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

KENNETH FOWLER,

Plaintiff,

v.

EDWARD F. WALL, ELIZABETH A. TEGELS, PAUL SUMNICHT, M.D., and BELINDA SCHRUBBE,

Defendants.

OPINION AND ORDER

14-cv-28-wmc

Plaintiff Kenneth Fowler initially filed this action *pro se* under 42 U.S.C. § 1983, taking issue with the conditions of his confinement in the Wisconsin Department of Corrections. The court recruited volunteer counsel to assist Fowler, who is severely dyslexic and functionally illiterate. With the assistance of counsel, Fowler filed an amended version of his complaint. Because he is incarcerated, the court is required by the Prison Litigation Reform Act (the "PLRA") to screen that complaint and determine whether this proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After examining the amended complaint as required, the court will grant Fowler leave to proceed with his claims against all but one of the defendants for reasons set forth briefly below.

ALLEGATIONS OF FACT

Plaintiff Kenneth Fowler is currently confined in the Wisconsin Department of Corrections ("WDOC") at the Jackson Correctional Institution in Portage. Before that, he was in custody at the Green Bay Correctional Institution ("GBCI"), Waupun Correctional

Institution ("WCI"), and Columbia Correctional Institution ("CCI").

Fowler sues defendants Edward F. Wall and Elizabeth A. Tegels in their official capacities as secretary of WDOC and warden of JCI, respectively. Defendant Belinda Schrubbe is the Health Services Unit ("HSU") manager at WCI, where defendant Paul Sumnicht is employed as a physician.

Because of his severe dyslexia, Fowler can neither read nor comprehend written words without assistance, which has rendered him functionally illiterate. He also suffers from chronic pain due to an old, unspecified injury that required the placement of a mental plate in his right hip. Finally, as a result of his chronic pain, Fowler reportedly requires frequent medical treatment.

In 2003, a "licensed Learning Disabilities teacher" at GBCI concluded that Fowler was severely dyslexic and "completely illiterate." An independent psychologist hired through the state courts conducted a series of tests and reportedly confirmed that Fowler is functionally illiterate and unable to read or write. As a result, Fowler requires assistance with anything in writing.

Due to his severe dyslexia and other health issues, officials at GBCI also determined that Fowler qualified for accommodations under the Americans with Disabilities Act ("ADA"). Accordingly, GBCI created a plan in collaboration with Fowler to accommodate his learning disability and "to maintain confidentiality and compliance with [the Health Insurance Portability and Accountability Act ('HIPAA')] and to assure Access to Care in [the] HSU." Under the terms of this plan, Fowler met with an assigned tutor three times a week for assistance with personal, medical and prison correspondence. Fowler was also provided a

"Franklin Reading Master," which would read words aloud after he typed them into the machine. Finally, Fowler was provided weekly nursing appointments so that he could effectively communicate his health needs without having to breach confidentiality by relying on non-medical personnel to fill out health service request forms, particularly with respect to his chronic hip and leg pain.

In January 2012, Fowler was transferred from GBCI to WCI. Despite Fowler's repeated requests, officials at WCI refused to make accommodations under the ADA for his learning disability. Fowler was given a Franklin Reading Master, but it was not in working condition. Nor was he assigned a tutor to help him read or write. As a result, Fowler was forced to rely on other inmates at WCI for assistance in filling out internal inmate requests or grievances and other types of prison correspondence, including requests for medical care from the HSU, which required him to disclose confidential health information.

Apart from the lack of accommodation for his learning disorder, Fowler contends that he was denied adequate medical care while at WCI. In April 2012, Dr. Sumnicht allegedly discontinued Fowler's Vicodin prescription for chronic right hip pain based on allegations that Fowler had misused the medication. Even though officials at WCI dismissed the charges as unsubstantiated in May 2012, both Sumnicht and Schrubbe nevertheless refused Fowler's requests to reinstate his prescription medication.

In early August 2012, Fowler was transferred from WCI back to GBCI. Once the transfer was made, officials at GBCI immediately reinstated the same ADA accommodations that had been made available to him previously. In late August 2012, however, Fowler was transferred from GBCI to CCI, where Fowler's Franklin Reading Master was again taken

away from him. Although he was assigned a tutor, the tutor refused to assist Fowler with personal correspondence or even internal complaints. His tutor was also prohibited from assisting Fowler with forms to communicate his medical needs. As a result, Fowler was once again forced to rely on other inmates to fill out confidential health service requests forms to obtain treatment.

In October 2014, Fowler was transferred from CCI to JCI, where he currently resides. Upon his arrival, Fowler alerted prison staff to his learning disability and requested reasonable accommodations under the ADA. Despite repeated requests, officials at JCI have allegedly denied him accommodations for his severe dyslexia. As a result, Fowler claims he has been denied access to the services, programs and activities provided to other inmates at JCI.

In this § 1983 action, Fowler seeks declaratory relief, as well as a preliminary and permanent injunction directing defendants Wall and Tegels to provide reasonable accommodations for his learning disability similar to the accommodations afforded to him previously at GBCI. This relief would include, but not be limited to, the following:

1. Reasonable and regular access to a tutor to assist Mr. Fowler with personal, prison, and medical/health correspondence.
2. Reasonable and regular access to a functioning Franklin Reading Master, or its equivalent, to assist Fowler with personal, prison, and medical/health correspondence.
3. Weekly meetings with health services staff to ensure that Fowler's needs under the ADA are being met.
4. That any future institution in the WDOC system in which Fowler is incarcerated provide reasonable accommodations to Fowler consistent with the above.

Amended Complaint, Dkt. # 12, at 13. Fowler also seeks declaratory relief and compensatory damages from defendants Sumnicht and Schrubbe for refusing to provide him with adequate

medical care in violation of the Eighth Amendment.

OPINION

A plaintiff is required to provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). A plaintiff need not plead specific facts; his statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). On the other hand, a complaint that offers merely "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). Instead, a viable complaint must contain sufficient factual allegations that, if accepted as true, "is plausible on its face." *Id*. (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). Except for the claims alleged against WCI's warden, plaintiff generally meets this *Twombly* threshold.

I. Violations of the Americans with Disabilities Act and the Rehabilitation Act

Fowler alleges that defendants Wall and Tegels have failed to provide reasonable accommodations for his severe dyslexia, which qualifies as disability. As a result, Fowler alleges that he has been discriminated against or excluded from participating generally in services, programs or activities that require correspondence, most particularly in the medical

treatment program offered by WDOC. These allegations certainly appear to state a viable claim under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This also appears to state a viable claim under § 504 of the Rehabilitation Act, which similarly prohibits discrimination based on a disability or denial of access to services, programs and activities receiving federal financial assistance. 29 U.S.C. §§ 794-94e.

The court notes that the proper defendant for claims under the ADA and the Rehabilitation Act is generally the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(b); *Jaros v. Illinois Dep't of Corrections*, 684 F. 3d 667, 670 n.2 (7th Cir. 2012) (noting that because individual capacity claims are not available, the proper defendant is the agency or its director in his official capacity). Accordingly, Fowler will be allowed to proceed with his ADA and Rehabilitation Act claims against Wall in his official capacity as secretary of WDOC. The claims against Tegels will be dismissed.

II. Violation of the Eighth Amendment

To the extent that Fowler contends that he was also denied adequate medical care at WCI in 2012, his claim is governed by the Eighth Amendment, which prohibits "punishment" that is "cruel and unusual." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious

medical needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104). Prison officials may be liable under the Eighth Amendment deliberate-indifference standard "if they intentionally disregard a known, objectively serious medical condition that poses an excessive risk to an inmate's health." *Gonzalez v. Feinerman*, 663 F.3d 311, 313-14 (7th Cir. 2011) (citing *Farmer v. Brennan*, 511 U.S. 825, 827 (1994)).

Serious medical conditions include: (1) those that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and/or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997). Because Fowler alleges that Schrubbe and Dr. Sumnicht were both aware of and failed to treat his complaints of chronic pain, the court will allow the plaintiff to proceed with a claim against these defendants under the Eighth Amendment.

Although Fowler's allegations against Schrubbe and Dr. Sumnicht pass muster under the court's lower standard for screening, he will have to present *admissible* evidence permitting a reasonable trier of fact to conclude that defendants acted with deliberate indifference to his serious medical need to be successful on his claim, which is a high standard. Inadvertent error, negligence or even gross negligence are all insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Fowler's burden to prove: (1) his condition constituted a serious medical need; and (2) more daunting here, that Schrubbe and Sumnicht knew his condition was serious, caused

associated pain and suffering, could be relieved by prescription medication, *and* deliberately ignored his need for this medication. Both elements may well require Fowler to provide credible, expert testimony from a physician in the face of medical evidence to the contrary.

ORDER

IT IS ORDERED that:

(1) Plaintiff Kenneth Fowler's request for leave to proceed with claims under the Americans with Disabilities Act and the Rehabilitation Act against Edward F. Wall is GRANTED. Fowler's request for leave to proceed with on Eighth Amendment claims against Belinda Schrubbe and Dr. Paul Sumnicht is GRANTED. His request for leave to proceed with claims against Elizabeth Tegels is DENIED and the claims against her are DISMISSED.

(2) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint (dkt. # 12) and this order are being sent today to the Attorney General for service on the 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 amended complaint if it accepts service for defendants. At that time, defendants are also directed to provide an affidavit advising what steps are currently being taken to accommodate the plaintiff's current disabilities and medical needs.

(3) Counsel for plaintiff, who agreed to take this case for the limited purpose of preparing an amended complaint, are directed to advise the court in writing **within twenty days** of the date of this order whether they will agree to stay on as plaintiff's counsel of record for the remainder of this case. If plaintiff's current counsel of record are unwilling or unable to continue in this matter, the court will undertake to recruit new counsel to assist plaintiff in this case.

Entered this 3rd day of March, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge