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

PRINCE D. KEY,

Plaintiff,

v. OPINION & ORDER

ROBERT SHANNON, JOSEPH CICHANOWICZ, JOSHUA KOLBO, and GARY BOUGHTON, 17-cv-521-jdp

Defendants.

Plaintiff Prince D. Key, an inmate at the Wisconsin Secure Program Facility, filed this lawsuit in the Circuit Court for Dane County, Wisconsin, alleging that defendant prison officials violated his rights by failing to provide him with his medication at various times. Defendants removed the case to this court and have paid the $400 filing fee for this action. Nonetheless, because Key is a prisoner, the next step is for me to screen the complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. Because Key is a pro se litigant, I must read his allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam).

After reviewing Key's complaint with these principles in mind, I conclude that he may proceed on Eighth Amendment, First Amendment, and equal protection claims against defendants. He also potentially states Wisconsin-law negligence claims against defendants, but I cannot allow him to proceed on those claims unless he explains that he has satisfied Wisconsin's notice-of-claim law.

ALLEGATIONS OF FACT

Plaintiff Prince D. Key is an inmate at the Wisconsin Secure Program Facility (WSPF), located in Boscobel, Wisconsin. Key suffers from ulcerative colitis, and he is prescribed medication to treat his constant pain. Key also suffers from post-traumatic stress disorder, antisocial personality disorder, and depression, for which he is prescribed medication.

On February 21, 2017, defendant Correctional Officer Robert Shannon came to Key's cell door to give him his bedtime medication. But Shannon told him "you didn't push your button," so he did not give Key his medication. There is a WSPF policy stating that prisoners should push their call button at "medication pass" time. Key called the sergeant on duty, defendant Joshua Kolbo, but he responded that Key "made a habit of not pushing his button." A couple hours later, Key contacted the sergeant then in charge, and he was given his medication.

Key wrote the unit manager and the warden, defendant Gary Boughton, about Shannon's actions and the policy requiring that inmates push their call button. Boughton responded in part that the unit manager "reminded staff to pass out medication as required by policy." Boughton ruled in Key's favor on a grievance, approving the grievance examiner's recommendation that staff cannot deny medications even if an inmate does not specifically request it via intercom.

A few days later, defendant Shannon again withheld Key's medication, this time saying that he could not give Key his medication while Key was wearing a "du-rag." Key told Shannon that there was no "du-rag" medication policy, nor was that rule being applied to other inmates. Shannon responded, "[S]ince people want to complain, now we're following all the rules." Key

understood that Shannon was punishing him because he had complained about Shannon's previous withholding of medication.

In mid-March, Shannon again withheld Key's medication, stating that he was doing so because Key was wearing a du-rag. Key said that by this point, Shannon had been told that there was no du-rag rule for medication. But when Key complained to the unit manager, the supervisor on duty, defendant Lieutenant Joseph Cichanowicz, said that Shannon was correct—there was a du-rag policy not mentioned in the prisoner manual. Key filed a grievance about this denial, which was rejected for failing to raise a significant issue. Defendant Boughton approved that rejection.

The next week, Shannon again denied Key's medication. He told Key, "since you want to wear your du-rag, now you can stand in the middle of the cell if you want your meds." Key says that there is no rule mandating that prisoners stand in the middle of their cells to receive their medication, and no other prisoners were subjected to this demand.

ANALYSIS

A. Eighth Amendment

Key brings a few different types of claims about the denials of his medications. First, he brings claims under the Eighth Amendment, which prohibits prison officials from acting with deliberate indifference to prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (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). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless

pain and suffering, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371–73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

To be considered "deliberately indifferent," an official must know of and disregard "an excessive risk to an inmate's health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Snipes v. Detella*, 95 F.3d 586, 590 (7th Cir. 1996). However, inadvertent error, negligence, gross negligence, and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

Here, Key alleges that he suffers pain from ulcerative colitis and also suffers from mental health problems. I conclude that these are serious medical needs. He says that defendant Shannon knew about these problems but denied him medications for fabricated reasons. That is enough to show that Shannon acted with deliberate indifference toward Key's medical needs, so I will grant Key leave to proceed on Eighth Amendment claims against Shannon.

The other defendants were all involved in limited parts of the events. Key says that defendant Kolbo supported Shannon's decision to withhold medication the first time, so I will allow Key to proceed on an Eighth Amendment claim against Kolbo as well. Key says that both Cichanowicz and Boughton sided with Shannon when he denied Key medication because Key was wearing a du-rag. I take Key to be saying that they knew there was no "du-rag rule," so I will allow Key to proceed on Eighth Amendment claims against them.

B. Negligence

Key states that we would like to bring a Wisconsin-law negligence claim against defendant Shannon for denying him his medications. Because Key already states that he seeks Eighth Amendment claims against defendants Kolbo, Cichanowicz, and Boughton, I will consider negligence claims against them as well. Under Wisconsin law, a claim for negligence "requires the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages." *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. I would allow Key to proceed on negligence claims for the same reasons I am allowing to proceed on Eighth Amendment claims, but I cannot yet allow him to proceed on these state law claims because Key does not explain whether he has complied with Wisconsin's notice-of-claim statute, Wis. Stat. § 893.82, by notifying the attorney general about his state law claims. This notice is required before a plaintiff can sue defendants under state law theories. Section 893.82(3) states:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.

Key does not address the notice-of-claim requirement in his complaint, so I cannot allow him to proceed on his state law claims at this point. I will give him a short time to submit a supplement to his complaint explaining whether he has complied with the notice-of-claim

statute. If Key does not respond or his response is inadequate, the case will proceed with only his federal law claims.

C. First Amendment retaliation

Key attempts to bring retaliation claims under the First Amendment. Key says that Shannon started denying his medications under fictitious rules about Key's du-rag and standing in the middle of the cell, after Key complained about Shannon's first denial. To state a First Amendment retaliation claim, Key must show that: (1) he engaged in activity protected by the First Amendment; (2) defendants took actions that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) the First Amendment activity was at least a "motivating factor" in defendants' decision to take those actions. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

It is well settled that prisoners have the right to file grievances, and Key alleges that Shannon reacted to Key's grievance by using pretexts to deny him of medication again. I conclude that this states a retaliation claim against Shannon.

Key also appears to attempt to bring a retaliation claim against Boughton, stating that Boughton enforced the intercom rule for distribution of medication and denied Key's later complaints about Shannon's denials. Boughton's actions are covered above regarding Key's Eighth Amendment and negligence sections claims, but Key does not allege that Boughton himself meant to retaliate against him, so he cannot proceed on a retaliation claim against Boughton.

D. Equal protection

Finally, Key attempts to being an equal protection claim against Shannon for applying false rules about wearing du-rags and standing in the center of his cell. Key states that he was singled out for this treatment.

An ordinary equal protection claim alleges that the plaintiff has been denied equal treatment because of his membership in an "identifiable group." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008). But Key does not allege that he is a member of such a group. Instead, he attempts to bring a class-of-one equal protection claim. The required elements of such claims are not entirely clear, as explained in *Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 891 (7th Cir. 2012) (affirming dismissal of a class-of-one claim by an evenly divided court). To state a class-of-one claim, Key must allege, at a minimum, (1) that defendants intentionally treated him differently from others similarly situated and (2) that there was no rational basis for the difference in treatment. It is an open question whether Key must also allege that the differential treatment was not merely arbitrary, but motivated by an improper purpose or "reasons of a personal character." *Id*. at 893, 899 (Posner, J., plurality opinion); *see id.* at 917 (Wood, J., dissenting).

This will be a difficult claim for Key to prove, because class-of-one claims are generally disfavored in the prison context, at least where they involve discretionary decision-making by prison officials. *See, e.g.*, *Shaw v. Wall*, No. 12-cv-497-wmc, 2014 WL 7215764, at *3 (W.D. Wis. Dec. 17, 2014) (class-of-one claim failed where prison officials used discretion in denying prisoner phone call); *Taliaferro v. Hepp*, No. 12-cv-921-bbc, 2013 WL 936609, at *6 (W.D. Wis. Mar. 11, 2013) ("class-of-one claims are likely never cognizable in the prison disciplinary context"). In both *Shaw* and *Taliaferro*, the court cited *Engquist* for the proposition that class-

of-one claims are not available for discretionary decisions that are "based on a vast array of subjective, individualized assessments." But because Key alleges that he was singled out for this treatment without a valid reason, I will allow him to proceed on his class-of-one claim against Shannon.

ORDER

IT IS ORDERED that:

1. Plaintiff Prince D. Key is GRANTED leave to proceed on the following claims:

    - Eighth Amendment claims against defendants Robert Shannon, Joshua Kolbo, Joseph Cichanowicz, and Gary Boughton.
    - A First Amendment retaliation claim against Shannon.
    - An equal protection "class of one" claim against Shannon.

2. A determination on plaintiff's Wisconsin-law negligence claims is STAYED pending plaintiff showing the court that he has complied with Wis. Stat. § 893.82. Plaintiff may have until October 20, 2017 to inform the court whether he has complied with this statute. If plaintiff does not respond by this deadline, I will dismiss his state law claims.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. 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 the defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered September 29, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge