IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEREMY CLARK,

OPINION AND ORDER

Plaintiff,

15-cv-333-bbc

v.

J. WATERMAN, ROBERT HABLE,
DR. COX, SECURITY DIRECTOR SWEENEY,
LT. SHANNON-SHARPE, NURSE GATES,
NURSE SUTTER, NURSE LUND, LORI ALSUM,
INMATE COMPLAINT EXAMINER BROWN,
NURSE HAMMER, UNIT MANAGER BROADBENT,
WELCOME ROSE and WARDEN GARY BOUGHTON,

Defendants.

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Pro se prisoner Jeremy Clark has filed a proposed complaint under 42 U.S.C. § 1983, in which he alleges that various prison officials at the Wisconsin Secure Program Facility violated the Eighth Amendment and the equal protection clause by not adequately treating his foot condition and not allowing him to order extra wide shoes from a non-approved vendor to address his foot problems. Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A.

Having reviewed the complaint, I concluded that plaintiff may proceed on his claims against defendants Gary Boughton, Sweeney, Lt. Shannon-Sharpe, Lori Alsum, William

Brown, Gates, Sutter, Lund, Hammer, Broadbent and Welcome Rose under the Eighth Amendment. However, I am dismissing plaintiff's Eighth Amendment claims against defendants Dr. Cox, J. Waterman and Robert Hable and his claims under the equal protection clause for failure to state a claim upon which relief may be granted.

The following facts are drawn from the allegations in plaintiff's complaint and the documents he attached to it.

ALLEGATIONS OF FACT

A. The Parties

Plaintiff Jeremy Clark is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. At all times relevant to this lawsuit, all of the defendants except defendant Welcome Rose were employed at the facility: Gary Boughton was the warden, J. Waterman was the health service manager, Robert Hable was a unit manager, Dr. Cox was a physician, Sweeney was the security director, Shannon-Sharpe was a supervising officer, Lori Alsum was the nursing coordinator, Broadbent was the unit manager of the Echo Unit, William Brown was an inmate complaint examiner and Gates, Sutter, Lund and Hammer were nurses. Defendant Rose is a corrections complaint examiner who works at the Department of Corrections in Madison, Wisconsin.

B. Plaintiff's Medical History and Treatment

On June 17, 2013, plaintiff saw defendant Dr. Cox for swelling and tenderness in his foot. Dr. Cox noted that plaintiff had bunions and hammertoe. At a subsequent visit on

August 8, 2013, Dr. Cox noted that plaintiff's shoes were not wide enough and that he needed to be measured for proper sizing. On December 18, 2013, Dr. Cox requested that plaintiff see a podiatrist because extra wide shoes and nonsteroidal anti-inflammatory drugs were no help.

In a memorandum to all inmates dated August 5, 2013, defendant Hable, the unit supervisor, explained that the institution would not allow inmates to order shoes from vendors other than Jack L. Marcus and Union Supply, the two contracted property vendors for the Wisconsin Department of Corrections. He also cited Health Services Policies and Procedure 300:07, which states that the health services unit does not issue, purchase or authorize special purchases if an inmate is able to wear regular shoes and that the prison and not health services shall provide any medically necessary alternatives.

On February 9, 2014, plaintiff filed an interview and information request to purchase shoes from a non-contracted vendor because none of the pre-approved vendors offered shoes wide enough to accommodate his foot problems. A prison official named "Hermans" denied the request, stating that the Union Supply catalog carried a sneaker in wide and the Marcus catalog had a wide-sized walking shoe.

In March 2014, plaintiff saw defendant Waterman in health services about needing a size 12½ EE shoe (which plaintiff says a University of Wisconsin podiatrist recommended), but Waterman told him that they would provide only a size 13 shoe because "he actually was fitted for a size 13 shoe." Dkt. #1, exh. #5. On April 18, 2014, defendants Sweeney, Shannon-Sharpe, Gates, Sutter and Lund on the special needs committee denied

plaintiff's request to order personal shoes from an outside vendor and advised him to order from Union Supply.

On May 2, 2014, plaintiff saw Dr. Jill Migon, a podiatrist at the University of Wisconsin Hospital and Clinics, who noted that plaintiff may be able to avoid surgery if he had a proper pair of shoes. She noted that he should be allowed to purchase 12½ EE size shoes from an outside vendor. (Plaintiff had reported to Dr. Migon that the prison only offered size 12 or 13 shoes in triple wide but that he needed a 12½ in double wide for a proper fit.) Plaintiff completed a health service request on May 8, 2014 to inform Dr. Cox of this recommendation. On May 9, 2014, defendant Waterman responded that the health services unit does not "issue, pursue, or authorize special purchases if the inmate is able to wear regular shoes" or "provide orders to order shoes from a catalog outside institutional vendors." Dkt. #1, exh. #8.

On May 19, 2014, plaintiff completed a health service request, stating that he still had foot pain and the health services unit was ignoring Dr. Migon's recommendation. Defendant Waterman responded on May 20 that there was no order for health services to provide shoes from an outside vendor. Plaintiff filed an inmate complaint, which defendant Brown dismissed on May 29, 2014. Also on May 29, 2014, Dr. Cox saw plaintiff for a followup appointment and noted that the special needs committee would be reviewing Dr. Migon's recommendation. Defendant Alsum affirmed defendant Brown's decision on May 30, 2014, noting that even though the podiatrist recommended a 12½ EE shoe, the prison and not the health services unit must make the accommodation.

On June 3, 2014, defendants Sweeney, Shannon-Sharpe, Gates, Sutter and Hammer on the special needs committee denied plaintiff's request to order personal shoes from an outside vendor but stated that the health services unit would provide him the appropriate shoes. On June 30, 2014, the corrections complaint examiner affirmed defendant Aslum's May findings with the modification that "the institution must locate and purchase 'state issued' footwear sized for this inmate that provides proper medical support." Dkt. #1, exh. #12 at 3. Plaintiff completed an information request on July 7, 2014, asking to speak with defendant Broadbent about obtaining his shoes. Broadbent responded that he was working with the health services unit to resolve the issue.

Plaintiff filed another inmate complaint about his shoes on July 21, 2014, which defendant Brown rejected on August 18, 2014 because defendant Waterman reported that the health services unit had provided plaintiff with the shoes. Defendant Boughton reviewed that decision and found plaintiff's complaint to be moot. Around this time, plaintiff also complained about not receiving care for his foot pain. The inmate complaint examiner dismissed the complaint, and defendant Alsum affirmed the dismissal.

Between July and September 2014, plaintiff saw health services staff for followup appointments regarding foot pain and swelling. On October 2, 2014, Dr. Cox signed off on recommendations from a UW podiatrist that plaintiff be allowed to order supportive athletic shoes and custom orthotics with extra depth and extra width from a company called Aljans. On October 21, 2014, plaintiff complained to the Deputy Secretary of the Department of Corrections that he had not received appropriately-sized shoes. On November 13, 2014,

defendant Welcome Rose sent plaintiff a letter in response, stating that plaintiff had been provided footwear sized for his feet and that the health services unit was treating his condition and scheduling him for an appointment with a footwear specialist. A week later, plaintiff filed another inmate complaint about not receiving shoes, which defendant Brown rejected as "previously addressed." Dkt. #1, exh. #24. Defendant Alsum affirmed that finding.

Plaintiff continued to complain of foot pain and the need for better fitting shoes in December 2014 and January 2015. On January 11, 2015, he again wrote to the special needs committee about ordering shoes from an outside vendor. On January 27, 2015, defendant Boughton wrote plaintiff and explained that he considered the situation resolved because plaintiff had been fitted for custom orthotics and athletic shoes and health services was waiting for them to arrive. Plaintiff continued to experience pain and complained to health services in February 2015. Defendant Alsum wrote plaintiff on March 4 and March 8, 2015, noting that plaintiff had been seen regularly for his foot problems by Dr. Cox and UW-Podiatry and that he had been provided a size 13 shoe until his custom orthotics and shoes arrived.

In March 2015, plaintiff filed an additional inmate complaint and wrote letters to defendant Boughton and Alsum about his need for appropriately-sized shoes. Plaintiff was informed by defendant Boughton and the inmate complaint examiner that no action would be taken because Aljans was in the process of fabricating his custom shoes and orthotics.

Plaintiff finally received the shoes and orthotics on April 20, 2015, but he is able to wear them only two or three hours a day.

OPINION

I understand plaintiff to contend that (1) defendants violated his rights under the Eighth Amendment by failing to treat his foot condition adequately and by not allowing him to order appropriately-sized shoes from an outside vendor; and (2) defendants allowed other similarly situated prisoners but not him to order shoes from an outside vendor, in violation of the equal protection clause of the Fourteenth Amendment. I will consider each issue in turn.

A. Eighth Amendment

A prison official may violate the Eighth Amendment if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (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). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511

U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Did plaintiff need medical treatment?

(2) Did defendants know that plaintiff needed treatment?

(3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

With respect to the first element, plaintiff alleges that he experienced foot pain and swelling for more than two years as a result of bunions and hammertoe and that two different podiatrists recommended specially-sized shoes to reduce his discomfort. Therefore, it is reasonable to infer at this stage that plaintiff had a serious medical need for which he needed treatment. In addition, plaintiff alleges that he informed defendants Cox, Boughton, Waterman, Sweeney, Shannon-Sharpe, Alsum, Brown, Gates, Sutter, Lund, Hammer, Broadbent and Rose about his pain and his medical need for size 12½ EE shoes. However, plaintiff's allegations with respect to defendants Hable, Waterman and Cox are inadequate.

The only allegation that plaintiff makes with respect to defendant Hable is that he issued a general memorandum to all inmates about the prison's policy for ordering shoes. Because plaintiff did not allege that defendant Hable had any personal knowledge about plaintiff's need for medical treatment or special shoes, plaintiff has failed to state an Eighth Amendment claim against defendant Hable.

Although plaintiff includes Dr. Cox as a defendant, he does not say what measures Dr. Cox failed to take to address his foot pain. He alleges that Dr. Cox diagnosed bunions and hammertoe, recommended that plaintiff be measured for wider shoes, referred him to a podiatrist and signed off on the podiatrist's recommendation for custom shoes and orthotics. Even read in the light most favorable to plaintiff, these allegations show that Dr. Cox took reasonable measures to provide medical treatment. Although plaintiff alleges that he filed a health services request on May 8, 2014 to "inform" Dr. Cox about a podiatrist's recommendation for 12½ EE shoes, defendant Waterman denied the request. Plaintiff does not allege that Dr. Cox was notified of the request or had any role in rejecting it. As a result, he has failed to state an Eighth Amendment claim against Dr. Cox.

Plaintiff's only allegation with respect to defendant Waterman is that she denied two of his health services requests for size 12½ EE shoes. However, Waterman explained to plaintiff that the health services unit did not have the authority to issue, purchase or authorize purchases of special shoes and Hable's general memorandum confirms this. Defendant Waterman cannot be held liable under § 1983 unless she was "personally involved" in depriving plaintiff of his constitutional rights. Minix v. Canarecci, 597 F.3d 824, 833-34 (7th Cir. 2010); Brooks v. Ross, 578 F.3d 574, 580 (7th Cir. 2009). Because plaintiff does not allege that Waterman had any authority to provide him with size 12½ EE shoes, he has failed to state a claim against her.

With respect to whether defendants Boughton, Sweeney, Shannon-Sharpe, Alsum, Brown, Gates, Sutter, Lund, Hammer, Broadbent and Rose consciously refused to take

reasonable measures to provide plaintiff with appropriately-sized shoes, plaintiff alleges that these defendants either denied or ignored his inmate complaints or special needs requests for size 12½ EE shoes that were specifically recommended by a podiatrist. Because it seems that these defendants had the authority to grant plaintiff's request, these allegations are sufficient at the pleading stage to state a claim upon which relief may be granted under the Eighth Amendment. At trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each element of his claim. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). It will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment, Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). In particular, he will have to show that defendants' conduct was "blatantly inappropriate" and that defendants knew about reasonable alternatives, but refused to consider them. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). For example, plaintiff will have to show that the size 13 shoes he received were not a reasonable alternative for treating his bunions and hammertoe.

B. Equal Protection

With respect to his equal protection claim, plaintiff does not contend that defendants refused to provide him with shoes because of his race or any other reason subject to heightened scrutiny. Plaintiff's only allegation is that defendants have allowed other

prisoners "similarly situated" to him to order shoes from unapproved vendors. This is what the courts refer to as a "class of one" claim because plaintiff alleges that defendants treated him differently not because he belonged to a particular group, but because of some personal dislike for him. E.g., Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Plaintiff's allegation is not sufficient to state a claim upon which relief may be granted. First, as I have noted in other cases, it is unlikely that a plaintiff may maintain a class-of-one claim in the prison context. Knowlin v. Gray, No.12-cv-926-bbc, 2013 WL 541525, *3 (W.D. Wis. Feb. 13, 2013); Jackson v. Flieger, 12-cv-220-bbc, 2012 WL 5247275, *4 (W.D. Wis. Oct. 23, 2012); Upthegrove v. Holm, No. 09-cv-206-bbc, 2009 WL 1296969, *1 (W.D. Wis. May 7, 2009). In Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008), the Supreme Court held that a plaintiff cannot bring a class-of-one claim under some circumstances involving discretionary decision making, such as employment. See also Abcarian v. McDonald, 617 F.3d 931, 939 (7th Cir. 2010) ("[I]nherently subjective discretionary governmental decisions may be immune from class-of-one claims."); United States v. Moore, 543 F.3d 891, 898-901 (7th Cir. 2008) (no class-of-one claim for discriminatory prosecution). See also Dawson v. Norwood, 2010 WL 2232355, *2 (W.D. Mich. 2010) ("The class-of-one equal protection theory has no place in the prison context where a prisoner challenges discretionary decisions regarding security classifications and prisoner placement."); Alexander v. Lopac, 2011 WL 832248, *2 (N.D. Ill. 2011) (applying Engquist in prison context); Russell v. City of Philadelphia, 2010 WL 2011593, at *9 (E.D. Pa. 2010) (same). As in the employment context, decisions made in

the context of running a prison "by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments." Engquist, 553 U.S. at 603. A claim about ordering shoes in prison is no exception because it requires prison staff to consider many factors, including selecting and contracting with vendors.

However, even if I were to assume that plaintiff could bring a class-of-one claim, he could not prevail on such a claim without showing that he "was intentionally treated differently from other similarly situated individuals and that there was no rational basis for this difference in treatment." Thayer v. Chiczewski, 697 F.3d 514, 531-32 (7th Cir. 2012). At the pleading stage, the plaintiff must "'allege facts sufficient to overcome the presumption of rationality that applies to government classifications.'" St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). Plaintiff has not met that standard in this case. It is impossible to infer from the few facts he alleges that defendants did not have a rational basis for their decision. Accordingly, I am dismissing this claim against all defendants for plaintiff's failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Jeremy Clark is GRANTED leave to proceed with respect to his claims that defendants Security Director Sweeney, Lt. Shannon-Sharpe, Nurse Gates, Nurse Sutter, Nurse Lund, Lori Alsum, William Brown, Nurse Hammer, Unit Manager Broadbent,

Welcome Rose and Gary Boughton violated his rights under the Eighth Amendment by not allowing him to order medically-prescribed shoes from a non-approved vendor.

2. Plaintiff is DENIED leave to proceed on all other claims for his failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to defendants Dr. Cox, J. Waterman and Robert Hable.

3. Pursuant to 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 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 complaint if it accepts service for the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the 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 the defendants or to defendants' attorney.

5. 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.

6. Plaintiff is obligated to pay the unpaid balance of his 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 accounts until the filing fee has been paid in full.

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 defendant or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 18th day of August, 2015.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge