IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAMIEN SMITH,

OPINION AND ORDER

Plaintiff,

15-cv-633-bbc

v.

TIM DOLANG, CANDACE WARNER
and JOHN DOES,

Defendants.

- -

In an order dated December 30, 2015, dkt. #13, I concluded that pro se plaintiff Damien Smith could proceed on a claim under the Eighth Amendment against a nurse at the New Lisbon Correctional Institution who allegedly failed to provide any treatment other than ibuprofen when plaintiff broke his hand in May 2014. Because plaintiff did not know the name of the nurse, I allowed him to proceed against Tim Dolang (the warden) and Candace Warner (the health services manager) for the sole purpose of helping to uncover the nurse's identity. With respect to other health services staff members, I concluded that plaintiff had not provided enough information to comply with federal pleading standards, but I gave him an opportunity to file an amended complaint.

In response to the December 30 order, plaintiff has filed an amended complaint in which he describes the conduct of both Warner and the unnamed defendants in more detail. Having reviewed the amended complaint, I conclude that plaintiff may proceed on his claims

that Warner and the unnamed defendants failed to provide adequate treatment for his broken hand, in violation of both the Eighth Amendment and state law. Because plaintiff does not include defendant Dolang in his amended complaint, I am dismissing him from the case.

OPINION

I understand plaintiff to be asserting the following claims in his amended complaint:

- John Doe 1, a nurse, provided no treatment to plaintiff other than prescribing ibuprofen for him after he broke his hand on May10, 2014, in violation of the Eighth Amendment and the common law of negligence; this nurse again refused to prescribe anything other than ibuprofen and Tylenol more than a year later in August 2015, in violation of the Eighth Amendment and the common law of negligence;
- John Doe 2, a nurse, refused plaintiff's request to see a doctor on May 16, 2014, refused to give plaintiff more effective pain medication and failed to order an x-ray as she promised, in violation of the Eighth Amendment and the common law of negligence;
- John Doe 3, a nurse, refused to do anything for plaintiff on May 23, 2014, other than provide ibuprofen, in violation of the Eighth Amendment and the common law of negligence;
- John Doe 4, a nurse, after examining plaintiff on May 27, 2014, delayed

plaintiff's appointment with a specialist, placed plaintiff's hand in a splint instead of a cast and refused to provide more effective pain medication, in violation of the Eighth Amendment and the common law of negligence;

- Candace Warner, the health services manager, after reviewing plaintiff's health services request on June 5, 2014, refused to help him see a specialist sooner or receive an x-ray, in violation of the Eighth Amendment and the common law of negligence; in addition, she failed to adequately supervise her staff, in violation of the common law of negligence;
- John Doe 5, a nurse, refused to provide a cast or more effective pain medication after examining plaintiff on June 5, 2014, in violation of the Eighth Amendment and the common law of negligence; (plaintiff says that he had an appointment with a specialist on June 13, 2014, and his hand was placed in a cast then);
- an NLCI Physical Therapist refused to give plaintiff any pain medication other than ibuprofen or Tylenol on June 25, 2014, in violation of the Eighth Amendment and the common law of negligence;
- John Doe 6, a nurse, refused to give plaintiff any medication other than ibuprofen and Tylenol on July 5, 2014, in violation of the Eighth Amendment and the common law of negligence;
- an NLCI doctor, after examining plaintiff in September 2015, refused to prescribe any medication for plaintiff other than ibuprofen and Tylenol.

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?

To prevail on a claim for negligence in Wisconsin, a plaintiff must prove that the defendants breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. The elements of negligent supervision are the same, except that the plaintiff must show that the failure to

supervise caused the harm. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶ 16, 303 Wis. 2d 34, 50-51, 734 N.W.2d 827, 834.

I conclude that plaintiff has alleged the minimum facts necessary to state a claim upon which relief may be granted against each of the defendants under both federal and state law. However, plaintiff should keep in mind several things as he is proceeding with these claims.

First, one of plaintiff's most common complaints is that the defendants failed to give him adequate pain medication. Plaintiff is not entitled to the pain medication of his choice. Rather, courts must give deference to the judgment of medical professionals in determining the appropriate treatment for a prisoner, including pain medication. Arnett v. Webster, 658 F.3d 742, 759 (7th Cir. 2011) (plaintiff must show that no "minimally competent" doctor would have prescribed medication chosen by defendant); Snipes v. DeTella, 95 F.3d 586, 591 (7th Cir. 1996) ("The administration of pain killers requires medical expertise and judgment. Using them entails risks that doctors must consider in light of the benefits."); Banks v. Cox, No. 09-cv-9-bbc, 2010 WL 693517, *7 (W.D. Wis. 2010) ("Although plaintiff may believe that he needed narcotic pain medication, the Constitution does not require prison officials to provide prisoners the medical care they [the prisoners] believe to be appropriate; it requires officials to rely on their medical judgment to provide prisoners with care that is reasonable in light of their knowledge of each prisoner's problems."). Particularly when narcotics are involved, prison officials have a legitimate interest in insuring that prisoners do not become addicted or otherwise abuse the medication. DeBoer v. Luy,

No. 01-C-382-C, 2002 WL 32345414, *4 (W.D. Wis. 2002) ("[The] delicate balancing between the benefits of pain relief and the risk of can be characterized fairly as 'a classic example of a matter for medical judgment' that falls outside the purview of the Eighth Amendment.") (quoting Estelle, 429 U.S. at 107). See also Block v. Rutherford, 468 U.S. 576, 588-89 (1984) ("[T]he unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country."). These concerns have even more force with respect to plaintiff's claim that a nurse and a doctor refused to give him stronger medication more than a year after he broke his hand. It would be unusual for a patient to be on strong pain medication so long after the injury.

That being said, prison officials may not persist in the same ineffective treatment if reasonable alternatives are available. Rowe v. Gibson, 798 F.3d 622, 628 (7th Cir. 2015); Gonzalez v. Feinerman, 663 F.3d 311, 314-15 (7th Cir. 2011). Because that is what plaintiff alleges, I am allowing him to proceed on his claims regarding pain medication. Further, even if plaintiff was not entitled to stronger medication, there may have been something else that medical staff could have done to treat plaintiff's condition more effectively. However, to prevail on his Eighth Amendment claim, plaintiff will have to show that defendants' medical judgment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes, 95 F.3d at 592 (internal quotations omitted).

In addition, plaintiff will have to show that each defendant *could* have provided different medication. Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir.1997) ("[O]fficials do

not act with 'deliberate indifference' if they are helpless to correct the protested conditions."). It seems unlikely that nurses or a physical therapist had authority to provide anything other than over-the-counter medication. At this stage of the proceedings, I will assume that each defendant could have done something else to help plaintiff, such as refer him to the doctor. However, if the nurses or physical therapist were relying on a doctor's orders when denying plaintiff's request for different medication, then it is unlikely that plaintiff will be able to prevail on those claims. Berry v. Peterman, 604 F.3d 435, 443 (7th Cir. 2010) ("[A] medical care system requires nurses to defer to treating physicians' instructions and orders in most situations.").

Finally, with respect to the alleged delays in receiving treatment such as a cast or referral to a specialist, plaintiff will have to show that the defendant at issue was responsible for the delay and could have done something to provide treatment sooner. If a defendant had no control over scheduling, then he or she cannot be held liable for violating plaintiff's rights.

As I explained to plaintiff in the December 30 order, he will have to conduct discovery to learn the names of all the Doe defendants. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

In the December 30 order, I stated that defendant Warner did not have to file an

answer to the complaint because she was named for the sole purpose of discovering the name of the Doe defendant. However, now that plaintiff is proceeding on a claim against Warner, she should file an answer.

ORDER

IT IS ORDERED that

1. Plaintiff Damien Smith is GRANTED leave to proceed on the following claims:

(a) John Doe 1, a nurse, provided no treatment to plaintiff other than prescribe ibuprofen for him after he broke his hand on May10, 2014, in violation of the Eighth Amendment and the common law of negligence; this nurse again refused to prescribe anything other than ibuprofen and Tylenol over a year later in August 2015, in violation of the Eighth Amendment and the common law of negligence;

(b) John Doe 2, a nurse, refused plaintiff's request to see a doctor on May 16, 2014, refused to give plaintiff more effective pain medication and failed to order an x-ray as she promised, in violation of the Eighth Amendment and the common law of negligence;

(c) John Doe 3, a nurse, refused to do anything for plaintiff on May 23, 2014, other than provide ibuprofen, in violation of the Eighth Amendment and the common law of negligence;

(d) John Doe 4, a nurse, after examining plaintiff on May 27, 2014, delayed plaintiff's appointment with a specialist, placed plaintiff's hand in a splint instead of a cast and refused to provide more effective pain medication, in violation of the Eighth Amendment and the common law of negligence;

(e) Candace Warner, the health services manager, after reviewing plaintiff's health services request on June 5, 2014, refused to help him see a specialist sooner or receive an x-ray, in violation of the Eighth Amendment and the common law of negligence;

in addition, she failed to adequately supervise her staff, in violation of the common law of negligence;

(f) John Doe 5, a nurse, refused to provide a cast or more effective pain medication after examining plaintiff on June 5, 2014, in violation of the Eighth Amendment and the common law of negligence;

(g) an NLCI Physical Therapist refused to give plaintiff any pain medication other than ibuprofen or Tylenol on June 25, 2014, in violation of the Eighth Amendment and the common law of negligence;

(h) John Doe 6, a nurse, refused to give plaintiff any medication other than ibuprofen and Tylenol on July 5, 2014, in violation of the Eighth Amendment and the common law of negligence;

(i) an NLCI doctor, after examining plaintiff in September 2015, refused to prescribe any medication for plaintiff other than ibuprofen and Tylenol.

2. Defendant Tim Dolang is DISMISSED from the case.

3. The Wisconsin Department of Justice may have until February 19, 2016, to inform the court whether it will accept service for defendant Warner. If it does, Warner may have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint.

4. For the time being, plaintiff must send defendant Warner a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing Warner, he should serve the lawyer directly rather than Warner. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to Warner or her 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. 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, his case may be dismissed for failure to prosecute.

Entered this 11th day of February, 2016.

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