will not consider them as defendants. *See* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties") (emphasis added).

> doctors you may certainly continue to address these issues with your treatment team and staff at WRC. If you have specific medical concerns you may also write to Dr. Thomas Michlowski, Medical Director.

On March 5, 2013, plaintiff met with defendant Gaanan to check his blood pressure. Plaintiff brought up the pain he continued to have in his right hand while brushing his teeth with the small toothbrush. Gaanan briefly examined plaintiff's thumb and stated that he was still waiting for a decision from a "higher-up" regarding the toothbrush issue. He also increased plaintiff's pain medication. Gaanan never got back to plaintiff about his request.

At one point (plaintiff does not explain when), plaintiff met with Michlowski and told him about the problems he had with the small toothbrush. Michlowski stated that he did not read plaintiff's letter because he gets many letters, but stated that he would make a note in plaintiff's medical file.

On March 27, 2013, plaintiff received correspondence from defendant Klemz stating that defendant Gaanan denied his request. The last plaintiff had heard from Gaanan was that he was waiting for a "higher up" to make a determination. Klemz suggested that plaintiff use his other hand, a different finger, or a rolled washcloth around his index finger to brush his teeth. However, because of plaintiff's arthritis, these alternatives would have been just as painful.

ANALYSIS

A. Imminent Danger

Plaintiff seeks leave to proceed *in forma pauperis* in this case under 28 U.S.C. § 1915. However, as stated above, plaintiff has struck out under 28 U.S.C. § 1915(g). This provision states as follows:

> 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.

On at least three prior occasions, plaintiff has been denied leave to proceed *in forma pauperis* in lawsuits that were legally frivolous. *Dye v. Bartow*, No. 07-3836 (7th Cir. June 12, 2008); *Dye v. Kay*, No. 00-C-1058 (E.D. Wis. Apr. 23, 2001); *Dye v. Milwaukee Journal Sentinel, Inc.*, No. 99-C-1324 (E.D. Wis. Dec. 28, 1999). Therefore, he may not proceed *in forma pauperis* on his claims unless his complaint alleges facts from which an inference may be drawn that he was in imminent danger of serious physical injury at the time he filed his complaint. To meet the imminent danger requirement of 28 U.S.C. § 1915(g), a prisoner must allege a physical injury that is imminent or occurring at the time the complaint is filed and show that the threat or prison condition causing the physical injury is real and proximate.[4] *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (citing *Heimermann v. Litscher*, 337 F.3d 781 (7th Cir. 2003); *Lewis v. Sullivan*, 279 F.3d 526, 529 (7th Cir. 2002)).

Construing the complaint generously, I understand plaintiff to be alleging that he suffers serve arthritis pain because he is forced to use a short-handled toothbrush. Although plaintiff does not explain why a normal-sized toothbrush would alleviate his pain, at this early stage of the proceedings, his allegations are sufficient to meet the relatively low bar

[4] Plaintiff's recent transfer to the Waupun Correctional Institution is irrelevant to the "imminent danger" determination. *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1174 (7th Cir. 2010) ("if when the prisoner files his suit he is in imminent danger of serious physical harm, he doesn't have to pay the entire filing fee up front even if later the danger passes; the existence of the danger and therefore the applicability of the imminent-danger exception to the "three strikes" rule are determined *when the suit is filed*.") (emphasis added). Plaintiff was still at WRC when he submitted his original complaint. *See* dkt. 1.

required to meet the "imminent danger" standard he faces as a three-strikes litigant. *Ciarpaglini*, 352 F.3d at 331 (It is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute "serious physical injury."). Therefore, plaintiff's claims regarding his most recent stint at WRC may be screened without him prepaying the $350 filing fee.

However, plaintiff also appears to be bringing claims against defendants Loria and Spanbauer for treatment during first stint at WRC, taking place in 2008 and 2009. Because these are claims for past harm, they do not qualify under the imminent danger requirement of 28 U.S.C. § 1915(g). Plaintiff may not proceed on these claims without prepaying the entire $350 filing fee for this case, so I will give plaintiff a short time to submit that payment. If plaintiff fails to submit payment by the deadline, those claims will be dismissed. If plaintiff does submit payment, I will screen those claims of past harm.

B. Screening Plaintiff's Claims

In screening plaintiff's claims, the court must construe the complaint liberally. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). However, I must dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). I understand plaintiff to be attempting to bring three types of claims regarding the failure to provide him with a normal toothbrush: Eighth Amendment deliberate indifference claims, due process claims, and claims under Americans with Disabilities Act. I will address these in turn below.

1. Eighth Amendment

To state a claim under the Eighth Amendment for inadequate medical care, 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). At this point, plaintiff's allegations that he needlessly suffers severe pain when he brushes his teeth are sufficient to meet this standard.

"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). Only one of the remaining defendants, Dr. Gaanan, is alleged to have directly treated plaintiff's medical problems. Gaanan met with plaintiff several times, reviewed his records, examined his thumb, increased his pain medication, but ultimately denied plaintiff's request for a normal toothbrush after two months. Even assuming that the correct medical decision would have been to allow plaintiff a normal toothbrush, it is unclear whether Gannan's delay in making a determination or ultimate denial of plaintiff's request (he may have been waiting for approval from higher ranking officials) violated the Constitution. 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). Although it is possible that the treatment decisions made by Gaanan were either medically correct or the result of negligence or an incorrect diagnosis, it is too early to dismiss an arguable claim at this point of the proceedings, so I will allow plaintiff to proceed on an Eighth Amendment claim against Gaanan.

Plaintiff alleges that defendant institution complaint examiner Spanbauer denied his grievances based on defendant Loria's medical determinations. This does not state a claim against Spanbauer, as inmate grievance examiners do not violate the Eighth Amendment by deferring to the health care decisions of medical professionals. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009).

Plaintiff also alleges that he sent letters about his problem to various defendant prison staff members (psychiatrist Waedekin; administrators Jess, Jenkins, and Humphreys; deputy director Klemz; medical director Michlowski; and warden Bartow), but got a reply from only defendant deputy director Klemz, who stated that defendant medal director Michlowski would address plaintiff's concerns. The Court of Appeals for the Seventh Circuit has held that prisoners do not have a right to assistance from anyone and everyone at the prison that receives a complaint. *Id.* ("Public officials do not have a free-floating obligation to put things to rights, disregarding rules (such as time limits) along the way. Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job."). In the context of medical care in particular, prison officials are "entitled to relegate to the prison's medical staff the provision of good medical care." *Id*. Thus I will not allow plaintiff to proceed on claims

against the various defendant officials who did not respond to his letter where there is no suggestion that they had a duty to respond to a letter about a prisoner's arthritis.

However, to the extent that plaintiff alleges that defendants Klemz and Michlowski chose to intervene yet failed to help plaintiff, he has arguably stated claims against them. Plaintiff alleges that Klemz told him that Michlowski would address his concerns, but at some later point when plaintiff met with Michlowski, he stated that he had not read plaintiff's letter. Plaintiff also alleges that Klemz suggested other futile ways for plaintiff to brush his teeth. Although it is possible that these defendants did all that they were required to do (Klemz at least in part suggested that plaintiff continue to contact medical staff and Michlowski "made a note" in plaintiff's medical file), I will allow him to proceed on these arguable Eighth Amendment claims against Klemz and Michlowski.

2. Due process

Plaintiff also states that he is bringing both substantive and procedural due process claims about the denial of a regular toothbrush. However, the due process clause is not the proper source for a claim against prison officials for failing to make medical accommodations for him. The United States Supreme Court has held that where a particular constitutional amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citations omitted). Because plaintiff's allegations about the failure to accommodate his arthritis are already covered by the Eighth Amendment, he may not bring a substantive due process claim.

Similarly, plaintiff cannot bring a procedural due process claim because the Eighth Amendment already prohibits deprivation of adequate medical care; there is *no* procedure that would allow the imposition of cruel and unusual punishment on him. *See Clentscale v. Beard*, No. 2008 WL 3539664, at *5 (W.D. Pa. Aug. 13, 2008) ("Because . . . deliberate denial of adequate medical care constitutes a violation of the Eighth Amendment, i.e., amounts to cruel and unusual punishment, it is inconceivable to this Court what procedural protections could apply to such a deprivation of a 'liberty interest' which constitutionally cannot occur.").

3. Americans with Disabilities Act/Rehabilitation Act

Plaintiff argues that the defendant prison officials have violated the Americans with Disabilities Act ("ADA") by forcing him to use a smaller toothbrush that causes him severe pain. He states that he "submitted this complaint as a direct result of his diagnosed 'mallet deformity' in his right thumb." Dkt. 26, at 6. As the court noted in its original screening order, plaintiff cannot sustain a claim regarding *only* his right thumb problem because if this was plaintiff's only medical issue, he could easily just use his left hand to brush his teeth. However, construing plaintiff's new allegations generously, I understand him to be saying that defendants violated the ADA because his thumb deformity and arthritis make it impossible to brush his teeth with the small toothbrush without suffering severe pain.

Title II of the ADA provides that qualified individuals with disabilities may not "by reason of . . . disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. State prisons are considered "public entities," *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206-09 (1998), and state prison officials can be sued under the ADA for declaratory and injunctive relief, *Radaszewski ex*

rel. Radaszewski v. Maram, 383 F.3d 599, 606 (7th Cir. 2004). However, given the uncertainty about the availability of damages under Title II, the Court of Appeals for the Seventh Circuit has suggested replacing a prisoner's ADA claim with a parallel claim under the Rehabilitation Act, 29 U.S.C. § 701 et seq., where damages are available against a state that accepts federal assistance for prison operations.[5] *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) ("As a practical matter, then, we may dispense with the ADA and the thorny question of sovereign immunity, since Jaros can have but one recovery."); *see also Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012) ("courts are supposed to analyze a litigant's claims and not just the legal theories that he propounds—especially when he is litigating pro se.") (citations omitted).

Claims under the Rehabilitation Act require the plaintiff to allege that "'(1) he is a qualified person (2) with a disability and (3) the [state agency] denied him access to a program or activity because of his disability.'" *Wagoner v. Lemmon*, No. 13-3839, 2015 WL 449967, at *5 (7th Cir. Feb. 4, 2015) (quoting *Jaros*, 684 F.3d at 672). "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap, with reasonable accommodation." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 482 (7th Cir. 1996) (internal quotation omitted). Disability includes the limitation of one or more major life activities, which includes caring for oneself, *see* 42 U.S.C. § 12102(2)(A). I understand plaintiff to be saying that his ability to care for himself by brushing his teeth has been limited by his thumb deformity and arthritis, but that he could perform this task with a normal toothbrush. "Refusing to make reasonable accommodations [for a program or activity] is tantamount to denying access." *Jaros*, 684 F.3d at 672. The question whether

[5] Courts have repeatedly taken judicial notice that every state accepts federal assistance for prison operations. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005).

brushing one's teeth counts as a "program or activity" is a close one, but in light of other cases suggesting that hygienic activities can meet this standard, at this point I will allow plaintiff to proceed on this arguable claim. *See id*. ("Although incarceration is not a program or activity . . . showers made available to inmates are."); *Kearney v. N.Y.S. DOCS*, 2012 WL 5197678, at *4 (W.D.N.Y. Oct. 19, 2012) (prisoner allowed to maintain claim for being "unable to access services, programs and activities, such as showers, dental care and recreation.").

The proper defendant for claims under the Rehabilitation Act is the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(B); *Jaros*, 684 F. 3d at 670 n.2. Accordingly, plaintiff will be allowed to proceed with his Rehabilitation Act claim against already-named defendant Edward F. Wall in his official capacity as secretary of the DOC.

4. Remaining defendants

Finally, I do not understand plaintiff to be bringing any claims against named defendants Barwell, Vande Slunt, Facktor, O'Donnell, or John Does. These defendants will be dismissed from the case.

ORDER

IT IS ORDERED that:

1. Plaintiff JOHN L. DYE, JR. is GRANTED leave to proceed on the following claims:

    a. Eighth Amendment deliberate indifference claims against defendant Dr. Gaanan for failure to accommodate plaintiff's arthritis and against defendants Mary Klemz and Thomas Michlowski for their responses to plaintiff's complaints.

b. A Rehabilitation Act claim against defendant Edward F. Wall.

2. Plaintiff is DENIED leave to proceed on his claims for past harm against defendants Loyda Loria and Steve Spanbauer because he is ineligible to proceed *in forma pauperis* on those claims under 28 U.S.C. § 1915(g). Plaintiff may have until April 10, 2015, in which to submit a check or money order made payable to the clerk of court for the remainder of the $350 filing fee for this case if he wishes to proceed with these claims. If he fails to pay the remainder of his filing fee by this date, those claims will be dismissed.

3. Plaintiff is DENIED leave to proceed on the remainder of his claims. Defendants Theresa Barwell, Mary Vande Slunt, Charles Facktor, Cindy O'Donnell, and John Does are DISMISSED from the case.

4. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended 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.

5. 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.

6. 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.

7. 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 March 24, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge