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

DALE D. DRINKWATER,

Plaintiff,

v.

WISCONSIN DEPT. OF CORR. MEDICAL COMMITTEE, ET AL.,

Defendants.

ORDER

Case No. 16-cv-134-wmc

Plaintiff Dale Drinkwater brought this proposed civil action pursuant to 42 U.S.C. § 1983, in which he claims that the defendants' treatment of his failing hip replacements violated his rights under the Eighth Amendment, the Americans with Disabilities Act and state law. Having paid the full filing fee, Drinkwater's complaint is ready for screening pursuant to 28 U.S.C. § 1915A. Along with his complaint, Drinkwater filed a supplement and 124 exhibits, which the court will consider part of his complaint for purposes of screening. (Dkts. #1, #2.) He has also filed a Motion for Ruling (dkt. #23) and a letter requesting that the court transfer this matter to the Eastern District of Wisconsin (dkt. #22). For the following reasons, the court is denying Drinkwater's motions but permitting him to proceed on Eighth Amendment and state law claims against certain defendants.

ALLEGATIONS OF FACT[1]

Drinkwater is currently incarcerated at the Racine Correctional Institution, but the events relevant to his claims took placed when he was incarcerated at the Fox Lake Correctional Institution ("FLCI") and the Redgranite Correctional Institution ("Redgranite"). He has

[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 facts above based on the allegations in Drinkwater's complaint.

named at least nine defendants: the Wisconsin Department of Corrections ("WDOC") Medical Committee; Drs. Larson, Burnett, Hoftiezer, and Springs; registered nurses Bellin and Moerchen; nurse practitioner Deitrich; and unknown John Does of FLCI's Health Services Unit ("HSU"). All of the individual defendants appear to be WDOC employees but they are located at different WDOC institutions.

Drinkwater alleges that from 2010 to 2014, he was "shuffled" around between various doctors located at several different WDOC institutions who attempted to treat him for his hip problems. His timeline begins on May 24, 2010. At that point, Drinkwater was incarcerated at FLCI. He had already received hip replacements, but his hips were in such a bad state that he could no longer walk without crutches. That day, he fell while taking a shower. He then lay on the floor for five minutes until someone found him. Because he was having trouble breathing, Drinkwater was taken to Waupun Memorial Hospital, where he stayed three days. While there, Dr. Grossman saw him, assessed that the left hip replacement was failing, and recommended that Drinkwater see a specialist. Because Drinkwater did not want to see a specialist at the University of Wisconsin-Madison ("UWM"), Grossman suggested Froedert or the Mayo clinic, as possible options. (Dkt. #3, at 63-66.)

When Drinkwater returned to FLCI, Dr. Larson also saw him, but reported that the WDOC medical committee denied him hip replacement surgery. (*See* dkt. #3, at 66.) One of the exhibits Drinkwater attached to his complaint indicates that Larson observed him, found no issues and did not order x-rays because Drinkwater allegedly refused to be examined. (Dkt. #3, at 30.) Questioning the decision not to permit the surgery, Drinkwater requested a file review, but apparently no one responded to his requests. Drinkwater received a memorandum dated June 30, 2010, stating that his request for review had been received and that he could

contact Dr. Burnett and Dr. Hoftiezer, members of the WDOC medical committee, with any questions. (Dkt. #3, at 10.) Drinkwater notes on the memorandum that he sent letters to both denying that he refused care. (*Id.*)

In June of 2010, Drinkwater was declared legally disabled by the Social Security Administration. Then, in September of 2011, Drinkwater was released from incarceration, and he saw a doctor who told him that: (1) Dr. Grossman's surgery recommendation was proper; and (2) Drinkwater had one broken hip and a broken pelvis. The medical records Drinkwater attached to his complaint from October 2011 indicate that the doctors saw some issues with his left hip and were recommending follow-up. (Dkt. #3, at 67-68.) In 2013, Drinkwater went to the Mayo Clinic and received a hip replacement revision surgery date of January 2014.

Before his surgery, however, Drinkwater's parole was revoked, and he was returned to prison in October of 2013, this time at Redgranite. (Dkt. #3, at 85.) His medical records show that as of October 2014, Drinkwater was wheelchair-bound due to the problems with his left hip, and he requested an orthopedic consultation with Dr. Grossman.

Drinkwater alleges that Dr. Grossman saw him again on November 3, 2014, at which point he told Drinkwater that he could not fix his right hip and referred him to a doctor at UWM. Then, on January 1, 2015, while still at Redgranite, Drinkwater stood up, felt as though his hip went through his pelvis and his leg went numb. Drinkwater requested to go to the hospital the next day, but HSU instead scheduled him for x-rays. Apparently, he received some morphine, but was denied his request for more. Although scheduled for January 4, his x-rays were not taken until January 6, 2015. Apparently nurses Bellin and Moerchen reviewed the x-rays and told him that nothing was wrong with him and sent him back to his unit despite his

claims of serious pain. Dr. Spring also saw Drinkwater again on January 12 and 16, but did not make any changes to their assessments. (Dkt. #43.)

On January 20, 2015, Drinkwater saw a doctor at UWM. (Dkt. #3, at 90-98.) The doctor took multiple x-rays and saw that both of Drinkwater's hips and pelvis needed repair. Specifically, the doctor found that Drinkwater's hips had "significant severe polyethylene wear." He further found that Drinkwater "has had a catastrophic failure of his left total hip" and that his "right hip was failing." (*Id.* at 95-96.) The doctor made plans to repair the right hip immediately, as well as longer term plans to fix the left hip and pelvis. (Dkt. #3, at 54.) In particular, the doctor told Drinkwater that it would be "reasonable to revise the right hip and give him a good hip to stand on as he is essentially wheelchair bound." (*Id.*) From Drinkwater's filings, he appears to have undergone revision surgeries in May and November of 2015. (Dkt. #3, at 110-11, 115-18.)

OPINION

Plaintiff claims that the defendants' failure to treat his hip problems in a timely and proper fashion violated his Eighth Amendment rights, the Americans with Disabilities Act ("ADA") and state negligence law. As an initial matter, the WDOC medical committee will be dismissed. Claims under § 1983 must be alleged against "persons." Because the WDOC medical committee is not a person for § 1983 purposes, it must be dismissed from this lawsuit. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Plaintiff's claims against other defendants are addressed below.

I. Eighth Amendment

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). "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). Allegations of delayed care, even a delay of just a few days, may violate the Eighth Amendment if the delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010) ("[T]he length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment.") (citations omitted); *Smith v. Knox County Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011). Under this standard then, plaintiff's claim of deliberate indifference has three elements: (1) Did plaintiff need medical treatment?; (2) Did defendants know that plaintiff needed treatment?; (3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

Dr. Larson appears in plaintiff's timeline shortly after his fall in the shower, as plaintiff alleges that he saw Drinkwater in 2010, and affirmed the WDOC medical committee's decision denying surgery. However, Dr. Grossman had just evaluated plaintiff at the hospital because of that same fall, and he noted serious problems with his hip replacements. Thus, Dr. Larson's failure to pursue further evaluation might at least allow a trier of fact to infer that Dr. Larson was deliberately indifferent to Drinkwater's then serious condition. Similarly, plaintiff has

submitted sufficient facts to create an inference that members of the WDOC medical committee, Drs. Burnett and Hoftiezer, also ignored the fact that his hip replacements were failing by not recommending surgery.[2]

Plaintiff also names "FLCI John Does" as defendants, but he does not refer to any specific wrongdoing in his complaint as being attributable to any unnamed defendants. In reviewing plaintiff's medical records, it does appear that doctors other that those listed above saw him while he was incarcerated at FLCI, but the court could only match those doctors with alleged wrongdoing by guesswork. Thus, plaintiff will not be permitted to proceed on his Eighth Amendment claim against these unnamed FLCI John Does, but he is free to amend his complaint to name additional doctors if he uncovers during discovery specific facts supporting his allegations, including the names of the staff and their actions or inactions.

The next group of defendants are Redgranite employees involved in plaintiff's January 2015 treatment. Plaintiff alleges that between 2011 and 2014 (when he was not incarcerated), Drinkwater received feedback from multiple doctors that he should have revisionist surgery on at least his left hip. This is sufficient to find that Drinkwater had a serious medical need as of January 2015. This would support an inference that nurses Bellin and Moerchen did not properly assess the results of Drinkwater's January 2015 x-rays, as well as ignored his claims of serious pain by sending him back to his unit without a treatment plan. Similarly, as to Dr. Springs, plaintiff alleges that at the beginning of January 2015, he saw Drinkwater, but made no different recommendations than the nurses. These allegations, coupled with x-rays that

[2] While the medical records plaintiff attaches to his complaint note that plaintiff refused treatment from Larson, plaintiff denies these facts. At least at the pleading stage, plaintiff's denial of the content of his medical records creates an issue of fact as to how his medical treatment was actually handled, buttressing the fact that these claims should proceed past the screening stage.

were taken at UWM shortly thereafter, showing significant wear in both of his hip replacements, suggest that Springs, as well as nurses Bellen and Moerchen ignored plaintiff's serious medical issues. Plaintiff will, therefore, be permitted to proceed on his Eighth Amendment claim against them.

Finally, as to nurse practitioner Deitrich, the court has been unable to locate any instance in plaintiff's allegations, or in his medical records, where a nurse practitioner named Deitrich treated him. As such, plaintiff has failed to allege facts suggesting her personal involvement in his treatment, which is required to hold a defendant liable under § 1983. *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (defendants liable under § 1983 only if they were personally involved in depriving plaintiff of constitutional rights). While plaintiff is free to amend his complaint to include specific allegations against this individual, plaintiff may not proceed against Deitrich as his complaint stands now.

Going forward, plaintiff should be aware that while his allegations are sufficient to pass muster under the court's lower standard for screening, plaintiff will have to prove not just that he has serious medical needs, but defendants' deliberate indifference to those needs, since inadvertent error, negligence, or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 937, 992 (7th Cir. 1996).

II. ADA Claims

Plaintiff also claims that defendant's actions violate his rights under the ADA. The ADA, 42 U.S.C. §§ 12131-12134, prohibits discrimination against qualified persons with disabilities. To establish a violation of Title II of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an

entity, and that the denial or discrimination was 'by reason of' his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (*citing Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). While Congress has abrogated states' Eleventh Amendment sovereign immunity for ADA violations that also constitute federal constitutional violations, the Seventh Circuit has yet to address whether ADA violations that do not implicate constitutional rights may be brought in federal court. *Norfleet v. Walker,* 684 F.3d 688, 690 (7th Cir. 2012). Moreover, in circumstances where an ADA claim is questionable and a pro se plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.,* the Seventh Circuit has suggested reading in a claim under the Rehabilitation Act so as to avoid this tricky abrogation question. *Id.* Accordingly, that is what this court will do.

The Rehabilitation Act is substantially identical, providing that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

The proper defendant for claims under the ADA and Rehabilitation Act is generally the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(b); *Jaros*, 684 F.3d at 670 n.2 (because individual capacity claims are not available, the proper defendant is the agency or its director in his official capacity). Plaintiff's statement that he must rely on

either crutches or a wheelchair to ambulate suggest that he may qualify as disabled. 42 U.S.C. § 12102(1) (defining "disability," in part, as a physical or mental impairment that substantially limits one or more major life activities).

However, plaintiff has not named an agency or agency director as a defendant, and so he has not named a proper defendant for relief under the Rehabilitation Act. Even if plaintiff had named a proper defendant, he has no claim under the ADA or Rehabilitation Act having failed to allege facts suggesting that he was denied a benefit because of his disability; rather, they suggest that he was denied proper medical treatment due to his treatment providers' poor decisions. *See Barrett v. Wallace*, 570 Fed. Appx. 598, 600 (7th Cir. 2014) (plaintiff had no ADA claim where his claims related to the failure to properly treat mental health issues and he did not allege denial of treatment *because of* his mental illness).

III. State Law Claims

Finally, plaintiff claims that defendant's actions constitute medical malpractice and negligence. The exercise of supplemental jurisdiction is appropriate when the state law claims are "so related" to the federal claims that "they form part of the same case or controversy." 28 U.S.C. § 1367(a). Here, plaintiff's negligence-type claims arise from the defendants' failure to respond properly to his requests for corrective surgery for his hips. Accordingly, the court will allow him to proceed on his state law claims, but only against certain defendants.

To prevail on a claim for medical malpractice or negligence in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or injuries, or damages. *Paul v. Skemp*, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (*citing Nieuwendorp v. Am. Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594

(1995)). Therefore, every claim for medical malpractice and negligence requires a negligent act or omission that causes an injury. *Id.*

Based on plaintiff's allegations, Dr. Larson, Dr. Burnett, Dr. Hoftiezer, Dr. Springs, Bellin and Moerchen either ignored his requests for treatment in the face of contrary findings, or provided improper treatment themselves. Accordingly, plaintiff will be permitted to proceed on a negligence claim against each of them. However, the court declines to exercise supplemental jurisdiction over the negligence and medical malpractice claims against any of the remaining defendants, Deitrich and the FLCI John Doe doctors. In determining whether to decline to exercise supplemental jurisdiction over state law claims, "a district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state-law claims." *Wright v. Associated Ins. Companies Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). As all of the federal claims against these defendants have been dismissed, it would be a waste of judicial resources to require them to respond only to state law claims.

IV. Motion for Ruling (dkt. #23) and for Transfer of Case (dkt. #22)

Finally, in his pending motions, Drinkwater requests that the court screen his complaint or transfer this matter to the Eastern District of Wisconsin for screening. While the court regrets the delay in screening this matter, this order will place his lawsuit back on track for trial. As such, both motions will be denied as moot.

ORDER

IT IS ORDERED that:

(1) Plaintiff Dale Drinkwater's Motion for Ruling (dkt. #23) and letter requesting transfer (dkt. #22) are DENIED.

(2) Plaintiff is GRANTED leave to proceed on Eighth Amendment deliberate indifference and state law claims against defendants Dr. Larson, Dr. Burnett, Dr. Hoftiezer, Dr. Springs, Bellin and Moerchen.

(3) Plaintiff is DENIED leave to proceed against defendants WDOC medical committee, the FLCI John Does and Deitrich, who are DISMISSED from this action. Plaintiff is also DENIED leave to proceed on his ADA claims against all 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.

(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) Pursuant to an informal 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 for the defendant.

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

Entered this 10th day of October, 2017.

BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge