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

JAMES KENDALL BREYLEY III,

Plaintiff,

v.

HERBERT DARDEN,
CHRISTINE WIEDMEYER,
LT. RENTARIA, LARRY FUCHS,
DON STRAHOTA, CANDACE WARNER,
KARL HOFFMAN, LYNN WAUSHETAS,
MARIAH MARTIN, ROSLYN HUNEKE,
ERIC PETERS, and JOHN and JANE DOE(S),

Defendants.

OPINION AND ORDER

20-cv-006-wmc

Pro se plaintiff James Kendall Breyley III, a prisoner at New Lisbon Correctional Institution("NLCI"), filed this lawsuit under 42 U.S.C. § 1983, claiming defendants violated his Eighth Amendment rights by failing to protect him from another inmate's assault, then deliberately refusing to provide needed medical treatment for the injuries he sustained. Under 28 U.S.C. § 1915A, the court must screen and dismiss any portion of the complaint that is frivolous or malicious, fails to state a claim upon which relief can be granted, or seeks money damages from a defendant who is immune from such relief. For the reasons that follow, the court will allow Breyley to proceed against *some* of the named defendants on Eighth Amendment claims for failure to protect and deliberate indifference to his medical needs.

ALLEGATIONS OF FACT[1]

In addition to naming John and Jane Doe(s) as defendants, Breyley asserts claims against eleven defendants. First, he names Herbert Darden, the inmate who attacked him and Christine Wiedmeyer, his ex-wife. Second, he names the following NLCI employees: Lt. Rentaria, a corrections officer; Security Director Larry Fuchs; Warden Don Strahota; Candace Warner and Roslyn Huneke, Health Services Unit ("HSU") managers; Dr. Karl Hoffman, a physician; Lynn Waushetas, the prison's program director; Mariah Martin, a nurse; and Eric Peters, a captain.

Specifically, Breyley claims that on September 21, 2016, Lt. Rentaria, Security Director Fuchs, and Warden Strahota were made aware of an "adulterous relationship" between Darden and Wiedmeyer, who was still married to Breyley at the time. (Compl. (dkt. #1) 2.) Nevertheless, Breyley asserts, none of these three NLCI officials placed a separation notice on inmates Darden and him, nor did they take any other action to prevent an attack. Breyley also alleges that his wife actually paid Darden to attack Breyley. On December 24, 2016, Darden did just that, striking him ten times in the face and causing him great bodily harm. Finally, Breyley further claims that these same NLCI officials failed to report the incident to law enforcement.

Following the attack, Breyley further alleges that a CT scan revealed his nose was severely damaged and hindered his ability to breathe, so much so that an ER physician

[1] In addressing any *pro se* litigant's complaint, the court must read the allegations generously, drawing all reasonable inferences and resolving ambiguities in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

advised that he be seen by an ENT specialist for his nose within three to seven days. According to Breyley, however, HSU Manager Warner and Dr. Hoffman "deliberately refused" to arrange for him to be seen within that time frame.

Apparently, Breyley was also charged with violating prison policy, because he alleges that Captain Peters offered him 30 days in segregation, and if he did not accept, Peters said he would remain in segregation for another twenty-one days while an investigation took place, following which he would serve an additional 60 or 90 days in segregation. Ultimately, Breyley states that he accepted this 30-day offer because HSU staff were also refusing to treat his medical needs while he remained in segregation.

Breyley next filed an inmate complaint on January 2, 2017, while he still remained in segregation pending an investigation, although that complaint was "lost." When Breyley refiled the complaint, he further alleges that NLCI Program Director Waushetas rejected it, and Warden Strahota then rejected it again on appeal.

On November 13, 2019, Nurse Martin allegedly acknowledged numerous errors in Breyley's medical records that were adversely impacting his health. Despite this, Breyley claims that Huneke and Dr. Hoffman declined to correct his medical record and that they were also responsible for failing to treat his nose injury, his inability to breathe, and the other side effects of his injury.

OPINION

Although plaintiff's claims for failure to protect and deliberate indifference both implicate his Eighth and Fourteenth Amendment rights, and arise out of the same basic attack, the court will address each claim separately. However, as an initial matter, the

court will dismiss defendants Darden and Wiedmeyer, as well as the Doe defendants. Generally speaking, Darden and Wiedmeyer must be dismissed because private actors do not act "under color law," and thus, are not subject to suit under § 1983.[2] As for the Doe defendants, plaintiff has failed to allege facts suggesting that any Doe defendants were involved in the events comprising his claims. To be held liable under § 1983, a defendant must have been personally involved in the constitutional violation. *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional deprivation."). Accordingly, the court turns to the arguable merit of each of plaintiff's Eighth Amendment claims.

I. Failure to Protect

As for plaintiff's claim for failure to protect against Lt. Rentaria, Security Director Fuchs, and Warden Strahota, prison officials are required by the Eighth Amendment to take reasonable measures to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To prevail on a failure to protect claim, an inmate must prove: (1) he faced a "substantial risk of serious harm"; and (2) the prison official acted with "deliberate indifference" toward that risk. *Id.* at 834. "Deliberate indifference" has been defined as equivalent to reckless disregard under criminal law. *Id*. at 836. Additionally,

[2] While the court might exercise supplemental jurisdiction over whatever tort claims plaintiff may have against these two non-governmental actors, between the nature of the intentional common law torts and potential marital disputes, the proper forum would appear to be Wisconsin state court.

for a prison official to be held liable, he or she must actually know of and disregard the substantial risk of harm to the prisoner. *Id*. at 837.

Construing plaintiff's allegations generously, they are sufficient to support an *inference* that these three defendants were aware of a substantial risk of harm to plaintiff and responded to it with deliberate indifference. In particular, plaintiff claims that they each: (1) knew of an "adulterous relationship" between the attacking inmate Darden and his ex-wife, and (2) were in a position to separate him from Darden but chose not to take this or any other steps to prevent the attack. While plaintiff's complaint does not offer much in terms of the source or specifics of these defendants' knowledge of an impending threat -- such as whether plaintiff requested a separation order, alerting them to Darden's threat -- the court may reasonably infer at the pleading stage that knowledge of an adulterous relationship between an inmate and another inmate's wife would create such obvious animosity between the two inmates that violence will erupt between them unless separated by the institution. Similarly, for purposes of notice pleading, it follows that the failure by the defendants to put a separation notice on the inmates and prevent the attack may constitute proof of deliberate indifference to plaintiff's substantial risk of harm. Of course, fact-finding may bear out that the named defendants were neither aware of any relationship between plaintiff and his attacker, nor had defendants reason to believe that there was a risk of a physical altercation between them. At this stage, however, the court must resolve every ambiguity in plaintiff's favor. As such, plaintiff will be granted leave to proceed on his failure-to-protect claims against defendants Rentaria, Fuchs, and Strahota.

II. Deliberate Indifference

The plaintiff further seeks to proceed against defendants Warner, Hoffman, Huneke Waushetas, Strahota, Martin, and Peters on Eighth Amendment deliberate indifference claims related to their handling of his medical care. To prove a deliberate indifference claim, the plaintiff must show that prison officials, medical personnel or guards acted with "deliberate indifference" to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). Serious medical needs include: (1) life-threatening conditions or those carrying a risk of permanent serious impairment if left untreated, (2) withholding of medical care that results in needless pain and suffering, or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 262, 266 (7th Cir. 1997).

There is no question that Breyley's alleged, physical injuries would constitute a serious medical need, since a CT scan in the ER allegedly showed "severe" damage to his nose that greatly hindered his ability to breathe. Moreover, the ER doctor allegedly ordered Breyley to see an ENT specialist within three to seven days. HSU Manager Warner and Dr. Hoffman not only are alleged to have deliberately refused that order, but plaintiff alleges they refused him proper treatment for another thirty days while he waited in segregation. Therefore, plaintiff's injury falls into at least two of the three categories of serious medical needs described above, if not all three.

Likewise, plaintiff's allegations that Warner and Hoffman deliberately refused (1) to have an ENT treat Breyley and (2) to treat him properly in segregation for an injury hindering his ability to properly breathe are sufficient to infer deliberate indifference at the screening stage of this dispute. Additionally, plaintiff alleges that another HSU manager,

Huneke, also refused to treat plaintiff. While it is unclear whether both HSU managers were involved in the care of Breyley (or just one of them), at this stage the court will infer that both Warner and Huneke were involved in plaintiff's allegedly inadequate medical care.

However, the court will dismiss claims of deliberate indifference to a medical need against NLCI Program Director Waushetas and Warden Strahota, since ruling against a prisoner on an inmate complaint does not qualify as personal involvement in a constitutional violation, nor is it a sufficient basis to infer such a claim. *McGee v. Adams*, 721 F.3d 474, 485 (7th Cir. 2013); *see also George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation."); *see also Owns v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievances procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owen's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). As alleged, neither defendant was an active participant in the refusal to treat plaintiff: Waushetas merely rejected the inmate complaint, and Strahota rejected it on appeal. Thus, plaintiff may not proceed on his Eighth Amendment claim for refusal of necessary medical care against defendants Waushetas and Strahota.

As for Nurse Martin, plaintiff only alleges that she acknowledged errors existed in his medical file that had affected his treatment. Given that plaintiff has not alleged that Martin mishandled his need for treatment in any manner, nor was responsible for any error

in his medical file, it would be unreasonable to infer that *she* acted with deliberate indifference to a serious medical need. If anything, by acknowledging an error in his medical files, Martin did more to help the plaintiff than anyone else. Therefore, the court will also dismiss Martin from this lawsuit.

Finally, plaintiff did not allege any facts regarding Captain Peters' involvement with NLCI's refusal of his needed medical care. Rather, he alleges that Peters offered him 30 days in segregation, and if plaintiff refused, then he would get an additional 60 to 90 days in segregation instead, forcing plaintiff to accept the 30-day ticket. While plaintiff alleges that HSU was not treating his medical condition properly while he was in segregation, these allegations alone do not support an inference that Captain Peters was aware of, much less consciously disregarded, plaintiff's need for medical treatment. Accordingly, however disturbing his threats may have been, plaintiff may not proceed against Peters for an Eighth Amendment claim.[3]

III. Fourteenth Amendment Due Process Violation

To state a procedural due process claim, a plaintiff must allege that: (1) he has a liberty or property interest with which the state interfered; *and* (2) the procedures afforded him to address that interference were constitutionally deficient. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697 (7th Cir. 2009). A prisoner's placement in disciplinary segregation may implicate a liberty interest under some

[3] Although not expressly invoked, it appears that plaintiff may be seeking to pursue a Fourteenth Amendment due process claim against Peters, not a challenge to how he handled his medical needs, but as explained below, his factual allegations do not support such a claim.

circumstances. *See Marion*, 559 F.3d at 697 (citing *Wilkinson*, 545 U.S. at 224; *Sandin v. Conner*, 515 U.S. 472, 486 (1995)). To implicate a liberty interest, such a placement must result in an atypical and significant hardship when compared to the ordinary incidents of prison life. *Townsend v. Fuchs*, 522 F.3d 765, 768 (7th Cir. 2008) (quoting *Sandin*, 515 U.S. at 484-86). Thus, "both the duration and the conditions of the segregation must be considered in the due process analysis." *Townsend v. Cooper*, 759 F.3d 678, 687 (7th Cir. 2014); *see also Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006) (fourteen-day placement in segregation may have implicated liberty interest where inmate was denied sensory input, had no privileges, had to sleep naked on concrete slab); *but see Obriecht v. Raemisch*, 565 F. App'x 535, 539-40 (7th Cir. 2014) (seventy-eight day confinement with mattress placed directly on wet floor did not implicate liberty interest); *Thomas v. Ramos*, 130 F.3d 754, 760-62 (7th Cir. 1997) (seventy day confinement with another inmate in one-man cell for twenty-four hours a day did not implicate liberty interest).

Here, plaintiff was only placed in segregation for thirty days, which from the precedent cited above, is not sufficient to implicate a liberty interest. In addition, plaintiff has alleged no facts that show his placement in segregation resulted in any significant hardship when compared to the ordinary incidents of prison life. While plaintiff does allege that he was denied proper medical care because he was in segregation, plaintiff has not otherwise alleged that the conditions of his confinement were significantly different than those outside of segregation to support an inference that such a short period of time

would constitute the type of atypical hardship amounting to a loss of liberty.[4] Accordingly, plaintiff may not proceed on a due process claim, and defendant Peters will be dismissed from this lawsuit.

ORDER

IT IS ORDERED that:

1) Plaintiff James Kendall Breyley III is GRANTED leave to proceed on:

   a. his Eighth Amendment failure-to-protect claims against defendants Rentaria, Fuchs, and Strahota.

   b. his Eighth Amendment medical care deliberate indifference claims against defendants Warner, Huneke, and Hoffman.

2) Plaintiff is DENIED leave to proceed on any other claim, and the Doe defendants, as well as defendants Martin, Waushetas, Darden, Wiedmeyer and Peters, are all DISMISSED.

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 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.

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 to the defendants' attorney.

[4] Regardless, since thirty days in segregation by itself is not a liberty interest, the court need not address whether the due process afforded to plaintiff was constitutionally deficient.

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 is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 8th day of September, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge