

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

DONALD CHARLES WILSON,

Plaintiff,

v.

DR. LORI ADAMS and DR. PATRICK
MURPHY,

Defendants.

OPINION and ORDER

14-cv-222-bbc

This civil action is before the court in an unusual posture. In two cases filed in 2011 and 2012, 11-cv-725-bbc and 12-cv-114-bbc, plaintiff Donald Charles Wilson, a prisoner at the Oshkosh Correctional Institution, alleged that various defendants failed to provide him proper treatment for Alzheimer's disease and a neck condition (which, he says, has been diagnosed variously as thyroid problems, bacterial infection and cancer). In those cases, defendants Adams and Murphy were dismissed for plaintiff's failure to state a claim against them; plaintiff's remaining claims were dismissed for his failure to exhaust his administrative remedies.

In this case, plaintiff filed an initial complaint, dkt. #1, which was dismissed for failure to state a claim on which relief could be granted, with leave to amend. Plaintiff filed an amended complaint, dkt. #10, stating claims against a variety of defendants. Most of the claims had been dismissed in the previous cases for his failure to exhaust. In an order

entered on July 8, 2014, I found that plaintiff had stated viable claims against defendants Adams and Murphy and I directed those defendants to respond to the amended complaint. (The remaining defendants were dismissed in an order entered on July 10, 2014.) Still later, plaintiff found counsel to represent him in this case.

Counsel has now filed another amended complaint. Dkt. #29. It is before the court for screening to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915A.

Plaintiff's second amended complaint largely restates the allegations he made in his first amended complaint. To the extent he has already been granted leave to proceed, I need not re-screen those allegations. This leaves only three matters that require screening. First, plaintiff has added the Wisconsin Department of Corrections as a defendant and asserts claims against it under the Americans with Disabilities Act and the Rehabilitation Act. Second, plaintiff has amended his allegations against defendant Patrick Murphy related to his dental treatment and Alzheimer's disease. Third, in his proposed amended complaint, plaintiff alleges that his claims cover a broader time period than what he was allowed to proceed on previously. I will consider each matter in turn.

OPINION

A. Americans with Disabilities Act and Rehabilitation Act of 1973 Claims

Plaintiff seeks to add the Wisconsin Department of Corrections to the case as a defendant. He asserts claims under the ADA and Rehabilitation Act against it only. These

statutes prohibit the denial of access to programs or activities as a result of a prisoner's disability. They also prohibit prisons from refusing to make reasonable accommodations to allow prisoners to participate in those programs and activities. Jaros v. Illinois Dept. of Corrections, 684 F.3d 667, 672 (7th Cir. 2012); Foley v. City of Lafayette, Indiana, 359 F.3d 925, 928 (7th Cir. 2004). Plaintiff alleges that he is disabled as a result of his Alzheimer's disease because it interferes with his major life activities including "caring for himself, thinking, concentrating, communicating, and working." Plt.'s Am. Cpt., dkt. #29, at ¶ 103. He also says he is disabled as a result of his neck and teeth problems because they limit major life activities including "breathing, walking, swallowing, and eating." Id. at ¶ 102.

Plaintiff contends that defendant Wisconsin Department of Corrections violated the ADA and Rehabilitation Act in three ways. First, he says, he asked to participate in a substance abuse program in October 2013 and the domestic violence treatment program in March 2014 at the Oshkosh prison but has been denied the opportunity to participate as a result of his Alzheimer's disease and other health problems. State agencies such as the Wisconsin Department of Corrections have sovereign immunity against claims under the ADA, Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001), except in instances in which the alleged ADA violation is also a violation of a constitutional right, such as a right under the Eighth Amendment. United States v. Georgia, 546 U.S. 151, 158-59 (2006). Because I conclude that denying plaintiff access to program activities on domestic violence and substance abuse was not a violation of a constitutional right, plaintiff

will not be granted leave to proceed under the ADA. However, plaintiff does state a claim against the department under the Rehabilitation Act and will be granted leave to proceed on his claim that it denied him the opportunity to participate in programming because of his disability, in violation of this Act. Norfleet v. Walker, 684 F.3d 688, 690 (7th Cir. 2012) (sovereign immunity does not apply to claims under Rehabilitation Act and Rehabilitation Act is available to prisoners).

Second, plaintiff alleges that the prison previously approved accommodations for his disabilities, including his use of a low bunk, wheelchair and the dietary supplement Ensure, but revoked its approval for these items despite his continuing need for them. I may assume at screening that lack of access to a low bunk, wheelchair and a dietary supplement prevented plaintiff from participating in a program or activity provided by the prison.

Third, plaintiff alleges that he has been denied access to treatment of his dental problems as a result of his neck disability. At this stage of the case, I will assume that dental treatment is constitutes “services, programs, or activities” under the ADA and Rehabilitation Act. 42 U.S.C. § 12132.

Plaintiff may proceed under the Rehabilitation Act on his theories that he was denied access to a low bunk, wheelchair, dietary supplement and dental work as a result of his disability for the reasons discussed above. Plaintiff will also be granted leave to proceed on his ADA claim as it relates to the Eighth Amendment denial of medical necessities. Sovereign immunity applies when the alleged conduct violates a provision of the

Constitution such as the Eighth Amendment. Georgia, 546 U.S. at 158-59. At this stage of the proceedings, I will assume that deprivation of a low bunk, a wheelchair, a dietary supplement and dental treatments constitute “deliberate indifference of a serious medical need,” in violation of the Eighth Amendment. In any case, I note that relief under the ADA and Rehabilitation Act is coextensive; proceeding under both statutes does not change either the scope of defendant’s claims or the relief available to him. Jaros, 684 F.3d at 671-72 (“[T]he analysis governing each statute is the same except that the Rehabilitation Act includes as an additional element the receipt of federal funds, which all states accept for their prisons. . . . 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.”) (citations omitted).

B. Defendant Murphy

Plaintiff alleges that defendant Murphy was the doctor he saw for his neck condition and that defendant Murphy refused to provide adequate treatment for that condition. This allegation is sufficient to state claims under the Eighth Amendment and for negligence. Plaintiff also alleges that the prison dentist has refused or delayed treatment for plaintiff’s injured teeth because his neck condition interfered with the dentist’s ability to treat the dental problems. Although plaintiff presents these facts as a basis for a separate claim under the Eighth Amendment and for negligence, it appears that the dental treatment issue is bound together with plaintiff’s claim for failing to treat the neck problems because until the

neck problems are addressed, the dental problems cannot be treated.

Further, plaintiff alleges that defendant Adams refused to treat his Alzheimer's disease and he is proceeding on claims related to those facts against Adams. Plaintiff now alleges on "information and belief," that "Dr. Murphy was also aware of Mr. Wilson's requests for treatment for Alzheimer's disease and dementia but refused to provide any medication or treatment for those conditions." Plt.'s Am. Cpt., dkt. #29, at ¶ 76. Defendant Murphy's knowledge of plaintiff's Alzheimer's diagnosis alone is not sufficient to state a claim against him under the Eighth Amendment or for negligence; plaintiff must show that Murphy had some personal responsibility to attend to plaintiff's Alzheimer's-related needs. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003); Hoida, Inc. v. M & I Midstate Bank, 2006 WI 69, ¶ 28, 291 Wis. 2d 283, 304, 717 N.W.2d 17, 28 ("[A] court first must decide whether the defendant owed a duty to the plaintiff."). Accordingly, plaintiff will be granted leave to proceed under the Eighth Amendment and for negligence against defendant Murphy with respect to plaintiff's neck problems only.

C. Scope of Time of Plaintiff's Claims

In the order screening plaintiff's first amended complaint, entered on July 8, 2014, I allowed plaintiff to proceed on his claims only with respect to his allegations for February 2013 or later because his pre-February 2013 were dismissed in case nos. 11-cv-725-bbc and 12-cv-114-bbc for plaintiff's failure to exhaust and he had not alleged exhaustion of those

claims. However, defendants Adams and Murphy were dismissed not for plaintiff's failure to exhaust but because plaintiff failed to state a claim against them. Plaintiff's proposed amended complaint includes allegations against defendants Adams and Murphy related to his Alzheimer's disease and neck condition that arise from events before February 2013. In addition, plaintiff has filed a brief in which he argues that he has exhausted his pre-February 2013 claims against defendants Adams and Murphy. Because these defendants were dismissed for plaintiff's failure to state a claim, plaintiff need not show exhaustion before proceeding against them. Nevertheless, plaintiff's filing has alerted the court to the fact that he should have been granted leave to proceed on his claims against defendants Adams and Murphy for issues arising before February 2013. Accordingly, plaintiff will be granted leave to proceed on his claims with respect to events arising in or before February 2013.

Finally, I note that plaintiff also included a number of allegations against people not named in the caption of his proposed amended complaint. If plaintiff wishes to add these people as defendants or to further amend his complaint in any other respect, he may do so only by leave of court under Fed. R. Civ. P. 15.

ORDER

IT IS ORDERED that

1. Plaintiff Donald Charles Wilson is GRANTED leave to proceed on his claims as alleged in his proposed amended complaint that (1) defendant Patrick Murphy was

deliberately indifferent to his neck problems; (2) defendant Murphy was negligent with respect to plaintiff's neck problems; (3) defendant Lori Adams was deliberately indifferent to plaintiff's Alzheimer's disease; (4) defendant Adams was negligent with respect to plaintiff's Alzheimer's disease; (5) defendant Wisconsin Department of Corrections denied plaintiff access to substance abuse and domestic violence programming because of his disability in violation of the Rehabilitation Act of 1973; (6) defendant Department of Corrections failed to accommodate plaintiff's disabilities by providing him use of a wheelchair, low bunk and dietary supplement in violation of the Americans with Disabilities Act and Rehabilitation Act; and (7) defendant Department of Corrections denied plaintiff access to dental treatment as a result of his neck disability in violation of the ADA and Rehabilitation Act.

2. The caption will be AMENDED to include Wisconsin Department of Corrections as an additional defendant.

3. Plaintiff may not proceed on his claim that defendant Murphy was negligent or deliberately indifferent under the Eighth Amendment with respect to treatment of plaintiff's Alzheimer's disease or his teeth.

Entered this 25th day of February, 2015.

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