

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

ROY MITCHELL,

Plaintiff,

OPINION AND ORDER

v.

15-cv-108-wmc

EDWARD F. WALL, et al.,

Defendants.

Former state inmate Roy Mitchell has filed a proposed civil action under 42 U.S.C. § 1983, regarding the conditions of confinement in the Wisconsin Department of Corrections. Mitchell as a “female-presenting transgendered person.” Specifically, Mitchell contends that he was denied adequate treatment for Gender Identity Disorder (“GID”) or Gender Dysphoria (“GD”) while incarcerated and after his release on extended supervision. Because Mitchell requests leave to proceed without prepayment of fees and costs, or *in forma pauperis*, the court is required to screen the complaint to determine whether the 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. § 1915(e)(2)(B). In addressing any *pro se* litigant’s pleadings, the court must construe the allegations generously, and hold the complaint “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After examining the complaint under this lenient standard, the court will grant Mitchell leave to proceed with his claims for reasons that follow.

ALLEGATIONS OF FACT

Mitchell alleges, and the court assumes for purposes of this screening order, the following facts.

In February 2012, Mitchell wrote to Dr. Kallas, requesting information regarding treatment for GID. On March 5, 2012, Kallas replied, advising Mitchell to contact the psychology supervisor at CCI, Dr. Laurent. (Dkt. # 1, Exh. E, Letter from Dr. Kallas.) When contacted, Dr. Kallas explained that any inmate who would like to start hormone treatment for “transgender issues” must be evaluated by an outside consultant, Cynthia Osborne, to determine if such treatment was psychologically appropriate. Dr. Kallas further noted that Mitchell was on the list to see Osborne in April. If Osborne determined that Mitchell was eligible for hormone treatment from a psychological perspective, Mitchell would then need to be evaluated by a primary care physician at Columbia Correctional Institution, where he was currently assigned, to ensure that such treatments were medically appropriate.

Osborne interviewed Mitchell in May 2012. (Dkt. # 1, Exh. K, *Gender Identity Consultation Report*.) In a report dated September 27, 2012, Osborne diagnosed Mitchell with GID and found that he was “an excellent candidate for hormone therapy.” Osborne further recommended that Mitchell’s treating physician consider conducting karyotyping or chromosome analysis to rule out a genetic disorder (Klinefelter Syndrome), as well as participate in “supportive counseling concurrent with any hormone treatment, whether within the DOC or following release.”

In November 2012, Mitchell mailed correspondence to Hamblin, Wall and Kallas, requesting adequate treatment for GID as recommended by Osborne and in compliance with the WDOC health care policy on GID. According to that policy, inmates who have been diagnosed with GID or GD “shall” have access to:

1. Psychological treatment that addresses ambivalence and/or dysphoria regarding gender identity and assists in better adjustment to incarceration.
2. Appropriate psychiatric treatment.
3. Hormonal treatment, although limited to those situations outlined in Sections III and

IV of this policy.

4. Other treatment and accommodations, although limited to those determined to be medically necessary by the GD Committee.

(Dkt. # 1, Exh. B, WDOC Division of Adult Institutions (“DAI”) Policy #500.70.27, *Health Care Treatment of Gender Identity Disorder* (Effective Date Dec. 19, 2011) and the revised version, DAI Policy #500.70.27 *Gender Dysphoria -- Management and Treatment* (Effective Date April 16, 2014).)

On January 8, 2013, roughly two months later and before any meaningful treatment had begun, Mitchell was released from WDOC under extended community supervision without receiving the hormone treatments recommended by Osborne. While on supervision, Mitchell contends that he was “forced” to reside in a “male homeless shelter,” which was an unstable and unsafe environment. Mitchell contends further that his parole agents (Ruhnke and Wolfe) required him to present as a man. Mitchell notes that he was also required to attend treatment while on supervised release, but that there was no treatment program offered for offenders released into supervised release with GID or transgender issues. Eventually, on October 8, 2014, Mitchell’s extended supervision was revoked and he was returned to prison for committing a new offense. (Dkt. # 1, Exh. F, Wisconsin Div. of Hearings and Appeals, Decision *In the Matter of* 081914-309907-A.) Mitchell was released from WDOC recently in February 2015, still without receiving hormone treatments.

Mitchell contends that the defendants were deliberately indifferent to his need for adequate treatment for GID pursuant to DAI Policy #500.70.27. Mitchell seeks \$2,200,00.00 in monetary damages for his physical, emotional and mental pain and suffering.

OPINION

Mitchell seeks relief for civil rights violations pursuant to 42 U.S.C. § 1983. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

Mitchell's proposed complaint outlines a potential violation of the Eighth Amendment of the United States Constitution, which requires the state to "provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (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). 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). To establish deliberate indifference under the Eighth Amendment standard, the prisoner must demonstrate that the defendants were: (1) aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn; and (2) that they actually drew an inference that such potential for harm existed. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

The Seventh Circuit and several other courts have considered GID or transsexualism a "serious medical need" for the purposes of the Eighth Amendment. *See Fields v. Smith*, 712 F.

Supp. 2d 830, 862 (E.D. Wis. 2010) (citing *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792 (E.D. Wis. 1990)). At this early screening stage of the proceedings, therefore, the court will grant Mitchell leave to proceed with Eighth Amendment claims against Dr. Kallas and Dr. Laurent, although it seems quite likely that Mitchell was not provided with hormone treatments in November 2012 because Mitchell was scheduled to be released on January 8, 2013.

Mitchell does not, however, state a viable claim against any of the other defendants. Mitchell does not demonstrate that Wall, as Secretary of WDOC, or Hamblin, as former Secretary of WDOC, had the requisite personal involvement in the alleged violation. Hamblin, in particular, retired from WDOC in September 2012, the same month Osborne filed her report recommending hormone therapy for Mitchell. Moreover, higher level prison officials are entitled to delegate the medical treatment of prisoners to health care personnel because of their expertise, which means that any failure to intervene in treatment decisions does not violate the Eighth Amendment. *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). A prisoner must allege facts showing that he contacted supervisory officials whose job responsibilities make them liable for his alleged mistreatment. Otherwise, he fails to establish supervisory liability. *See id.* (“Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another’s job.”). Accordingly, the claims against Wall and Hamblin will be dismissed.

Likewise, Mitchell does not allege facts showing that Ruhnke, Wolfe or Raisbeck were personally involved in making decisions about Mitchell’s medical treatment for GID or that,

as probation agents, they were bound to provide such treatment pursuant to DAI Policy #500.70.27. It is well established that liability under 42 U.S.C. § 1983 must be based on a defendant's personal involvement in the constitutional violation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

Although Mitchell's allegations against Dr. Kallas and Dr. Laurent 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, assuming the plaintiff's GID condition constitutes a "serious medical need," it will be Mitchell's burden to prove the defendants knew his condition was serious, caused associated pain and suffering, could be relieved by hormone therapy, and deliberately ignored his need for this treatment, which may well require Mitchell to provide credible, expert testimony from a physician in the face of medical evidence to the contrary.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Roy Mitchell's request for leave to proceed on his Eighth Amendment claim against Dr. Kevin Kallas and Dr. Dawn Laurent is GRANTED. Mitchell's request for leave to proceed with claims against all remaining defendants is DENIED.
- (2) 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.

- (3) For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, 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.
- (4) 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.

Entered this 7th day of April, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge