

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

ELPIDIO JUAREZ,

Plaintiff,

v.

OPINION & ORDER

ANTHONY HENTZ, CARROL WALTER, and
JEAN FELBER,

16-cv-181-jdp

Defendants.

This case has been severed from case no. 14-cv-747-jdp. In the '747 case, plaintiff Elpidio Juarez and several other prisoners filed a joint complaint regarding problems with the dispensation of medication at the New Lisbon Correctional Institution. The underlying theory of the case was that plaintiffs were harmed by a prison policy allowing correctional officers to dispense and keep track of medications rather than having nurses or other medical staff do so. However, plaintiff Juarez's allegations were that nurses failed to warn him about side effects of medications they gave him, leading to him falling down the stairs. In a March 22, 2016, order, I severed plaintiff Juarez's claims from the '747 case that case because his allegations about the nurses were not related to the prison policy at issue in the '747 case. *See* Dkt. 33 in the '747 case.

The next step in this case is to screen plaintiff Juarez's allegations. In screening the complaint, I must dismiss any portions that are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or ask 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 plaintiff to proceed on Eighth Amendment and state-law negligence claims regarding defendants' failure to address the danger caused by the side effects of his medications.

ALLEGATIONS OF FACT

Plaintiff Elpidio Juarez is an inmate at the New Lisbon Correctional Institution. Plaintiff does not explain what malady he suffers from, but he was prescribed Gabapentin, an anticonvulsant used to treat seizures and pain. On February 13, 2015, defendant Nurse Carroll Walter told plaintiff that his medication had arrived and that he could start taking it. But contrary to prison policy, she did not explain any of the side effects. Plaintiff was not aware that Gabapentin can cause dizziness, lack of balance, and drowsiness.

The next day, plaintiff became dizzy and ill. Defendant Nurse Jean Felber told plaintiff that this was a normal side effect and to drink more water. Felber did not examine him or schedule him to see a doctor. Later that day, plaintiff became dizzy at the top of a flight of stairs, blacked out, and fell down the stairs. He was taken to the hospital. He now suffers from chronic back pain.

On April 10, 2015, plaintiff was seen by defendant Nurse Anthony Hentz, who told plaintiff that he would be starting a new medication, "Tamiramate." (My own research did not reveal any drug by that name; but perhaps the new drug is Topiramate, another anticonvulsant.) As with his Gabapentin, defendant Hentz did not inform plaintiff about any of the side effects. Plaintiff does not explain what happened afterward, but he states that his failure to be informed of the side effects led to a serious physical injury.

ANALYSIS

Plaintiff brings both federal constitutional and state-law negligence claims against defendants Walter, Felber, and Hentz. The Eighth Amendment to the United States Constitution prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). But plaintiff does not seem to be saying that his underlying medical condition was mistreated. Rather, plaintiff is saying that in providing him with medication, defendants disregarded the risk of harm he faced from the drowsiness and dizziness the medication caused him. Given the generous interpretation that pro se pleadings are afforded, I conclude that plaintiff states Eighth Amendment claims against defendants for disregarding the risk he faced from the side effects of his medications. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (prisoner states Eighth Amendment claim where he alleges that he faced a "substantial risk of serious harm" and prison officials acted with "deliberate indifference" to that risk).

Alternatively, plaintiff alleges that defendants' actions were negligent. A negligence claim under Wisconsin law 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. I will allow plaintiff to proceed with his negligence claims for the same reason I am allowing him to proceed with his deliberate indifference claims.

I caution plaintiff that this case will remain in federal court because he has successfully pleaded Eighth Amendment claims. But to succeed on these claims, plaintiff will have to show that defendants acted with deliberate indifference toward the risk of harm. If all he can do is show that defendants were negligent, it is likely that this case will have to be dismissed so that plaintiff can pursue those claims in state court.

ORDER

IT IS ORDERED that:

1. Plaintiff Elpidio Juarez is GRANTED leave to proceed on Eighth Amendment and state-law negligence claims against Carroll Walter, Jean Felber, and Anthony Hentz.
2. 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.
3. 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.
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.
5. 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 his failure to prosecute it.

Entered April 18, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge