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

JACKIE CARTER,

Plaintiff,

v.

GARY BOUGHTON, TROY HERMANS, JEROME SWEENEY, BURTON COX, JOLINDA WATERMAN, and EDWARD WALL,

Defendants.

OPINION AND ORDER

15-cv-356-wmc

Pro se plaintiff Jackie Carter alleges that defendants all employees of the Wisconsin Department of Corrections violated his Eighth Amendment rights by: (1) subjecting him to unsafe conditions of confinement, namely a slippery shower; and (2) failing to treat his serious medical needs caused when he slipped in the shower. (Compl. (dkt. #1).) Because Carter is incarcerated and is seeking redress from a governmental employee, the Prison Litigation Reform Act ("PLRA") requires the court to screen his complaint and dismiss any portion that is: (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. For the reasons that follow, the court will grant Carter leave to proceed on an Eighth Amendment deliberate indifference claim against defendant Dr. Burton Cox, but will deny him leave in all other respects.

ALLEGATIONS OF FACT[1]

Carter is now housed at the Wisconsin Secure Program Facility ("WSPF"), at which all of the defendants are employed, except the Secretary of the Department of Corrections Edward Wall. Carter alleges that on February 11, 2015, he slipped in the shower and hit the concrete wall, floor and steel sink and toilet combination, injuring his head, neck, back, hip, elbow and knee. Carter contends that the shower itself was hazardous due to its slippery floor. He further contends that this unsafe condition had been brought to the attention of defendants WSPF Warden Gary Boughton, Deputy Warden Troy Hermans, Security Director Jerome Sweeney, and Secretary Wall.

After injuring himself, Carter was taken to the health services unit ("HSU"), where he contends that defendants Dr. Cox and HSU manager Jolinda Waterman denied him medical attention, including pain relief. Carter contends that Dr. Cox denied him treatment because "standards and practices" have changed. (Compl. (dkt. #1) p.1.)

OPINION

I. Screening of Complaint

A. Eighth Amendment Conditions of Confinement Claim

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To constitute cruel and

[1] In addressing any *pro se* litigant's complaint, the court must read the allegations of the complaint generously, resolving ambiguities and making reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Carter alleges, and the court assumes for purposes of this screening order, the following facts.

unusual punishment, conditions of confinement must be extreme. A general "lack of due care" by prison officials does *not* rise to the level of an Eighth Amendment violation, instead, "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective *and* subjective component. *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions were sufficiently serious so that "a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," *Farmer*, 511 U.S. at 834, *or* "exceeded contemporary bounds of decency of a mature, civilized society." *Lunsford*, 17 F.3d at 1579. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id.*

Assuming Carter's allegation that each of the above-named defendants were aware of the hazardous conditions of the shower -- an allegation which seems improbable, at least with respect to defendant Wall -- it still fails to satisfy the objective component of a conditions of confinement claim. Even crediting Carter's complaint that the shower floor is extremely slippery, such an allegation does not rise to the level of an Eighth Amendment violation. Cases in which courts have allowed a prisoner to proceed on a conditions of confinement claim based on shower conditions, involve unsanitary conditions, far exceeding the allegations at issue here. *See, e.g.*, *Curry v. Kerik*, 163 F.

Supp. 2d 232, 236 (S.D.N.Y. 2001) (granting plaintiff leave to proceed on a conditions of confinement claim based on his allegation that he was "exposed to an unsanitary and hazardous showering area for over nine months") (listing other cases). Accordingly, the court will deny Carter leave to proceed on an Eighth Amendment conditions of confinement claim against defendants Boughton, Hermans, Sweeney, and Wall without prejudice.

B. Eighth Amendment Deliberate Indifference to Medical Treatment Claim

Carter also seeks leave to proceed on an Eighth Amendment claim against defendants Cox and Waterman based on their alleged denial of medical attention, including pain relief, following his February 11, 2015, fall in the shower. The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To state a deliberate indifference claim, a plaintiff must allege facts from which it may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997).

"Serious medical needs" include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated, (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering, or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez*, 111 F.3d at 1371-73. A prison official has acted with deliberate indifference when the official "knew of a substantial risk of harm to the inmate and acted or failed to

act in disregard of that risk." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

As currently alleged, plaintiff may proceed on an Eighth Amendment deliberate indifference claim against Dr. Cox based on the allegation that Dr. Cox refused him pain medication for the injuries caused by the fall in the shower. These allegations suffice at the pleading stage to allow Carter to proceed on his claim that he had a serious medical need and Dr. Cox was deliberately indifferent to that need. Carter, however, fails to adequately allege Waterman's involvement, other than to state in the most conclusory fashion: that she denied him medical attention. Accordingly, the court will grant Carter leave to proceed on his claim against Dr. Cox, but not against Waterman.

While the allegations against Dr. Cox pass muster under the court's lower standard for screening, as Carter well knows, to be successful on this claim, he will have to prove defendants' deliberate indifference, which is a high standard. Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Carter's burden to prove: (1) his medical condition constituted a serious medical need, which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more daunting, Dr. Cox knew his condition was serious and deliberately ignored his condition and related pain.

II. Motion for Recruitment of Counsel

In this case as well as another of Carter's pending cases, No. 15-cv-165, plaintiff filed a renewed motion for assistance in recruiting counsel and stays of both cases

pending recruitment. This is Carter's second motion. The first was denied because Carter had failed to take the initial step of seeking counsel on his own, or at least demonstrating such actions. ('165 dkt. #13; '356 dkt. 9.) Attached to the present motion are three letters from attorneys denying his request for representation. (Mot., Ex. 1 (dkt. #10-1).) While Carter's renewed motion clears that initial hurdle, plaintiff has failed to demonstrate -- in either of his pending cases -- that "the difficulty of the case -- factually and legally -- exceeds [his] capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007).

From his filings to date in both cases, Carter has demonstrated that he understands the facts and law surrounding his claims. Carter is an experienced litigator. From his prior cases in this court, he has demonstrated an ability to conduct discovery and respond to dispositive motions. As such, the court will deny Carter's request at this time. If during the course of either case, specifically, if Carter's claims survive a dispositive motion, the court will assess whether the difficulty of the case then exceeds his ability and will recruit counsel at that time if warranted.

ORDER

IT IS ORDERED that:

1) Plaintiff Jackie Carter's request to proceed on an Eighth Amendment claim against defendant Burton Cox is GRANTED. In all other respects, Carter's request is DENIED, and all other defendants are dismissed from this action.

2) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, 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 defendant or to defendant's attorney.

3) 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.

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 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 defendants.

5) Plaintiff's renewed motion for recruitment of counsel (dkt. #10) is DENIED without prejudice.

Entered this 12th day of July, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge