

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

FAIRLY EARLS,

Plaintiff,

v.

OPINION AND ORDER

19-cv-117-wmc

SALAMUIIAH SYED, TIMOTHY
DITTERS, RENEE SCHUELER, ANGELA
HODGE, TERESA GAIER, DENNIS
VALERIUS, JACKIE PAFFORD,

Defendants.

Pro se plaintiff Fairly Earls, who is currently incarcerated at Columbia Correctional Institution (“Columbia”), filed this lawsuit pursuant to 42 U.S.C. § 1983, claiming that defendants, all Columbia employees, violated his rights under the Eighth Amendment and Wisconsin law in failing to respond appropriately to his broken leg. Earls’ complaint is ready for screening as required by 28 U.S.C. § 1915A. For the following reasons, the court will allow him to proceed on Eighth Amendment and Wisconsin negligence claims against the defendants.

ALLEGATIONS OF FACT¹

A. Parties

Fairly Earls is currently incarcerated at Columbia, where the events comprising his claims took place and where all defendants were or are employed. Defendants include Dr. Salamuiiah Syed; nurses Timothy Ditters, Teresa Gaier, Dennis Valerius and Jackie

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).

Pafford; and Health Services Unit (“HSU”) managers Angela Hodge and Renee Schueler.

On August 2, 2017, Earls was taken to the hospital for severe chest pain, where it appears he was diagnosed with a bacterial infection. At some point during the transport to or from the hospital, he suffered an injury to his leg. Earls has not provided any details about how the injury occurred, but he does provide details about his efforts to get treatment for his injury. In particular, after he returned from the hospital on August 2, Earls informed Nurse Ditters that his leg was injured, and he was in severe pain. Allegedly, Ditters did nothing to assess his injury or alleviate his pain. For several days, Earls then submitted health services requests complaining that his leg injury was causing him severe pain, his leg was swollen and throbbing, and he could not walk. In response, Earls claims that defendants Pafford, Gaier, Ditters, Hodge and Valerius each chose not to provide him treatment or pain relief.

On August 11, 2017, Dr. Syed next met with Earls related to his infection, as well as his reported leg injury and pain. Allegedly, Dr. Syed failed to assess his leg, order testing, or provide Earls with pain medication. On August 15, Earls had another follow-up appointment for his infection, this time with Nurse Valerius. After evaluating Earls’ leg, Valerius acknowledged that it was swollen and gave Earls an Ace bandage to wrap his leg. However, Valerius neither prescribed pain medication nor requested x-rays or other testing to assess his injury. On August 21, Earls had a third follow-up appointment, this time with Nurse Gaier, who cleaned Earls’ bacterial infection and evaluated his swollen leg, but also failed to order further testing or provide him any pain medication. On August 23, Earls met with Dr. Syed again about his infection, but in looking at his leg, Dr. Syed simply told

Earls to stay off the leg and keep it elevated for a week. Finally, on September 6, Dr. Syed ordered an x-ray, which was taken on September 12, 2017, after which it appears that no further action was taken by HSU staff related to his leg injury.

Earls followed up about his x-ray with the HSU multiple times in October and November, but he was not allowed to review the x-ray images or report. On November 12, 2017, Earls filed an inmate complaint, CCI-2017-29046, complaining that HSU staff would not allow him to review his x-ray images. On January 12, 2018, an inmate complaint examiner (“ICE”) recommended that his complaint be affirmed, since DOC policy, DAI 500.50.08, requires the HSU to provide patients access to their x-ray images. The DOC Secretary approved that recommendation on January 26, 2018.

Consistent with that ruling, on January 29, 2018, Earls once again submitted a request to review his x-rays, and he received a response that an appointment had been made. When he still had not been given the opportunity to review his x-rays by February 27, Earls next submitted a request to Schueler, Hodge and Pafford, who responded that he would either need to wait for his appointment or pay 15 cents per page to receive a copy of his records. On March 5, Earls submitted another request to review his records, which Pafford denied on March 9. On March 12, Earls wrote to the warden, Becher and Schueler, and then on March 20, he filed another inmate complaint, CCI-2018-7921, about defendants’ continued refusal to allow him access to his x-rays. During this time, he also continued to submit requests to Schueler, Hodge and Pafford in both April and May.

On May 15, 2018, Earls was finally allowed to review the x-ray images on a computer screen. The Radiology Report included the following conclusion: “there is no

radio graphic evidence of acute disease in the left ankle,” but Earls insists that the x-ray images show a clear crack in his leg inches above the ankle. Earls filed another inmate complaint, alleging this time that defendants failed to treat a broken leg. However, ICE dismissed his complaint because the x-ray did not note a fracture in his leg.

OPINION

Plaintiff seeks leave to proceed on Eighth Amendment deliberate indifference and Wisconsin negligence claims against all named defendants. A prison official who violates the Eighth Amendment in the context of a prisoner’s medical treatment demonstrates “deliberate indifference” to a “serious medical need.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). “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 1364, 1371 (7th Cir. 1997).

“Deliberate indifference” encompasses two elements: (1) awareness on the part of officials that the prisoner needs medical treatment and (2) disregard of this risk by conscious failure to take reasonable measures. Allegations of delayed care, even a delay of a just a few days, may violate the Eighth Amendment if the alleged delayed caused the inmate’s condition to worsen or unnecessarily prolonged his pain. *See Estelle*, 429 U.S. at 104–05; *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *Petties v. Carter* 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that inexplicable delay in medical treatment for a prisoner, which serves no penological interest, can support an inference of deliberate

indifference, as element for a prisoner's Eighth Amendment claim); *Grieverson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable under the Eighth Amendment for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference). Thus, a plaintiff's claim has three elements under this standard:

1. Did plaintiff objectively 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?

As an initial matter, the court will accept, for purposes of screening, that plaintiff's leg injury constitutes a serious medical need. While there are questions about whether plaintiff *actually* broke his leg, the court must accept plaintiff's allegation that it was fractured at the pleadings stage. That, coupled with his allegations about the severity of his pain and inability to walk, support an inference that his injury constituted a serious medical need. Thus, the operative question for purposes of screening is whether plaintiff's allegations as to each defendant support an inference of deliberate indifference.

At this stage, it is also reasonable to infer that all of the defendants were made aware of plaintiff's leg injury and report of severe pain, and either completely failed to take action to assure that he received medical attention, delayed examining him, or responded in a wholly inappropriate manner by failing to order x-rays or even provide him with ice or pain medication. Accordingly, the court will allow him to proceed on deliberate indifference

claims against each of these defendants, for their respective handling of his requests for treatment for his leg injury between August and September of 2017. Furthermore, since plaintiff also insists that he should have been diagnosed with a broken ankle, he may proceed against Dr. Syed as well based on his alleged failure to identify and treat plaintiff's fracture.

The court hastens to add that clearing this initial screening issue does not relieve plaintiff of the burden to come forward with concrete evidence as this case progresses. For example, at summary judgment or trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each element of his claim. *Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999). For example, plaintiff will have to show that each defendant's conduct was "blatantly inappropriate." *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). This may even require his introducing expert opinions that only a medical doctor can provide. *See Ledford v. Sullivan*, 105 F.3d 354, 358-59 (7th Cir. 1997) (distinguishing between deliberate indifference cases where an expert is unnecessary and those where the jury must consider "complex questions concerning medical diagnosis and judgment").

Plaintiff also seeks to proceed on Wisconsin negligence claims against the same defendants. The court may exercise supplemental jurisdiction over these claims. 28 U.S.C. § 1367(a) ("[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). Under Wisconsin law, the elements of a cause of action in negligence are: (1) a duty of

care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty, which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 307 (1987). Each of the defendant's alleged failure to either provide plaintiff with pain medication or adequately assess plaintiff's leg injury support an inference that they breached a duty of care, and that breach caused plaintiff unnecessary pain or worsened his injury. Thus, this claim may also proceed past screening.

ORDER

IT IS ORDERED that:

1. Plaintiff Fairly Earls GRANTED leave to proceed on Eighth Amendment deliberate indifference and Wisconsin negligence claims against defendants Syed, Ditters, Schueler, Hodge, Gaier, Valerius and Pafford, as provided above.
2. Plaintiff is DENIED leave to proceed on any other claim.
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 defendant. 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 the plaintiff's complaint if it accepts service for the defendant.
4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to 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. If plaintiff is transferred or released while this case is pending, it is plaintiff's 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 claims may be dismissed for his failure to prosecute him.
7. Plaintiff's request for action motion and prompt hearing motion (dkt. ##9-10) are DENIED as moot.
8. Given the close relationship between the timing and nature of the deliberate indifference and malpractice claims against Dr. Syed in this case and Case No. 18-cv-332, which was also screened to go forward today, the court recommends that consideration of consolidation be addressed with the parties at the preliminary pretrial conference.

Entered this 19th day of April, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge