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

ALLEN PAYETTE,

OPINION & ORDER

Plaintiff,

v. 14-cv-515-jdp

DR. ROBERT HOBDAY and EVELYN KILLIAN,

Defendants.

Pro se plaintiff Allen Payette, an inmate at the New Lisbon Correctional Institution, has filed this proposed civil action under 42 U.S.C. § 1983 alleging that he was forced to undergo a surgical dental procedure with an anesthetic to which he was allergic, which ultimately caused him heart-related problems. Plaintiff has made an initial partial payment of the filing fee as directed by the court, and has also submitted a motion for appointment of counsel.

The next step in this case is for the court to screen plaintiff's amended complaint[1] and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In screening 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). After considering plaintiff's allegations, I will allow him to proceed on Eighth Amendment deliberate indifference claims and state law medical malpractice claims against defendants Dr. Robert Hobday and Evelyn Killian. I will deny plaintiff's motion for appointment of counsel without prejudice to him refiling it at a later date.

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[1] Plaintiff initiated this case by filing a complaint, Dkt. 1, but later filed two motions to amend his complaint, Dkt. 12 and 13, along with an amended complaint, Dkt. 14. I will grant plaintiff's request and screen the amended complaint.

SCREENING THE COMPLAINT

1. Allegations of Fact

The following facts are drawn from the amended complaint. Plaintiff Allen Payette is an inmate at the New Lisbon Correctional Institution. On October 10, 2013, plaintiff had a dental appointment with defendant Dr. Robert Hobday to surgically remove a tooth causing plaintiff severe pain and making it difficult for him to eat or drink. Prior to the procedure itself, Hobday asked plaintiff whether he had any allergies to medications. Plaintiff told him that he was allergic to the local anesthetic lidocaine; the medication causes his throat to tighten and his blood pressure to drop "dangerously low," gives him chest pain, and causes him difficulty breathing. Plaintiff's medical chart confirmed his allergy. Plaintiff stated that he needed "gas" (I understand him to mean nitrous oxide) for the procedure instead of lidocaine because of these problems. Hobday told plaintiff that his only choices were a local anesthetic similar to lidocaine or to have the procedure without any anesthetic. Given the amount of pain that would have resulted without the use of anesthetic—Hobday "drilled the tooth apart" and "cut [through] some of the bone"—plaintiff felt compelled to choose the local anesthetic.

Hobday performed the procedure using the local anesthetic, and had defendant Evelyn Killian, a dental assistant, sit next to plaintiff with an epinephrine injection pen, presumably to counteract any reaction plaintiff might have to the anesthetic. Killian told plaintiff, "I can't believe he's going to use the anesthetic on you after you told him you['re] allergic to it."

During the procedure, plaintiff experienced "heart flutters," which plaintiff told defendant Hobday about after the procedure. Nonetheless, Hobday sent plaintiff back to his unit without further evaluation. After returning to his unit, plaintiff passed out and experienced chest pains, dizziness, and shortness of breath. After an electrocardiogram at the prison, plaintiff was sent to the emergency room at the Mile Bluff Medical Center, where he was diagnosed with

atrial fibrillation. While at the medical center, plaintiff passed out again and was sent to University of Wisconsin Hospital. Plaintiff's irregular heartbeat was treated with a "cardioversion," a procedure in which the patient is put under before being given low-level electrical shocks to regulate the heartbeat. *See* http://www.nhlbi.nih.gov/health/health-topics/topics/crv (last accessed January 7, 2014).

Plaintiff continued to experience chest pains and fluttering; he was sent to the emergency room on October 13, October 19, 2013 and November 3, 2013. On this last occasion, plaintiff went into atrial fibrillation and remained in the hospital for a few days. Plaintiff continues to have chest pain and heart flutters and is now on medication to control his heart rate.

In correspondence with plaintiff, defendant Hobday has now told plaintiff, "Future oral surgery will be somewhere else."

2. Analysis

Plaintiff states that he is attempting to bring Eighth Amendment medical care and Wisconsin law medical malpractice claims against defendants Hobday and Killian for giving him a local anesthetic despite knowing that he was allergic.

a. Eighth Amendment medical care claims

To state an Eighth Amendment medical care claim, 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). "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).

Plaintiff alleges that defendant Dr. Hobday forced him to choose between having the surgical procedure with use of an anesthetic to which he was allergic or without any anesthetic at all. Given the choice plaintiff faced—either risking the heart-related symptoms he ultimately allegedly suffered or having extremely painful dental surgery without anesthetic—I conclude that plaintiff has alleged a serious medical need. I further conclude that plaintiff's allegations support a reasonable inference that Hobday acted with deliberate indifference because he knew about plaintiff's allergy and the surgery could have been performed elsewhere (presumably with nitrous oxide), yet he decided to perform the surgery with potentially dangerous local anesthetic. I therefore conclude that plaintiff has stated an Eighth Amendment claim against Hobday.

The basis for plaintiff's claim against defendant dental assistant Killian is that she was aware of the risk to plaintiff yet stood by while Hobday performed the surgery. This is sufficient to state an Eighth Amendment claim against Killian. *See, e.g.*, *Berry v. Peterman*, 604 F.3d 435, 443 (7th Cir. 2010) ("Although a medical care system requires nurses to defer to treating physicians' instructions and orders in most situations, that deference may not be blind or unthinking, particularly if it is apparent that the physician's order will likely harm the patient.")

b. State law medical malpractice

Wisconsin law defines medical negligence as the failure of a medical professional to "exercise that degree of care and skill which is exercised by the average practitioner in the class

to which he belongs, acting in the same or similar circumstances." *Sawyer v. Midelfort*, 227 Wis. 2d 124, 149, 595 N.W.2d 423, 435 (1999); *Schuster v. Altenberg*, 144 Wis. 2d 223, 229, 424 N.W.2d 159, 161-62 (1988). Like all claims for negligence, a claim for medical malpractice includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 42, ¶17, 242 Wis. 2d 507, 625 N.W.2d 860. Just as plaintiff's allegations support Eighth Amendment claims, they are sufficient to meet the less stringent medical malpractice standard, so I will allow him to proceed on malpractice claims against defendants Hobday and Killian.

RECRUITMENT OF COUNSEL

Plaintiff has filed a motion for appointment of counsel, Dkt. 7. The term "appoint" is a misnomer, as I do not have the authority to appoint counsel to represent a pro se plaintiff in this type of a case; I can only recruit counsel who may be willing to serve in that capacity. To show that it is appropriate for the court to recruit counsel, plaintiff must first show that he has made reasonable efforts to locate an attorney on his own. *See Jackson v. Cnty. of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992) ("the 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"). Plaintiff attached several rejection letters from area attorneys, which is sufficient to show that plaintiff has made reasonable efforts.

A court will seek to recruit counsel for a pro se litigant only when he demonstrates that his case is one of those relatively few in which it appears from the record that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647,654–55 (7th Cir. 2007). Although some of the medical issues raised by plaintiff suggest that the case may indeed outstrip his abilities to litigate the case, it is too early to conclusively make that

determination. In particular, the case has not even passed the relatively early stage in which defendants may file a motion for summary judgment based on exhaustion of administrative remedies, which often ends up in dismissal of cases such as plaintiff's before they advance deep into the discovery stage of the litigation. Should the case pass the exhaustion stage and plaintiff believes that he is unable to litigate the suit himself, he may renew his motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Allen Payette's motions to amend his complaint, Dkt. 12 and 13, are GRANTED.

2. Plaintiff is GRANTED leave to proceed on Eighth Amendment medical care and state law medical malpractice claims against defendants Dr. Robert Hobday and Evelyn Killian.

3. Plaintiff's motion for the court's assistance in recruiting him counsel, Dkt. 7, is DENIED without prejudice.

4. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on 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 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 defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless he 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 unpaid balance of the filing fee for this case 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 this 20th day of January, 2015.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge