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

JOHN V. GROSS, JR.,

Plaintiff,

v.

B. EDGE, B. KRAMER, S. ANDERSON, J. WATERMAN, L. WOOD, DR. BURKE, JOHN/JANE DOE M.P.A.A., E. RAY, A. BOATWRIGHT, C. O'DONNELL, M. KARTMAN, E. DAVIDSON, C. JESS, G. MARQUARDT, W. BROWN, VARIOUS JOHN/JANE DOE CORRECTIONAL OFFICERS, G. BOUGHTON, A. HANNA, JANE DOE U.W. NURSE(S), U.W. HOSPITAL/INSURANCE CO., JOHN/DANE DOE W.S.P.F. NURSE(S), DR. BONSON, JOHN DOE HEALTH CARE PROVIDER/TRAINING CO., JOHN/JANE DOE W.S.P.F. SPECIAL NEEDS COMMITTEE and B.H.S. REGIONAL NURSING COORDINATOR JOHN/JANE DOE,

Defendants.

OPINION and ORDER

Case No. 16-cv-588-wmc

Pro se plaintiff John V. Gross contends that he has received inadequate medical treatment for back pain during his incarceration at Wisconsin Secure Program Facility. He brings proposed claims against various prison and non-prison staff under the federal and state constitutions and state medical malpractice law. Because Gross is incarcerated, his complaint must be screened under 28 U.S.C. § 1915A. After reviewing the complaint, the court concludes that Gross may proceed with his claims against several, but not all, of the defendants.

Gross has also filed a motion for a preliminary injunction (dkt. #7), seeking an order requiring the DOC to provide him with better treatment for his back pain. At this stage,

however, Gross has not shown that he needs immediate injunctive relief. Therefore, that motion must be denied.

ALLEGATIONS OF FACT

I. Background

Gross is incarcerated at the Wisconsin Secure Program Facility ("WSPF"), and defendants include various WSPF and DOC employees, as well as UW Hospital employees. He has a long history of numerous health problems, including back pain. On March 30, 2015, defendant Dr. Hanna and another surgeon performed spinal fusion surgery on Gross at the UW Hospital. He was scheduled to return to UW for follow-up appointments six months and one year after the surgery. In the meantime, he was to receive pain medication and physical therapy as part of his recovery.

II. Gross Injures His Back in November 2015

Several months after the surgery -- on November 12, 2015, to be exact -- Gross was performing physical therapy exercises, and he experienced a "popping" and pain in the area of his back where the surgery was performed. He immediately notified the health services unit (HSU). Nurse Edge responded in writing, stating that he would be placed on a doctor's list for the next available appointment and that until he could see a doctor, he should continue with his physical therapy exercises. Neither Nurse Edge nor any other member of HSU staff physically examined Gross. After waiting several days for an appointment, Gross filed another health service request complaining of pain in his back. Nurse Anderson responded that he would be seeing a doctor soon. Apparently, there was no on-site physician working at

WSPF during this time period. Thus, inmates needing appointments with a physician had to wait until an off-site physician could see them for a "tele-visit."

Gross was unable to speak to a doctor until Dr. Burke conducted a "tele-visit" on November 28, 2015. At that time, Gross told Burke about the "popping," and Burke explained that he could not physically examine him, but would order a follow-up visit for Gross with the UW Neurologist. Burke also ordered pain medication for Gross. In a follow up tele-visit on approximately December 18, 2015, Gross advised Dr. Burke that he had not been seen by the UW, which prompted Dr. Burke to direct Nurse Anderson to follow up with the UW to make the appointment happen, "urgently" if necessary.

III. Gross Writes to HSU Repeatedly About the Need for Medical Treatment

Over the next several months -- from December 2015 to April 2016 -- Gross wrote to HSU on numerous occasions about his back pain and loss of range of motion. He also wrote the Special Needs Commission at WSPF asking why his "double mattress" order had been rescinded and explaining that he needed it for his back pain. He also asked repeatedly about when he would be seen by UW Neurology per Dr. Burke's recommendation. On most occasions, HSU either responded that Gross would be seen "soon" or that an appointment had been scheduled, but without ever actually examining Gross or providing him any additional medication or treatment.

On January 26, 2016, Gross had a tele-visit with a different off-site physician, Dr. Griffin. After the appointment, Dr. Griffin ordered an MRI and a follow-up with UW Neurology. Over the next several weeks, however, Gross again heard nothing from HSU about the scheduling of an appointment at UW, much less an MRI. This silence continued despite Gross contacting them repeatedly. Gross next saw Dr. Griffin for another tele-visit on

February 16, a full three weeks after the first call, and Griffin asked Gross about the results from the MRI and visit with UW Neurology. Gross told him that no such appointments had occurred. Griffin then told Nurse Edge, who was present during the appointment, that his orders for an MRI and UW appointment needed to be followed. Gross was finally taken off-site for an MRI on March 1, 2016, more than a month after first ordered by Dr. Griffin and was seen by UW Neurology for his annual follow-up appointment and x-rays on April 8, 2016.

After reviewing the results of the MRI, Dr. Griffin concluded that Gross's back had been reinjured and that he should seek treatment options from UW. Dr. Hanna from UW Neurology, however, believed that the results of the x-rays and MRI showed no areas of concern. From April to August 2016, Gross continued to write HSU requesting additional treatment for his pain and loss of motion, as well as a follow up appointment with UW Neurology, based on Dr. Griffin's initial evaluation of the MRI results. Gross also wrote UW Hospital administration a number of times, asking that they recommend additional treatment based on the MRI results.

IV. WSPF's New On-Site Physician Recommends a CT Scan

On August 8, 2016, Gross was seen by WSPF's new on-site physician Dr. Bonson, who told Gross that, after reviewing the MRI and Dr. Griffin's recommendations, she believed Gross had likely suffered a re-injury and should be seen by UW doctors to discuss treatment options. First, however, Dr. Bonson ordered a CT scan. After reviewing the results of the CT scan, Dr. Bonson concluded that Gross had a back injury, but that he did not need to be seen by a UW specialist before his next scheduled follow-up appointment in April of 2017. Gross continues to suffer from pain in his back, leg and hip.

V. Gross Files Numerous Grievances about His Medical Care

Starting in January 2016, Gross began filing inmate complaints regarding his medical treatment. After contacting HSU regarding Gross's complaints, ICE Ellen Ray recommended dismissal of numerous of his complaints. Other staff involved in denying his complaints or dismissing his appeals included J. LaBelle, A. Boatwright, C. O'Donnell, W. Brown, G. Marquardt, E. Davidson and C. Jess.

OPINION

I. Denial of Adequate Medical Care

Plaintiff seeks to proceed on claims under the Eighth and Fourteenth Amendments, as well as Wisconsin negligence law, arising from the alleged denial of adequate medical treatment for his back problems and related pain. A prison official may be held liable under the Eighth Amendment if he or she was "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). The condition does not have to be life threatening. *Id.* A medical need may be serious if it: "significantly affects an individual's daily activities," *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997); it causes significant pain, *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996); or it otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825 (1994). "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).

Under this Eighth Amendment standard, plaintiff must prove three elements:

(1) Plaintiff needed medical treatment.

(2) Defendants knew that plaintiff needed treatment.

(3) Despite their awareness of the need, defendants consciously failed to take reasonable measures to provide the necessary treatment.

To prevail on his claim for medical negligence in Wisconsin, plaintiff must prove that the defendants breached their duty of care and plaintiff suffered injury as a result. *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865. The allegations in plaintiff's complaint are sufficient at this stage to state claims under both the Eighth Amendment and Wisconsin negligence law.

His allegations of severe and ongoing back pain and loss of range of motion suggest that he had an objectively serious medical need that required treatment and that, at times, he was not being adequately treated for it. The more difficult question is which of the 25 separately named defendants listed in his complaint he may proceed against. Even though an inference of deliberate indifference is reasonable on the alleged facts with respect to *some* of the defendants, many must fall out.

Specifically, plaintiff's allegations permit an inference that the following defendants violated his rights under the Eighth Amendment and state negligence law:

- Defendants B. Edge, B. Kramer, S. Anderson, J. Waterman and L. Wood, all of whom were nurses at WSPF. Plaintiff alleges that each of these nurses were personally aware of his numerous complaints of pain, yet repeatedly failed to conduct any physical examination of him or offer additional treatment options.

- Dr. Hanna. Plaintiff alleges that Dr. Hanna should have discovered that plaintiff had reinjured his back sooner, but failed to carefully review post-surgery x-ray and MRI results.
- Dr. Bonson. Plaintiff alleges that Dr. Bonson failed to prescribe any treatment or send plaintiff to a specialist at UW despite agreeing that plaintiff had likely reinjured his back.
- Nurse Anderson and John/Jane Doe M.P.A.A. Both allegedly were responsible for scheduling off-site appointments. Plaintiff alleges that even though Dr. Burke and Dr. Griffin ordered that he be seen by UW Neurology (in Anderson's case, seen urgently), both defendants failed to schedule any appointment, thus requiring him to wait in pain until his routine annual appointment occurred before he seeing a specialist.
- Warden Gary Boughton. Plaintiff alleges that Boughton was aware of, and at least partially responsible for, the inadequate medical system at the prison and how it resulted in denial of adequate care to inmates.
- John/Jane Doe Special Needs Committee Members. Plaintiff alleges that members of the Special Needs Committee denied his request for a second mattress, despite knowing that he needed the mattress to deal with his back pain.

In contrast, plaintiff's allegations do not support deliberate indifference claims against the other defendants. As discussed briefly below, plaintiff may not proceed with claims against the following defendants:

- Dr. Burke. Plaintiff's only allegations involving Dr. Burke concern two tele-visits he had with him in November and December 2015. At the first visit, Dr. Burke ordered pain medication for plaintiff and recommended he be seen by UW

Neurology. At the second visit, when Burke heard that Gross had not yet been seen, Burke directed a nurse to insure that he be scheduled for an appointment with UW and that the appointment be marked "urgent," if necessary. These allegations do not support an inference of deliberate indifference on Dr. Burke's part. As plaintiff also concedes, Dr. Burke's ability to examine him was limited considering the nature of their tele-visit. Plaintiff complains that Burke could have done *more* to insure that his orders were carried out, but even if true, Burke's recommendation that he be seen by UW and his prescribing pain medication is enough to defeat any claim by plaintiff that Dr. Burke consciously disregarded his medical needs.

- Jane Doe UW Nurses. Plaintiff alleges that these nurses should have done more after learning that he may have reinjured his back. However, plaintiff's allegations are so vague regarding what these nurses knew and how they responded that they are insufficient to state a claim for relief. Instead, plaintiff's allegations suggest that nurses at UW had little role to play in plaintiff's treatment.
- Jane/John Doe Physical Therapists. Plaintiff alleges that the physical therapists at the prison concluded that he was not making any improvement with physical therapy and that he may benefit from a different form of treatment. These allegations do not suggest that the physical therapists disregarded plaintiff's serious medical needs, however, but rather suggest that the physical therapists were concerned about plaintiff's lack of progress and suggested that he should seek alternative treatment from his primary care providers.
- UW Hospital Insurance Company. Plaintiff alleges that he wrote to UW Hospital and its insurer in an attempt to gain treatment and that they failed to ensure that he

received treatment. His allegations, however, do not suggest that either UW Hospital or its insurer acted improperly, or even negligently, in deferring to the decisions made by plaintiff's primary care providers.

- John Doe Health Care Provider/Insurance Company. Upon information and belief, plaintiff alleges that there *may* be a company that provides inadequate training to health care professionals working in the correctional setting. His belief is based *solely* on a television program he viewed and not on any factual allegations. This, too, is insufficient to proceed.
- Defendants E. Ray, J. LaBelle, A. Boatwright, C. O'Donnell, W. Brown, G. Marquardt, C. Jess, E. Davidson and the Regional Nursing Coordinator, all of whom allegedly reviewed the grievances plaintiff filed regarding his treatment through the inmate complaint review system (ICRS). From the facts alleged in his grievances, plaintiff alleges that these defendants should have been able to determine that the facility's HSU was understaffed and that he was not receiving adequate medical care. Plaintiff also alleges, however, that the inmate complaint examiners contacted medical professionals when investigating his complaints and accepted the explanation by the medical professionals that plaintiff was receiving appropriate care for his condition. Moreover, the responses he received from ICRS, attached as exhibits to his complaint, confirm this. (*See* dkt. #1-2.) Complaint examiners within a prison are allowed to defer to medical providers so long as they do not ignore an inmate's complaint. *See Greeno v. Daley*, 414 F.3d 645, 656 (7th Cir. 2005); *see also Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) (nonmedical prison officials "are entitled to defer to the judgment of jail health professionals" so

long as the inmate's complaints are not ignored (citations omitted)). Here, plaintiff's own allegations confirm that these defendants did not violate his rights in the course of reviewing grievances as to his medical treatment. *See, e.g. Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (a plaintiff can plead himself out of court by providing enough facts to demonstrate that he has no claim for which relief nay be granted).

II. Claims About the Grievance Process Itself

Although it is not entirely clear from plaintiff's complaint, he also seems to be challenging certain aspects of the grievance process itself. For example, he argues that some of the ICRS regulations that resulted in dismissal of his various complaints and appeals are unconstitutional because they violate his due process rights. If so, allegations relating to his inmate complaints do not state a claim upon which relief may be granted. Prison officials certainly may not *retaliate* against a prisoner for filing a grievance, *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000), but they are under no constitutional obligation to provide an effective grievance system or, for that matter, any grievance system at all. *Owens v. Hinsley*, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance 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 Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). Plaintiff has not alleged any facts suggesting that defendants retaliated against him for filing grievances, nor that any of the defendants involved in reviewing his inmate complaints were personally involved in making decisions regarding his medical care. *See 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). Rather, plaintiff's allegations relate solely to defendants' alleged improper handling of his grievances. As such, plaintiff will not be permitted to proceed on any claims regarding the grievance system.

III. Motion for a Preliminary Injunction

Finally, plaintiff moves for entry of an order granting a preliminary injunction that would require specialized treatment for his back. Preliminary injunctive relief, such as that requested by plaintiff, is rarely granted. To prevail on a motion for a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. *See Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007).

Here, at minimum, plaintiff is not entitled to preliminary injunctive relief because he has yet to show irreparable harm. Plaintiff has submitted evidence showing that he made numerous requests for treatment for a reinjury to his back starting in late 2015 and continuing throughout 2016. While there were several delays in receiving attention, he ultimately received an MRI, x-rays and a CT scan. Although Dr. Griffin and Dr. Bonson concluded that the scans showed possible injury, plaintiff has submitted no evidence showing that *any* other medical provider has recommended that he have surgery or some other treatment that he is currently being denied. Instead, each provider has apparently recommended that he continue to see UW specialists at his already-scheduled, follow-up appointments -- the most recent of which was in April 2017.

In other words, plaintiff has provided no evidence that a medical provider has recommended immediate intervention. Although plaintiff may believe he needs surgery or some other immediate intervention, his own belief about needed treatment is not enough to support a claim for preliminary injunctive relief. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015) ("A preliminary injunction is an extraordinary equitable remedy that is available only when the movant shows clear need.") Accordingly, his request for injunctive relief will be denied.

ORDER

IT IS ORDERED that:

(1) Plaintiff John V. Gross is GRANTED leave to proceed on claims under the Eighth Amendment and state negligence law against defendants B. Edge, B. Kramer, Nurse S. Anderson, J. Waterman, L. Wood, Dr. Hanna, Dr. Bonson, John/Jane Doe M.P.A.A., Gary Boughton and John/Jane Doe Special Needs Committee Members.

(2) Plaintiff is DENIED leave to proceed on all other claims and the following are DISMISSED from this case: defendants Dr. Burke, Jane/John Doe UW Nurses, Jane/John Doe Physical Therapists, UW Hospital Insurance Co, John Doe Health Care Provider/Insurance Company, John/Jane Doe Correctional Officers, E. Ray, J. LaBelle, A. Boatwright, C. O'Donnell, W. Brown, G. Marquardt, C. Jess, E. Davidson, M. Kartman, and the Regional Nursing Coordinator.

(3) Plaintiff's motion for a preliminary injunction (dkt. #7) is DENIED.

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

Entered this 21st day of June, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge