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

DONAVAN KROSKA-FLYNN,

Plaintiff,

v.

JON E. LITSCHER, REED RICHARDSON, and JAMIE BARKER,

Defendants.

OPINION AND ORDER

18-cv-304-wmc

Pro se plaintiff Donovan Kroska-Flynn, a former inmate in the custody of the Wisconsin Department of Corrections ("DOC") incarcerated at Stanley Correctional Institution ("Stanley"), alleges that defendants violated his Eighth Amendment rights under the United States Constitution by failing to treat unspecified symptoms, which plaintiff contends may be caused by Candida, a fungal infection. Kroska-Flynn filed a first amended complaint (dkt. #8), which the court accepts as the operative complaint. Because Kroska-Flynn is incarcerated and is seeking redress from a governmental employee, the Prison Litigation Reform Act ("PLRA") requires the court to screen his complaint and dismiss any portion that is: (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Additionally, Kroska-Flynn has renewed his motion for assistance in recruiting counsel. (Dkt. #16.) For the following reasons, the court will allow him to proceed against two of the named defendants, but will deny his motion for assistance in recruiting counsel without prejudice.

ALLEGATIONS OF FACT[1]

Kroska-Flynn names three defendants: former Wisconsin Department of Corrections ("DOC") Secretary Jon Litscher; Reed Richardson, Stanley's warden; and Jamie Barker, Stanley's Health Services Unit ("HSU") supervisor.

On January 5, 2017, Kroska-Flynn arrived at Dodge Correctional Institution ("Dodge"), where he underwent medical and dental screenings. Kroska-Flynn submitted a Health Service Request on March 7, writing that he felt like something was wrong with his blood and that he felt like he had "worms" in the blood of his legs. (First Am. Compl., Ex. 128 (dkt. #8-2) 142.) Over the next few weeks, he submitted a few requests for health and dental services, but "not much was done" to address his issues.

Kroska-Flynn was transferred from Dodge to Stanley on March 23. He was seen by HSU staff for symptoms he was complaining about, and staff referred him to psychological services. (*See* First Am. Compl., Ex. 121 (dkt. #8-2) 135.) On March 23, Kroska-Flynn also submitted a request for dental services to address an infected tooth. As for his request for dental care, at some point in April the tooth was extracted by a dentist.

On April 25, Kroska-Flynn lost consciousness and passed out in his living unit. He was transported to the HSU in a wheelchair, where his blood pressure was taken and he was cleared to return to his unit. Frustrated, Kroska-Flynn refused to leave, and he was handcuffed and placed in solitary confinement for 30 days.

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[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).

On April 26, Kroska-Flynn filed an inmate complaint about his experiences in the HSU, but his complaint was dismissed because he raised too many issues. On May 1, a Psychological Services Unit staff member, Kaeppeler, sent him a resource guide giving him advice about how to manage his distress about his health.

On May 10, Kroska-Flynn filed another inmate complaint, which was also denied. On May 15, Kroska-Flynn received a letter from Warden Richardson, who wrote that he was not going to get involved in his medical concerns. (First Am. Compl. Ex. 81 (dkt. #8-2, at 90).) However, Richardson also wrote that he had shared Kroska-Flynn's concerns with HSU staff for their review and response. It does not appear that any changes were made to how the HSU handled his requests for care.

On June 28, Kroska-Flynn appealed the dismissal of his inmate complaint, which was denied. On July 12, he attempted to resolve his ongoing medical issues by submitting an interview request to the inmate complaint examiner. However, those requests were denied as well.

On January 30, 2018, Kroska-Flynn attempted to resolve his medical issues with HSU supervisor Barker, but he was unsuccessful. He does not provide any details about what concerns he brought up specifically with Barker, but it appears he was complaining about HSU's failure to treat his Candida. Kroska-Flynn again wrote to Richardson about his concerns, but Richardson responded that Kroska-Flynn had not followed the proper chain of command in contacting him, referring him back to Barker.

On February 23, Kroska-Flynn wrote to Barker to complaint about how HSU have been handling his condition. (First Am. Compl., Ex. 31 (dkt. #8-2) 32.) He relayed that

Dr. Hannula told him that there was no test to confirm whether he had a Candida yeast overgrowth and asked for a second opinion. Kroska-Flynn complained that the cost of treatment was relatively low and could be as simple as antibiotics. He wrote that his heart hurt, he was irritable and itching, he felt as though his kidneys were dying, he was afraid to eat and so miserable he wanted to die. (*Id.*)

On February 26, Kroska-Flyn filed another inmate complaint that was also denied. On March 12, he wrote a letter to the Director of the Bureau of Health Services, James Greer, describing his medical issues. He did not receive a response. Finally, on April 4, Kroska-Flynn filed another inmate complaint, which, like the others, was dismissed.

OPINION

Plaintiff seeks to proceed against Litscher, Richardson and Barker on Eighth Amendment claims. However, the court dismisses Litscher at the outset, since plaintiff has not alleged he was involved in the events underlying his claims, *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional violation."), and plaintiff may not proceed against Litscher solely by virtue of his former position as the DOC Secretary, *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) (rejecting § 1983 actions against individuals merely for their supervisory role).

The Eighth Amendment imposes a duty on prison officials to take reasonable measures to guarantee an inmate's safety and to ensure that inmates receive adequate medical care. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). A prison official's "deliberate indifference" to a prisoner's medical needs or to a substantial risk of serious harm violates

the Eighth Amendment. *Id.* at 828; *Estelle v. Gamble*, 429 U.S. 104-05 (1976.). "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" means that the official is aware that the prisoner needs medical treatment, but disregards this need by consciously failing to take reasonable measures in response. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

As an initial matter, the court questions whether Kroska-Flynn's Candida is sufficiently serious, since "[t]ypically, without more, skin rashes are not" objectively serious medical conditions. *See Holden v. Knight*, No. 15-cv-432-JD, 2016 WL 696088, at *3 (N.D. Ind. Feb. 22, 2016) (citing *Sledge v. Kooi*, 564 F.3d 105, 108 (2d Cir. 2009) (holding that eczema is not a "serious medical need" on which to base a claim of deliberate medical indifference)). That said, Kroska-Flynn alleges that he reported to HSU staff about pain in his chest, itching, pain in his kidneys and that he was afraid to eat. These symptoms support a reasonable inference that he was suffering from severe pain that required medical attention, which supports a finding that he was suffering from a serious medical need. *Myrick v. Anglin*, 496 F. App'x 670, 674 (7th Cir. 2012) (a prisoner's "claim of 'excruciating pain' from skin infections" satisfied the objective prong of a deliberate indifference claim).

It is also reasonable to infer, under the lenient standard afforded to *pro se* plaintiffs at this stage, that Barker's failure to take any steps in response to Kroska-Flynn's complaints that HSU staff were failing to treat his Candida (or even order testing to

confirm that was the condition) supports a reasonable inference of deliberate indifference. Factual development may show that Barker responded adequately to Kroska-Flynn's complaints by deferring to sound medical decisions of HSU staff, but given Kroska-Flynn's allegations, Barker's apparent failure to do any investigation to address his concerns supports a reasonable inference of deliberate indifference. Accordingly, the court will grant Kroska-Flynn leave to proceed on an Eighth Amendment deliberate indifference claim against Barker.

The court will also allow Kroska-Flynn to proceed against Warden Richardson, but this claim appears quite weak from the start. Indeed, generally speaking, non-medical prison staff are entitled to defer to the judgment of health care professionals so long as they do not ignore prisoner complaints. *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010). Kroska-Flynn alleges that he alerted Richardson to the issues he was having trouble getting care for his Candida, and Richardson responded by either deferring to HSU staff or referring his complaint to HSU staff for their review and response. While fact-finding may reveal that Richardson had no legitimate reason to question how HSU staff were treating Kroska-Flynn's condition, it would be premature to dismiss him at the pleading stage. Indeed, given Kroska-Flynn's allegation that he told Richardson that HSU staff were mishandling his medical care in the first place, it may be reasonable to infer that Richardson's complete deference to the HSU's approach to his care essentially ignored Kroska-Flynn's complaint. That is sufficient to support a deliberate indifference claim.

As Kroska-Flynn proceeds with his claims, he should be aware that he faces an uphill battle going forward. Clearing the low screening threshold does not relieve Kroska-Flynn

of the burden to come forward with concrete evidence as the case progresses. At summary judgment or at trial, Kroska-Flynn will bear the 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). To meet that burden, he will need to show more than that he disagreed with the defendants' decisions about his medical care, *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006), or even that the defendants could have provided better treatment, *Lee v. Young*, 533 F.3d 505, 511-12 (7th Cir. 2008). In particular, plaintiff will have to show that each defendant's conduct was "blatantly inappropriate." *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). Making this showing may even require the plaintiff to introduce 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.").

II. Motion for assistance in recruiting counsel (dkt. #16)

Kroska-Flynn seeks the court's assistance in recruiting counsel because he suffered a traumatic brain injury in 2007, a lawyer is better equipped to present evidence on his behalf and he has been unsuccessful in his efforts to recruit an attorney on his own. Civil litigants like plaintiff, however, have no constitutional or statutory right to the appointment of counsel, though the court may assist a pro se plaintiff in recruiting counsel. *See, e.g.*, *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866 (7th Cir. 2013); *Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997). However, the court can exercise its discretion

to assist a litigant in recruiting counsel if he is indigent and has unsuccessfully attempted to recruit representation on his behalf, and the court is persuaded that the complexity of the case exceeds the plaintiff's ability to litigate it. *Pruitt v. Mote*, 503 F.3d 647, 653 (7th Cir. 2007). Here, Kroska-Flynn explains that he has cognitive challenges and points out that an attorney will be able to present evidence on his behalf, but those representations do not indicate that Kroska-Flynn cannot represent himself at this stage in the lawsuit. The contrary appears to be the case: he has amended his complaint and renewed his motion for assistance in recruiting counsel, and his filings have been readable and show an understanding of the applicable standards. If, as this case proceeds, Kroska-Flynn determines that he lacks the ability to meet the demands of this case, he may renew this motion. As such, the motion is denied without prejudice.

ORDER

IT IS ORDERED that:

1. Plaintiff Donovan Kroska-Flynn is GRANTED leave to proceed on Eighth Amendment deliberate indifference claims against defendants Jamie Barker and Reed Richardson.

2. Plaintiff is DENIED leave to proceed on any other claims, and defendant Litscher is DISMISSED.

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 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 the plaintiff's complaint if it accepts service for the defendants.

4. For the time being, plaintiff must send the defendant 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 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. 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 renewed motion for assistance in recruiting counsel (dkt. #16) is DENIED without prejudice.

Entered this 11th day of March, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge