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

ERIC HOLTON,

Plaintiff,

v.

JON E. LITSCHER, CATHY JESS, JAMES GREER, DAVID BURNETT, KENN KALLIS, MARY MUSE, ASHWORTH, BRIAN FOSTER, TONY MELI, BEAHM, KOONTZ, LT. NELSON, MARCHANT, JEFFREY MANLOVE, VANWARD, JENSEN, and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

OPINION AND ORDER

18-cv-746-wmc

Pro se plaintiff Eric Holton, a prisoner currently incarcerated at Waupun Correctional Institution ("Waupun"), filed this proposed action under 42 U.S.C. § 1983, claiming that several employees at Waupun have been violating his constitutional rights. Because he has requested leave to proceed without prepayment of the filing fee and this lawsuit is governed by the Prison Litigation Reform Act, certain conditions must be satisfied before extending Holton this privilege. Of particular concern here, court records indicate that Holton (who is also known as "Bruce Walker") has already filed at least three previous civil actions while imprisoned that were dismissed as frivolous or for failure to state a claim. *See Holton v. Jess*, No. 09-2537 (7th Cir. Oct. 21, 2009) (noting that Holton has three strikes, including two under the name Bruce Walker, and denying him leave to proceed *in forma pauperis* pursuant to § 1915(g)); *Walker v. McDaniel*, No. 5-cv-248, dkt. #8 (D. Nev. Dec. 7, 2005) (failure to state a claim); *Walker v. McDaniel*, No. 01-cv-0121, dkt. #9 (D. Nev. Dec. 17, 2001) (failure to state a claim); *Holton v. Morales*, No. 07-C-241,

dkt. #3 (W.D. Wis. May 15, 2007) (failure to state a claim), *aff'd, Holton v. Morales*, No. 07-2327 (7th Cir. Apr. 3, 2008). Accordingly, Holton may not proceed with his present proposed action without the prepayment of fees under 28 U.S.C. § 1915(g), *unless* he can show that he is subject to imminent danger of serious physical injury.

After reviewing his complaint, the court concludes that Holton's claims against defendants Manlove and VanWard, sounding under the Eighth Amendment and Wisconsin tort law, may involve allegations of imminent danger since both allege refusals to prescribe him medications that adequately address his severe pain, anxiety and depression. Accordingly, Holton may proceed with both claims against those two defendants only. Because his remaining claims do not allege imminent danger, however, he may not proceed on any other claim, unless he pays the full filing fee.

ALLEGATIONS OF FACT[1]

A. The Parties

All of the relevant events here allegedly took place at Waupun. Plaintiff Eric Holton seeks to name eighteen defendants. Five of those defendants were personally involved in Holton's care and treatment between 2017 and August of 2018, and include employees of the Department of Corrections ("DOC") working at Waupun: Dr. Jeffrey Manlove, a physician; Dr. VanWard, a psychiatrist; Sergeants Beahm and Koontz; and Lieutenant Nelson. The remaining defendants were not personally involved in the events outlined

[1] Courts must read allegations in pro se complaints generously, resolving ambiguities and drawing all reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

below. Rather, Holton is seeking to proceed against them for their roles as supervisors or by virtue of their policy-making authority. Those "supervisory defendants" include: Jon Litscher, the DOC's former Secretary; Cathy Jess, the DOC's former Administrator; James Greer, the director of the Bureau of Health Services ("BHS"); David Burnett, the BHS medical director; Kenn Kallis, the BHS mental health care director; Mary Muse, the BHS nursing director; Brian Foster, Waupun's warden; Tony Meli, Waupun's security director; Marchant, Waupun's Health Services Unit ("HSU") manager; Jensen, an HSU staff member; Ashworth, Waupun's Restrictive Housing Unit ("RHU") manager; and the DOC itself.

B. Pain Medication

Holton suffers from depression, anxiety, degenerative disc disease, nerve pain and migraines. Up until the end of 2017, he was taking Lyrica for pain management, and bupropion for his anxiety and depression.

In October of 2017, Holton was placed in the RHU under suspicion for stock piling Lyrica pills that he had been receiving until then under a prescription, which was also simultaneously terminated. Dr. Manlove subsequently met with Holton on December 7, 2017, but he refused to renew that prescription despite Holton's complaints that his back pain was getting worse. Dr. Manlove also declined Holton's offer to have his pills crushed into applesauce to address concerns that he would hoard them. Allegedly, Dr. Manlove gave no explanation as to why he would not accept this option, while agreeing to prescribe Holton an increased dose of acetaminophen.

More recently, after Holton had been reporting that the acetaminophen was not effective, Dr. Manlove added a prescription of naproxen to address his pain. However, on May 4, 2018, Holton went to the Waupun Memorial Hospital after falling ill. Testing showed that he was having GERD-related issues, so a doctor recommended that he avoid acetaminophen going forward. In addition, Holton learned from other recent tests that he a long-term liver disease, which also requires him to avoid acetaminophen. The next day, March 5, Holton's back went out and he fell over in his cell. Although Sergeant Beahm was called to his cell and saw that Holton could not get up, Beahm left him on the floor without calling a nurse. Holton's pain medications have not been adjusted to provide an adequate alternative.

C. Depression and Anxiety Medication

On January 24, 2018, Holton was further accused of misusing his bupropion, and that prescription was terminated on February 1, 2018. Holton met with Dr. VanWard on March 12, 2018. While allegedly diagnosing him as having persistent depression and anxiety, and noting his tearfulness during their meeting, VanWard did not prescribe Holton any medications to treat his condition.

In the following days, Holton complained multiple times of increased pain and feelings of depression, culminating in a call for help at 11:20 p.m. on March 24, 2018, that he was feeling suicidal. By 12:55 a.m. the next morning, when no one responded, Holton covered his cell windows and started cutting his left forearm. Allegedly, Lt. Nelson and Sergeant Koontz failed to respond adequately, placing him back in his cell after his wound

was treated. While Holton received a conduct report for covering his windows before committing self-harm, the warden reversed that charge. At the time he initiated this action, Holton alleges that he still has not received any medications to treat his depression and anxiety.

OPINION

Plaintiff's allegations can be grouped into the following five claims:

(1) A challenge to Dr. Manlove's December 2017 decision terminating his Lyrica prescription.

(2) A challenge to Dr. VanWard's February 2018 decision to terminate his bupropion prescription, which is an ongoing problem, since plaintiff still does not take a medication to treat his depression and anxiety.

(3) Beahm's March 2018 failure to help plaintiff when he saw him fall.

(4) Dr. Manlove's March 2018 decision to prescribe plaintiff naproxen and acetaminophen for his pain, which is now inappropriate, given his liver condition.

(5) Koontz's and Nelson's handling of his March 24, 2018, suicide attempt.

To clear the imminent danger threshold under 28 U.S.C. § 1915(g), each of plaintiff's claims must separately support an inference that he is in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). This imminent danger exception is intended to provide "frequent filer" inmates otherwise subject to the three strikes rule "an escape hatch for genuine emergencies," where "time is pressing" and "a threat ... is real and proximate." *Heimermann v. Litscher*, 337 F.3d 781 (7th Cir. 2003). Accordingly, allegations of past harm do not suffice; the harm must be imminent or occurring at the time the

complaint is filed. *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003); *see also Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002).

Construing plaintiff's complaint generously, the *only* claim that might support an inference of imminent danger is that plaintiff is not receiving adequate medication to treat his severe back pain, anxiety and depression. Plaintiff's allegations in this regard are also sufficient to state a claim under the Eighth Amendment and Wisconsin law for inadequate medical care. To prevail on an Eighth Amendment claim, plaintiff must show that: (1) he had serious medical need; (2) defendants were aware of the need; and (3) defendants consciously refused to take reasonable measures to help plaintiff receive treatment. *See Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016). To succeed on Wisconsin negligence claims, plaintiff must prove the following elements: (1) a duty of care *or* a voluntary assumption of a duty by each defendant; (2) a breach of the duty; (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).

For screening purposes, the court will infer from plaintiff's allegations that: (1) his back pain, anxiety and depression are serious medical needs; and (2) as medical providers, defendants Manlove and VanWard were aware that plaintiff needed adequate medication to address those needs, but failed to prescribe it. Accordingly, plaintiff may proceed with his Eighth Amendment and Wisconsin negligence claims against these two defendants. However, the court will dismiss the following defendants with respect to these claims: Litscher, Jess, Greer, Burnett, Kallis, Muse, Foster, Meli, Marchant, Jensen, Ashworth, and the DOC. The DOC will be dismissed since it is not a suable entity under § 1983. *See*

Will v. Mich. Dep't of State Police, 491 U.S. 55, 66-67 (1989); *Witte v. Wis. Dep't of Corr.*, 434 F.3d 1031, 1036 (7th Cir. 2006). The remaining defendants will be dismissed because plaintiff has not alleged facts that any of these defendants actually know about or has been involved in denying plaintiff needed medications. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) (rejecting § 1983 actions against individuals merely for their supervisory role of others).

At the same time, *none* of plaintiff's remaining claims suggest imminent danger of serious physical injury. In particular, plaintiff's claims regarding Beahm's alleged failure to help plaintiff when he fell, as well as Koontz and Nelson's handling of his suicide attempt, both concern past harm only. Accordingly, plaintiff may not proceed on these claims without first paying the full $400 filing fee.

Finally, although plaintiff's claims against Manlove and VanWard appear to meet the imminent danger exception under § 1915(g), plaintiff is not excused from submitting an initial partial payment of the filing fee before the court will grant plaintiff any relief. Under § 1915(b)(1), plaintiff's initial partial payment is $0.41.

ORDER

IT IS ORDERED that:

(1) Plaintiff Eric Holton is GRANTED leave to proceed on his claim that defendants Manlove and VanWard violated his rights under the Eighth Amendment and Wisconsin law, as provided above.

(2) Plaintiff is DENIED leave to proceed on any other claim at this time under 28 U.S.C. § 1915(g), and defendants Litscher, Jess, Greer, Burnett, Kallis, Muse, Foster, Meli, Marchant, Jensen, Ashworth, the DOC, Beahm, Koontz and Nelson are DISMISSED without prejudice.

(3) Plaintiff is directed to make an initial, partial payment of the filing fee in the amount of $0.41 by **May 28, 2021**.

(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 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.

(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 7th day of May, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge