

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

DE'ANDRE BERNARD,

Plaintiff,

OPINION AND ORDER

v.

17-cv-331-wmc

OFFICER KIBBEL, et al.

Defendants.

Plaintiff De'Andre Bernard, an inmate at Waupun Correctional Institution ("WCI"), filed his complaint and supplement against several WCI employees, alleging deliberate indifference stemming from his suicide attempts and other instances of self-harm. For the reasons that follow, he will be permitted to proceed under the Prisoner Litigation Reform Act, 28 U.S.C. § 1915A, with Eighth Amendment claims for deliberate indifference to a serious risk of self-harm, to a substantial medical need, and to conditions of his confinement.

ALLEGATIONS OF FACT¹

Bernard has been diagnosed with a panoply of mental health disorders, including depressed-type schizoaffective, attention deficit/hyperactivity, cannabis use, antisocial and borderline personality, and post-traumatic stress disorders. (Mental Health Diagnosis (dkt. #5-1) 1.) He also has a history of both suicidal ideation and suicide attempts, as well

¹ In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint, unless otherwise noted. Because the court will grant Bernard's motion to amend his complaint, the allegations contained in his supplement are also considered for purposes of screening.

as a history of self-abuse. (*Id.*) His functional impairment has been rated as 3/4. (*Id.*) He further alleges that the defendants were aware of his serious mental health issues at all relevant times. (Compl. (dkt. #1) ¶¶ 6, 9; *see also* Suppl. to Compl. (dkt. #15) 3 (alleging plaintiff is classified as a “seriously mentally ill inmate” (capitalization altered).)

During a noon medicine distribution on October 29, 2016, plaintiff began suffering from a panic attack, suicidal thoughts and flashbacks; he also began hearing voices. (Compl. (dkt. #1) ¶ 1.) He informed Officer Kibbel about his suicidal thoughts and the voices and requested his medication, however Kibbel did not comply. (*Id.* ¶ 2.) Bernard then told Officer Kijek and Sergeant Haynes about feeling suicidal and hearing voices. (*Id.* ¶ 3.) He then showed Kibbel, Kijek and Haynes a sharp pen, which he threatened to use to cut himself, intending to bleed out. (*Id.*) Instead of taking the pen away from him, however, the defendants allegedly just laughed and left him alone with the pen. (*Id.* ¶ 4.) Bernard then used the pen to cut his arm, which continued to bleed until Officer Kijek saw what happened and removed him from his cell. (*Id.* ¶ 5.) Before he was returned to his cell, Bernard’s arm received stitches from a nurse.

Even after Bernard informed him that he was still suicidal following these stitches, Sergeant Haynes declined to put him on suicide watch. (*Id.* ¶ 6; *see also* Scott Decl. (dkt. #6) ¶¶ 6-7 (declaring he heard Haynes inform Bernard that he was not going to be placed in observation and that Bernard said “I’m still hearing voices telling me to kill myself”).) Back in his cell, Bernard cut himself again on October 29. (Compl. (dkt. #1) ¶ 6.) This time, the lacerations on his arms were each two inches long and deep enough to expose his veins, causing significant blood loss. (*See* Scott Decl. (dkt. #6) ¶¶ 2, 4 (averring that he

saw Bernard “being treated by Nurse Amy for a cut on his arm that was bleeding heavily, some [blood] even fell on the floor [outside] of his cell”).)

Nineteen days later, on November 17, 2016, Bernard again began hearing voices around dinnertime telling him to cut his wrist. He also was suffering a panic attack and flashbacks. (*Id.* ¶ 8.) Bernard informed Officers O’Neal and Pohl about his suicidal thoughts, the panic attack and the voices, as well as warned them that he was going to cut himself again. (*Id.* ¶ 9.) The officers even asked what he was going to cut himself with, at which point he allegedly showed them a sharpened pen, stating, “Imma use this.” (*Id.* ¶ 10.) Instead of taking the pen away, however, O’Neal allegedly responded, “I don’t have time for this shit,” and both officers walked away, again leaving Bernard alone with a sharpened pen. (*Id.* at ¶ 11.) Bernard then allegedly attempted to kill himself with the pen. (*Id.* ¶ 12.) Bernard was eventually found by Officer Gripentlog, who informed the sergeant. (*Id.* ¶ 13.) Although Bernard received additional stitches before being returned to his cell, Psychological Services Unit Staff McLaren allegedly instructed Larson not to put Bernard in observation. (*Id.* ¶ 13.) Bernard again suffered a deep, two-inch laceration, significant blood loss, pain and worsening mental illness, as indicated by an increase in his medication dosage. (*Id.* ¶ 14.)

On June 18, 2017, Officer Roper, a WCI guard, refused to give Bernard his prescribed medication because Bernard was not at his cell door on time.² Allegedly, Roper still gave Bernard his Ramadan meal bag, which was on the same medicine cart. Bernard

² While Bernard’s supplement does not include the June 18 date, his motion to amend the complaint identifies June 18, 2017, as the date of Officer Roper’s involvement. (Mot. Amend. (dkt. #14) 1.)

was in the midst of “a full blown mental crisis, and began having thoughts of self-harm.” (Supp. to Compl. (dkt. #15) 5.) After discovering two spoons in his Ramadan meal bag, Bernard quickly alerted the officer that he was on a “no sharps” precaution, which precluded him from receiving spoons. Nevertheless, Officer Roper allegedly allowed him to keep the spoons, even after Bernard warned Roper that he planned to use them to hurt himself.

The next day, June 19, Correctional Officer Koch woke Bernard for “Ramadan milk.” (*Id.* at 3.) Upon waking, Bernard allegedly discovered an ant infestation in his cell, with ants on his arms, pants, and Ramadan meal. This infestation caused him to have a panic attack, and Bernard asked Officer Koch to let him out of his cell. Koch confirmed that the ants were real -- not part of a hallucination -- and said that he would alert the sergeant. After thirty more minutes with the ants, Bernard allegedly pressed the intercom button and alerted the answering officer that he was planning to cut himself with a spoon. Shortly afterwards, Sergeant Joseph Beahm came to the cell door, and Bernard informed him of both his anxiety attack and intention to cut himself. Bernard next showed Beahm a broken, sharpened spoon. Instead of taking the sharpened spoon away from Bernard or otherwise addressing his mental health problems, however, Beahm also allegedly walked away. Predictably, Bernard then cut himself with the sharpened spoon, again causing bleeding and extreme pain.

On July 3, 2017, Correctional Officer Barrett allegedly refused to give Bernard his psychiatric medication during medication pass, again because Bernard was not at his door in time. Even after Bernard asked for the medication, Barrett refused. His continued

refusal allegedly caused Bernard to have an anxiety attack, about which he informed Barrett. Specifically, Bernard showed Barret a sharpened pen tip and informed her of his plans to cut himself with the goal of bleeding out. Instead of taking the pen or dispensing the medication, Barrett allegedly told him to “go ahead” before walking away. (*Id.* at 1.) When Barrett returned for mail pickup, she found Bernard bleeding from deep cuts on his arm. Worse, according to Bernard, “Officer Barrett did nothing. And left off shift.” (*Id.*)

On August 13, 2018, at around 1:40 p.m., Bernard began panicking and having another anxiety attack, along with thoughts of self-harm. He contacted the RHU “bubble officer,” John Doe, and told him about his anxiety and thoughts. Doe was allegedly wholly indifferent; indeed, not only was he “dismissive, antagonizing and even taunt[ing],” but instructed Bernard how to cut the vein in his arms and advised him to “cut deeper.” When Bernard sought medical attention, Doe further responded, “You[’re] not dead yet” and “You aren’t doing it right because you aren’t dead yet.” (*Id.* at 7.) Bernard continued cutting himself. At 2 p.m., when Officer Nelson came to Bernard’s door to pass out supplies, he allegedly showed Nelson his wounds and the sharpened pen tip, but Nelson only asked if he wanted supplies and ignored the situation. Bernard continued cutting himself until dinner trays were passed around, at which time Sergeant Koontz got him medical attention. On this occasion, Bernard needed 22 stitches to close three, deep lacerations on his left arm.

Finally, on October 19, 2018, Bernard was placed in restricted housing, which he contends has caused “serious anxiety attacks, severe waves of depression & self-mutilation.” (*Id.* at 9.) Bernard wrote to Security Director Tony Melli and Warden Brian

Foster about his condition and complained that security staff were not providing him with “necessary resources,” which Bernard appears to maintain should have included adequate therapy sessions, out-of-cell programming time, and other therapeutic activities. He was particularly hoping that Segregation Program Supervisor Ashworth would be directed to provide these resources. However, Melli and Foster did not direct Ashworth in accordance with Bernard’s request. Bernard then filed inmate complaints, but Complaint Examiners J. Munchow and T. Moon denied his complaints, allegedly “encouraging staff’s further violations.”³ (*Id.*)

Additionally, Bernard alleges that other inmates: (1) bang on his walls to prevent him from sleeping; (2) attempt to force him to hand over his psychiatric medications; and (3) talk or yell into the vents. In segregated housing, he allegedly harmed himself because of “overwhelming anxiety attacks & thought crushing depression brought on by [23 to] 24 hour lockdowns.” (*Id.* at 10.) More specifically, Bernard explains that he often feels smothered, “as if bashing [his] skull open or hanging [him]self is [the] only relief,” and that he hurts himself “to make sure [he] still do[es] exist.” (*Id.*) Bernard also complains that he has very little contact with his family and that he wants to get out of RHU or at least be allowed to knit or crochet. (*Id.*)

³ Bernard adds that he informed Melli, Foster, Ashworth, and Munchow “that they are intentionally violating their own mission statement on pg 1 of the W.C.I. Segregation handbook as well as staff antagonization, the denial of my food, showers & medications.” (Suppl. to Compl. (dkt. #15) 10.)

OPINION

I. Bernard's Request to Amend the Complaint

Before considering if plaintiff can proceed with his claims, there is an initial question about whether he can bring all these claims in a single lawsuit, since different WCI officers were involved in each of the incidents. *See Wheeler v. Wexford*, 689 F.3d 680, 683 (7th Cir. 2012) (“A litigant cannot throw all of his grievances, against dozens of different parties, into one stewpot. Joinder that requires the inclusion of extra parties is limited to claims arising from the same transaction or series of related transactions.”); *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (“[M]ultiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in different suits[.]”). Permissive joinder under Rule 20 provides that multiple defendants “may be joined in one action” if “any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2)(A)-(B).

While this case presents a close question because plaintiff is trying to sue seventeen individuals over seven events spanning over two years, ultimately, plaintiff's claims “involve some overlapping issues but different defendants,” so plaintiff should be able to proceed without having to file a separate suit. *See Armstrong v. Krupiczowicz*, 874 F.3d 1004, 1009 (7th Cir. 2017) (noting prisoner-plaintiff had two pending suits that “appear[ed] to involve some overlapping issues but different defendants” and recommending that if the

case “survived the pleading stage on remand, the district court should consider whether it would be appropriate to assign both cases to the same judge . . . or consolidate them under Federal Rule of Civil Procedure 20(a)(2)”; *see also Mitchell v. Kallas*, 895 F.3d 492, 503 (7th Cir. 2018) (reversing dismissal of parole officer defendant because plaintiff alleged “an ongoing denial of treatment arising out of one fundamental occurrence” because plaintiff “focused on a series of events stemming from one issue”); *Goodvine v. Meisner*, 608 Fed. Appx. 415, 417 (7th Cir. 2015) (finding “common questions of law or fact” permitting prisoners to be co-plaintiffs under Federal Rule 20(a)(1)(B) despite the fact that they “did not harm themselves in precisely the same way or on the very same days” because they “attributed their injuries to the same omissions and prison policies”).

Here, all of Bernard’s claims arise out of allegations that staff at WCI were deliberately indifferent to his serious mental health problems. *Cf. Terry v. Spencer*, 888 F.3d 890, 894 (7th Cir. 2018) (explaining that “[t]he two sets of claims are against different defendants, but they belong in the same suit because they arise out of the same connected ‘transactions.’ Joining these related claims in one suit is not the ‘scattershot’ litigation strategy we have criticized in the past.” (internal citations omitted)). Indeed, this is not the type of “omnibus” complaint that “raise[s] claims about unrelated conduct against unrelated defendants” about which the Seventh Circuit has warned district courts. *Mitchell*, 895 F.3d at 503. Further, the court has “considerable flexibility in managing and structuring civil litigation for fair and efficient resolution of complex disputes,” including the ability to sever, claims later, if necessary. *UWM Student Ass’n v. Lovell*, 888 F.3d 854, 863 (7th Cir. 2018). Finally, these claims all have a unifying defendant in Warden Foster,

not only for his own personal involvement, but to the extent plaintiff is stating a larger claim against WCI for systemic problems in keeping all its staff sufficiently aware of an inmate's ongoing mental health challenges, including incidents of self-harm and suicidal tendencies. Satisfied that plaintiff can bring these claims in one lawsuit, the court turns to his Eighth Amendment claims, on which, as explained below, he will be permitted to proceed.⁴

II. Deliberate Indifference to Risk of Self Harm

The Eighth Amendment imposes a duty on prison officials to provide “humane conditions of confinement” and to ensure that “reasonable measures” are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To prevail on an Eighth Amendment claim, a plaintiff must show that the defendant acted with “deliberate indifference” to a “substantial risk of serious harm” to the plaintiff’s health or safety. *Id.* at 836. Significant self-harm, such as attempted suicide, constitutes “serious harm.” *See Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). Deliberate indifference to a risk of self-harm is present when an official is subjectively “aware of the significant likelihood that an inmate may imminently” harm himself, yet “fail[s] to take reasonable steps to prevent the inmate from performing the act.” *Pittman ex rel. Hamilton v. County of Madison, Ill.*, 746 F.3d 766, 775-76 (7th Cir. 2014) (alteration in original) (citations omitted); *see also Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 665 (7th Cir.

⁴ The court notes that plaintiff has included references to other individuals in his complaint and supplement, but does not expressly bring claims against them. If plaintiff intends to bring claims against any other individuals, he needs to amend his complaint and seek leave to proceed.

2012) (“[P]rison officials have an obligation to intervene when they know a prisoner suffers from self-destructive tendencies.”).

Bernard has adequately pled facts to allow him to proceed on deliberate indifference claims against defendants Barrett, Beahm, Doe, Haynes, Kibbel, Kijek, Nelson, O’Neal, Pohl, and Roper by alleging that each of these defendants knew about a substantial risk that he was going to harm himself, yet failed to act, allowing him to, in fact, harm himself or remain at substantial risk of doing so. Plaintiff also will be permitted to proceed against defendants Ashworth, Foster, Melli, Moon and Munchow because he alleged that they were aware that the conditions of his confinement in segregation were aggravating his suicidal ideation and tendencies to self-harm, or that WCI had failed systemically in keeping officers sufficiently apprised of the ongoing risks of plaintiff’s acts of self-harm, and did nothing. Therefore, plaintiff will be able to proceed with his deliberate indifference to a risk of self-harm claims against the aforementioned defendants.

III. Deliberate Indifference to a Serious Medical Need

Although not affirmatively pled, plaintiff will also be able to proceed on claims for deliberate indifference to a serious medical need concerning: (1) the denial of his medications on October 29, 2016, June 18, 2017, and July 3, 2017; (2) Nelson’s failure to seek medical attention for Bernard when shown his self-inflicted wounds; (3) Bernard’s alleged inadequate access to therapeutic activities while in segregation; and (4) Warden Foster’s inadequate attention to a systemic failure to address plaintiff’s ongoing mental health challenges.

A prison official may violate the Eighth Amendment if the official is “deliberate[ly]

indifferen[t]” to a “serious medical need.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In this context, “deliberate indifference” means that the officials are aware that the prisoner needs medical treatment, but disregard the risk by consciously failing to take reasonable measures. *See Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). “An objectively serious medical need is ‘one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.’” *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 810 (7th Cir. 2000) (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997)). A plaintiff can prove deliberate indifference if he can establish both objective and subjective elements -- that the medical need is actually serious *and* the official acted with a “sufficiently culpable state of mind” with actual knowledge of the medical need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (internal citation omitted). Thus, to establish deliberate indifference under the Eighth Amendment on a denial of medical care claim, the plaintiff must demonstrate that: (1) he had a serious medical need; (2) defendants knew that plaintiff needed medical treatment; and (3) defendant consciously failed to take reasonable measures to provide the necessary treatment. *Forbes*, 112 F.3d at 266.

Plaintiff has alleged sufficient facts to meet this standard. He has serious mental health issues, including medically recognized mental health disorders and a history of suicidal ideation, suicide attempts and repeated acts of self-harm. While his original complaint alleges that “all defendants” knew of his mental illness, his supplement is not so explicit. In his supplement, he alleges that he “is a mentally ill inmate with a mental health code of MH-2a, which is classified as a ‘seriously mentally ill inmate.’” (Suppl. to Compl.

(dkt. #15) 3.) From this, the court will infer that all named defendants were aware of his serious mental illness. Plaintiff further alleges that during the medicine distribution on October 29, 2016, June 18, 2017, and July 3, 2017, he was outright denied his prescribed medications by defendants Kibbel, Roper, and Barrett, respectively. As to defendant Nelson, at 2 p.m. on August 13, 2018, Bernard alleges that he showed Nelson a “sharpen[e]d metal pen-tip and [his] bleeding wounds,” but instead of Nelson seeking medical attention for Bernard, he simply asked if Bernard wanted supplies and “disregard[ed]” Bernard’s injuries. (Supp. to Compl. (dkt. #15) 7.) As to defendants Ashworth, Foster, Melli, Moon, and Munchow, Bernard alleges that he made them aware of his mental illness, history of self-harm and the inadequacies of available therapeutic activities.

At this stage, these allegations are sufficient to move forward. Accordingly, plaintiff will be able to pursue a deliberate indifference to a serious medical need claim against defendants Kibbel, Roper, Barrett, Ashworth, Foster, Melli, Moon, and Munchow.

IV. Conditions of Confinement

To the extent that Bernard is challenging the conditions of his confinement in segregation, he will be able to proceed on that claim as well. The Constitution requires the government to “provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” *Farmer*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)). An Eighth Amendment “conditions of confinement” claim has two parts. As a threshold matter, an inmate must

show that the alleged deprivation was “sufficiently serious” on an objective basis such that an official’s act or omission results in the “denial of the minimal civilized measure of life’s necessities.” *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (citing *Farmer*, 511 U.S. at 834). Second, the inmate must show that the prison official acted with a subjectively culpable state of mind, known as “deliberate indifference” -- that is, as before, the official knew about the risk of harm, had the ability to prevent the harm, and failed to do so. *Mays v. Springborn*, 575 F.3d 643, 648 (7th Cir. 2009).

Plaintiff alleged that: (1) he was placed in segregation on October 19, 2018, and expected to remain there until January 22, 2019; (2) he was deprived a variety of therapeutic outlets, including therapy and contact with his family; (3) other inmates worsen his mental health by disrupting his sleeping, talking or yelling into the vents, and trying to intimidate him into handing over his medications; and (4) staff deny him “food, showers & medications.” (Suppl. to Compl. (dkt. #15) 10.) At this point, these allegations appear sufficient to permit an inference that Bernard was subjected to conditions that created a serious risk of injury, at least for someone with existing, profound mental health disorders. Likewise, he has sufficiently alleged that defendants Ashworth, Foster, Melli, Moon, and Munchow were aware of these conditions, knew WCI was in violation of a Department of Adult Institutions policy, and did nothing.

ORDER

IT IS ORDERED that:

- 1) Plaintiff DeAndre Bernard is GRANTED leave to proceed on Eighth Amendment deliberate indifference to a risk of self-harm claims against the following defendants: Ashworth, Barrett, Beahm, Doe, Foster, Haynes, Kibbel, Kijek, Melli, Moon, Munchow, Nelson, O'Neal, Pohl, and Roper.
- 2) Plaintiff is GRANTED leave to proceed on Eighth Amendment deliberate indifference to a serious medical need claims against the following defendants: Ashworth, Barrett, Foster, Kibbel, Melli, Moon, Munchow, Nelson, and Roper.
- 3) Plaintiff is GRANTED leave to proceed on Eighth Amendment conditions of confinement claims against Ashworth, Foster, Melli, Moon and Munchow.
- 4) 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 state defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.
- 5) 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 to the defendants' attorney.
- 6) 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.
- 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 defendants or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 16th day of January, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY

District Judge