

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

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TOMMIE L. CARTER,

Plaintiff,

v.

ANTONIO CUMMINGS, ROBERT PICKLE,  
JAY VANLANEN and AMY GANDY,

Defendants.  
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OPINION AND ORDER

16-cv-55-bbc

Pro se prisoner Tommie Carter is suing several prison officials for events occurring on October 17, 2013. I understand plaintiff to be raising the following claims: (1) defendants Antonio Cummings and Robert Pickle (both correctional officers) knew that plaintiff was going to try to harm himself, but refused to take reasonable steps to stop him; (2) defendant Jay Vanlanen (a correctional officer) called plaintiff “stupid” and a “coward” for having suicidal thoughts and trying to harm himself; (3) defendant Vanlanen refused to take pictures of plaintiff’s injuries; (4) defendant Amy Gandy (a nurse at the prison) called plaintiff “a retarded fucker” when plaintiff was brought to the health services unit for treatment; and (5) defendant Gandy treated plaintiff’s wounds with steri strips rather than sutures and refused to take plaintiff to the hospital.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 2815(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915(e)(2)

and § 1915A. Having reviewed the complaint, I am allowing plaintiff to proceed on his claim that defendants Cummings and Pickle failed to stop plaintiff from harming himself, in violation of the Eighth Amendment, and on his claim that defendant Vanlanen attempted to conceal evidence, in violation of plaintiff's constitutional right to have access to the courts. I am dismissing all other claims for plaintiff's failure to state a claim upon which relief may be granted.

## OPINION

### A. Failure to Prevent Self Harm

It is well established that prison officials have a duty to protect prisoners from harming themselves as a result of a mental illness. Minix v. Canarecci, 597 F.3d 824, 833 (7th Cir. 2010); Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). The standard for prevailing on such a claim is called "deliberate indifference." An official is deliberately indifferent if he is aware of a substantial risk that the plaintiff will seriously harm himself, but consciously refuses to take reasonable measures to prevent the harm. Farmer v. Brennan, 511 U.S. 825 (1994).

In this case, plaintiff alleges that he told defendants Cummings and Pickle that he was feeling suicidal, but they did nothing to help him or prevent him from harming himself. Instead, they allegedly said, "We do not give a fuck if you kill yourself." Soon after, plaintiff lacerated his left arm. From those allegations, it is reasonable to infer at this stage of the proceedings that Cummings and Pickle knew of a substantial risk that plaintiff would

seriously harm himself, but consciously refused to help him. Accordingly, I am allowing plaintiff to proceed on this claim.

### B. Name Calling

Plaintiff alleges that both defendant Vanlanen and defendant Gandy called him cruel names after he cut himself. Although I agree with plaintiff that there is no legitimate reason for offensive language, name calling does not violate the Constitution. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). See also Beal v. Foster, 803 F.3d 356, 358 (7th Cir. 2015) (“[M]ost verbal harassment by jail or prison guards does not rise to the level of cruel and unusual punishment.”). If these defendants had been encouraging plaintiff to harm himself or otherwise taunting plaintiff *before* his acts of self harm, plaintiff could argue that Vanlanen and Gandy acted with deliberate indifference and contributed to plaintiff’s injuries. However, plaintiff alleges that Vanlanen and Gandy did not make the comments until *after* plaintiff cut himself, so their comments could not have contributed to the harm he alleges. Accordingly, I am dismissing this claim for plaintiff’s failure to state a claim upon which relief may be granted.

### C. Refusal to Preserve Evidence

Plaintiff alleges that defendant Vanlanen refused to take photographs of plaintiff’s injuries in an attempt to conceal their existence. Plaintiff says that Vanlanen’s actions “constituted deliberate indifference to the plaintiff’s safety.” However, this claim has a

problem similar to plaintiff's claim about name calling. Vanlanen's alleged conduct did not occur until after plaintiff harmed himself. Again, an officer cannot be held liable for failing to correct a problem after it has occurred. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

However, a claim cannot be dismissed at the pleading stage simply because the plaintiff did not choose the right legal theory. Plaintiff's allegations could be construed as raising a claim under his constitutional right to have access to the courts. "The First and Fourteenth Amendments protect the rights of individuals to seek legal redress for claims that have a reasonable basis in law and fact. Interference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights under § 1983." Rossi v. City of Chicago, 790 F.3d 729, 734 (7th Cir. 2015) (citations omitted). At this stage of the proceedings, it is reasonable to infer from plaintiff's allegations that defendant Vanlanen was trying to conceal evidence regarding a nonfrivolous civil rights claim and that Vanlanen's conduct has made it more difficult for plaintiff to prevail on his claim. Accordingly, I will allow plaintiff to proceed on a claim that defendant Vanlanen violated plaintiff's right to have access to the courts.

#### D. Choice of Medical Treatment

Finally, plaintiff challenges the way that defendant Gandy chose to treat his wounds. In particular, she used "steri strips" instead of sutures and did not take plaintiff to the hospital.

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 defendant know that plaintiff needed treatment?
- (3) Despite her awareness of the need, did defendant consciously fail to take reasonable measures to provide the necessary treatment?

In this case, plaintiff has alleged that he needed treatment and that defendant Gandy knew that he needed treatment. However, plaintiff does not allege that Gandy refused to provide any treatment. Rather, he challenges Gandy's *choice* of treatment. He believes that she should have used sutures instead of steri strips and that he should have been taken to

the hospital.

Courts are required to defer to the judgment of medical professionals in choosing how to treat a particular ailment; prisoners are not entitled to whatever treatment they want, even if the treatment chosen by health care staff is not “flawless.” McGowan v. Hulick, 612 F.3d 636, 641 (7th Cir. 2010); Knight v. Wiseman, 590 F.3d 458, 466-67 (7th Cir. 2009). Rather, a prisoner must show that the provider’s choice was “so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate” his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

In this case, plaintiff’s allegations do not support the view that defendant Gandy acted unreasonably. Although plaintiff says that he believes that the bandages Gandy used were insufficient to deal with his wounds, he does not identify any problems that he had as a result of Gandy’s treatment. For example, he does not allege that he continued to bleed, that he suffered an infection or that his wounds failed to heal appropriately. Further, plaintiff does not identify any treatment that he needed at the hospital that he did not receive at the prison. Without those or similar allegations, it is not reasonable to infer that Gandy’s treatment decisions were blatantly appropriate.

## ORDER

IT IS ORDERED that

1. Plaintiff Tommie Carter is GRANTED leave to proceed on the following claims:
  - (1) defendants Antonio Cummings and Robert Pickle were aware of a substantial risk that plaintiff would seriously harm himself on October 17,

2013, but they consciously failed to take reasonable measures to prevent the harm, in violation of the Eighth Amendment;

(2) defendant Jay Vanlanen refused to take pictures of plaintiff's injuries on October 17, 2013, in violation of plaintiff's right to have access to the courts.

2. Plaintiff's remaining claims are DISMISSED for his failure to state a claim upon which relief may be granted. Plaintiff's complaint is DISMISSED as to defendant Amy Gandy.

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 defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than 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 defendants or their 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 9th day of March, 2016.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge