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

ROGER ALLEN COSE,

OPINION & ORDER

Plaintiff,

v. 14-cv-540-jdp

BELINDA SCHRUBBE, MARY GORSKE, and CHARLES LARSON,

Defendants.

Pro se plaintiff Roger Allen Cose is a prisoner in the custody of the Wisconsin Department of Corrections currently housed at the Stanley Correctional Institution. Plaintiff filed a complaint alleging that members of the Waupun Correctional Institution Health Services Unit failed to provide plaintiff adequate medical care and caused him unnecessary pain when he was previously housed there. After considering plaintiff's allegations, I dismissed his complaint for failing to comply with Federal Rule of Civil Procedure 8 and directed him "to file an amended complaint that clarifies his deliberate indifference allegations" Dkt. 3, at 4.

Plaintiff has filed an amended complaint. Dkt. 4. After reviewing plaintiff's amended allegations, I will allow him to proceed with his Eighth Amendment deliberate indifference claim as alleged against defendants Gorske and Larson. I will dismiss plaintiff's claim as alleged against defendant Schrubbe. Plaintiff has also filed a "formal request for legal counsel," Dkt. 5, which I will deny at this point, as explained below.

ALLEGATIONS OF FACT

In his amended complaint, plaintiff alleges that in 2013, while receiving medical attention at the Stanley Correctional Institution (SCI), he learned that he had an "over-riding" fibula fracture and that it had been causing him lower leg pain since at least October 2003. Plaintiff alleges that medical professionals at the Waupun Correctional Institution (WCI) had X-rayed plaintiff's leg in October 2003 but never properly treated the fibula fracture. Plaintiff indicates that he has complained of lower left leg pain for nearly a decade; along the way, plaintiff received left shoe lifts, a lower bunk restriction, and ibuprofen.

As in his original complaint, plaintiff identifies three defendants: Mary Gorske, a nurse practitioner at WCI; Charles Larson, a physician at WCI; and Belinda Schrubbe, a registered nurse at WCI. Plaintiff specifically alleges that defendant Gorske served as plaintiff's "primary caregiver" at WCI and that she prescribed ibuprofen for his lower leg pain. Plaintiff identifies defendant Larson as Gorske's "immediate supervisor" and alleges that he received and reviewed the October 2003 X-rays. Plaintiff alleges that neither defendant Gorske nor defendant Larson made note of plaintiff's fibula fracture or discussed the fracture with him. Plaintiff alleges that defendants Gorske and Larson ignored the pain and suffering plaintiff's fractured fibula caused him.

Plaintiff implicates defendant Schrubbe because she is "responsible for what happens at H.S.U." Dkt. 4, at 2. More specifically, plaintiff alleges that he requested a lower bunk restriction from the prison's Special Needs Committee; Schrubbe served as one of the committee's members. Plaintiff alleges that although the committee granted him a low bunk restriction through 2010, it denied the accommodation in March 2011. Plaintiff alleges that

"to take [the restriction] away in March would knowingly cause me great difficulty and pain[.]" *Id.* at 4.

ANALYSIS

A. Plaintiff's amended allegations

As I discussed in my previous order, the Eighth Amendment prohibits prison officials from acting with deliberate indifference toward prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). For a defendant to be deliberately indifferent to a plaintiff's serious medical need, he or she must know of the need and disregard it. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

As in his original complaint, plaintiff alleges that he suffered from a serious medical need: a fractured fibula. Plaintiff's allegations concerning defendants' deliberate indifference are clearer in his amended complaint. Plaintiff alleges that defendants Gorske and Larson treated his lower leg pain and examined his X-rays from October 2003. Plaintiff alleges that both Gorske and Larson were aware of his fractured fibula (as revealed in the X-rays) and that neither of them properly or sufficiently treated the injury or otherwise worked to alleviate his ongoing pain. I will allow plaintiff to proceed with his Eighth Amendment deliberate indifference claim as alleged against defendants Gorske and Larson. These allegations are sufficient to state a claim under Federal Rule of Civil Procedure 8.

However, I will not allow plaintiff to proceed against defendant Schrubbe. Plaintiff's amended complaint identifies defendant Schrubbe as a member of the Special Needs Committee at the prison. Plaintiff alleges that Schrubbe played a role in denying him a lower bunk restriction in March 2011. However, plaintiff does not allege any facts that indicate

that Schrubbe herself was aware of a serious medical condition (i.e., plaintiff's fractured fibula) and deliberately disregarded the condition when denying the bunk restriction. To the contrary, plaintiff's amended complaint suggests that Schrubbe likely did not know about plaintiff's fractured fibula because those treating him—Nurse Practitioner Gorske and Dr. Larson—had not documented or treated that particular injury. Plaintiff has not pled facts sufficient to state an Eighth Amendment claim directly against defendant Schrubbe in her individual capacity under Rule 8.

Plaintiff also fails to sufficiently implicate Schrubbe in her supervisory capacity. In the context of supervisory officials, plaintiff does not need to allege direct participation in a deprivation of constitutional rights, *Miller v. Smith*, 220 F.3d 491, 495 (7th Cir. 2000), but "there must be a showing that the official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act." *Rascon v. Hardiman*, 803 F.2d 269, 273-74 (7th Cir. 1986); *see also Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("To be personally liable under these circumstances, [a director of medical services] must have condoned or acquiesced in a subordinate's unconstitutional treatment."). Because plaintiff has not alleged facts sufficient to establish that defendant Schrubbe purposefully or recklessly deprived plaintiff of adequate medical care, plaintiff has failed to state an Eighth Amendment deliberate indifference claim against defendant Schrubbe based on her role as supervisor.

Plaintiff identifies several other prison officials by name in the body of his amended complaint. However, plaintiff has not specifically identified these individuals as defendants or alleged claims against them. Accordingly, I will not treat these individuals as defendants.

One final note with respect to plaintiff's amended complaint: plaintiff alleges a number of additional factual allegations that do not appear to be related to his Eighth Amendment claim, including allegations that the prison required him to purchase his own ibuprofen, that he continued to receive ibuprofen even after his prescription expired, that his medical file contained copies of documents (as opposed to originals), and he includes a conclusory statement that he believes he was a "pawn" in some criminal scheme meant to defraud the state. None of these tangential factual allegations gives rise to an independent claim for relief or directly implicates any of the named defendants.

B. Plaintiff's formal request for legal counsel

Plaintiff has also filed a "formal request for legal counsel." Dkt. 5. Because this case has not progressed far enough for me to determine whether plaintiff will be capable of prosecuting it on his own, I will deny plaintiff's request. But I will do so without prejudice; plaintiff may renew his motion later in this case.

Litigants in civil cases do not have a constitutional right to a lawyer, and the court has discretion to determine whether assistance recruiting counsel is appropriate in a particular case. *Pruitt v. Mote,* 503 F.3d 647, 654, 656 (7th Cir. 2007). To prove that assistance recruiting counsel is necessary, this court generally requires a pro se plaintiff to: (1) provide the names and addresses of at least three lawyers who declined to represent him in this case; and (2) demonstrate that his is one of those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds his demonstrated ability to prosecute it. *Id.* at 655; *see also Young v. Cramer*, No. 13-cv-077, 2013 WL 5504480, at *2 (W.D. Wis. Oct. 3, 2013).

Plaintiff's request for counsel is brief and conclusory; he merely states that he, like most prisoners, has limited resources and does not have sufficient legal knowledge to handle his complex case. But plaintiff has not demonstrated that he has attempted to obtain counsel on his own and, as a result, has not demonstrated that he has been unsuccessful. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("[T]he district judge must first determine if the indigent has made reasonable efforts to retain counsel and was unsuccessful or that the indigent was effectively precluded from making such efforts."). If plaintiff decides to file a motion for assistance recruiting counsel later in this case, then he must provide adequate documentation that he has requested assistance from at least three firms or attorneys, and that those requests have been unsuccessful.

Regardless, plaintiff cannot meet the second prong of the test: demonstrating that the legal and factual complexity of the case exceeds his ability to prosecute it. It is too early to tell whether plaintiff's claims will surpass his litigation abilities. The case has not even passed the relatively early stage at which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which often results in dismissal of cases before they advance deep into the discovery stage of litigation. Should the case pass the exhaustion stage, and should plaintiff continue to believe that he is unable to litigate the suit himself, then he may renew his motion.

For these reasons, I will deny his request for legal counsel at this time.

ORDER

IT IS ORDERED that:

1. Plaintiff Roger Allen Cose is GRANTED leave to proceed with his Eighth Amendment deliberate indifference claim as alleged against defendants Mary Gorske and Charles Larson.

2. Plaintiff is DENIED leave to proceed against defendant Belinda Schrubbe, who is DISMISSED from this case.

3. Plaintiff's formal request for legal counsel, Dkt. 5, is DENIED without prejudice to plaintiff renewing his request later in this case.

4. Pursuant to 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 defendants. Plaintiff should not attempt to serve defendants 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 amended complaint if it accepts service for 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 learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show 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 he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, then his case may be dismissed for his failure to prosecute it.

Entered December 22, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge