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

EMMANUEL PAGE,

Plaintiff,

v.

DOCTOR HOFFMAN, DOCTOR O'BRIEN AND CANDICE WALKER *et al.*,

Defendants.

OPINION AND ORDER

17-cv-450-wmc

Pro se plaintiff Emmanuel Page ("Page"), a prisoner at New Lisbon Correctional Institution ("NLCI"), filed a complaint under 42 U.S.C. § 1983, claiming that the defendants, health care employees at NCLI and the Wisconsin Department of Corrections ("DOC"), violated the Eighth Amendment and state law by delaying or failing to provide him with adequate medical care, as well as by denying his requests for pain medication. After filing his complaint, Page also filed a motion to amend, attaching a proposed amended complaint. (Dkt. #6.) Because that motion will be granted, Page's amended complaint is ready for screening as required by 28 U.S.C. §1915A. Moreover, for the following reasons, the court will grant Page leave to proceed against named defendants Frisk, Mellisa and Warner on deliberate indifference claims, and against Warner on a negligence claim.

ALLEGATIONS OF FACT[1]

At all relevant times, plaintiff Page was incarcerated at NCLI, where each of the

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's amended complaint, unless otherwise noted, drawing all reasonable

defendants worked. Defendants include registered nurses Johnson, Frisk, Dobbert and Hentz, "doctor's nurse" Mellisa, Doctor Hoffman of NCLI's Health Services Unit ("HSU"), and HSU Managers, Candice Warner and Barker.[2]

In November 2016, Page injured his right, upper body while lifting weights. In the days following the injury, he then began experiencing excruciating pain. Page also claims that he could not lift his right arm without assistance, and he had difficulty performing everyday tasks. On December 6, 2016, Page wrote HSU to inform them of his condition and to request an appointment with a doctor. Shortly thereafter, Page was advised that Doctor Hoffman, the chief supervising doctor in the HSU, had ordered x-rays and a follow-up visit.

While the complaint does not specify *when* the visit took place, Page eventually did visit with HSU Nurse Frisk, advising that he was in constant pain as a result of his shoulder injury. Page also told Nurse Frisk that he had been using the drug "Meloxicam," which had been previously prescribed for his knee pain to relieve the pain in his shoulder. Page further told Frisk that drug was ineffective and requested stronger pain medication, as well as asked to see the doctor. Frisk responded by giving Page an extra pillow, Tylenol and ice, and telling Page that she would inform Doctor Hoffman about his injury.

On December 10, 2016, having still not seen a doctor, Page wrote a letter to HSU, again explaining that he was in constant pain and had not yet seen a doctor. He also requested stronger pain medication because the pain was preventing him from sleeping. It

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inferences in a light most favorable to plaintiff.

[2] Plaintiff's amended complaint does not give a surname for defendant Mellisa, nor does it provide a given name for defendant Barker.

is unclear who responded to Page's letter, but Page apparently received a response from the HSU soon after, stating that he had "been scheduled to see a doctor this week." Even so, Page was not seen by a doctor, nor was he given stronger medication that day. Rather, Nurse Johnson visited with Page. After explaining his pain registered at an 8 or 9 out of 10, that he was in need of stronger medication, and that he needed to see a doctor, Johnson told Page that she, too, would inform Doctor Hoffman.

On December 11, 2016, HSU staff again informed Page that he was scheduled to see the doctor and would be x-rayed. Page was then x-rayed on December 13 and 27, 2016. Although those x-rays apparently revealed no fractures in Page's shoulder, the x-ray report, signed by Doctor Hoffman, indicated that Page's right shoulder joint spaces were narrowed consistent with a diagnosis of chondrolysis arthritis or glenhumeral degenerative joint disease. In addition, Page continued to report constant pain and loss of mobility in his shoulder, and he still had not seen a doctor.

On January 12, 2017, Page wrote HSU, informing them that he was still in pain and that his medication was not helping. At that point, Page requested a Cortisone injection, or "something stronger" than Tylenol to deal with the pain, as well as an MRI. (Compl. (dkt. #1) ¶ 27.) On January 13, 2017, Page was also informed for the third time since December 10 that he would be seen by a doctor, this time by Dr. O'Brien, who examined him that same day.

Consistent with the x-ray report, Doctor O'Brien found no breaks or fractures and concluded that the cause of Page's pain was arthritis or a strain. Accordingly, O'Brien instructed Page to take 2 Tylenol every 4 hours over a 3 day period (12 pills daily) followed

by 2 Tylenol every six hours during the following days, although the amended complaint does not specify for how many days the second phase of treatment would last. O'Brien also ordered Page to see a physical therapist. Although Page followed the prescribed course of treatment with Tylenol, in addition to Meloxicam, he still suffered pain to the point that he couldn't sleep on his back or put pressure on his right side while sleeping.

A little over two weeks later, on January 31, 2017, Page reached out to HSU again, reporting excruciating pain in his shoulder area and again asking for strong medication. On February 2, Page was called to HSU by either Nurse Frisk or Nurse Johnson. The nurse who saw him scheduled an appointment to see Doctors Hoffman or O'Brien, while also informing Page that he was scheduled for physical therapy. Page told that nurse that he did not need physical therapy because he could not move his arm over his head.

On February 14, 2017, Page went to see a physical therapist, who electronically injected a medication pain patch in his shoulder area. After this treatment apparently failed to lessen his pain, Page informed the physical therapist that he did not need physical therapy and requested an MRI and possibly surgery.

On February 28, 2017, Page wrote HSU complaining that he was still in pain and again asked to see a doctor. That same day, HSU responded to Page's request, informing him that he was scheduled to see a doctor at the end of March. Page was also informed that the doctor would not order an MRI without seeing him face-to-face. Still, HSU summoned Page later that day, and he talked to either Nurses Johnson or Frisk (again, the complaint does not specific which nurse), reporting that he was still in excruciating pain and the prescribed medication was not alleviating it. He also told the nurse that the

physical therapist was trying to make him do exercises that were impossible for him. Nevertheless, Page was again told that he would have to wait until the end of March to see a doctor.

On March 3, 2107, Page filed a formal complaint stating that Doctors Hoffman and O'Brien were deliberately indifferent to his serious medical need because they were refusing to see him and declining to prescribe stronger medication or schedule an MRI. By this point, Page also believed he had a torn bicep that required surgery and that physical therapy was inadequate in treating his continuing pain.

Page visited the physical therapist again on March 7, 2017, renewing his request for an MRI and possibly surgery. The therapist told Page he was not authorized to order an MRI and instructed Page to perform exercises. Page told the therapist that he could not do any exercises because of the pain and limited mobility in his shoulder and that the prescribed therapy "was tantamount to telling a man with a broken leg to walk on it until it heals." (*Id.* ¶ 49.)

On March 10, 2017, Page also informed HSU Manager Warner that he was being denied adequate medical treatment for a shoulder injury that had been causing him excruciating pain since December. On March 11, 2017, Warner responded that Doctor O'Brien's January 13, 2017, orders did not include an MRI, but physical therapy. Warner cited a written report by the physical therapist indicating that Page was given an exercise program to follow, but was unwilling to participate in physical therapy. Finally, Warner confirmed that Page was scheduled to see a doctor at the end of March.

On March 31, 2017, Page was called to the HSU for a doctor's appointment. When

he arrived, however, Nurse Mellisa allegedly told him to sign a medical refusal slip. When Page refused to sign the slip and stated that he needed to see the doctor, Nurse Mellisa allegedly still refused to allow him to see a doctor, telling Page instead that he had received an appointment slip on March 30, 2017, advising of the time of his March 31 appointment, which Page had missed. Page told her he had never received an appointment slip and had been waiting to see the doctor for weeks and was in constant pain, and again requested to see the doctor. (Pl.'s Compl. (dkt. #1) 9.) Nevertheless, Nurse Mellisa refused to let Page see the doctor and instead told him to file a complaint with HSU Manager Warner.

On March 31, 2017, Page again contacted Warner demanding to see a doctor as soon as possible and insisting that he had been denied medical treatment. In particular, Page denied Nurse Mellisa's claim that he had received any appointment slip, much less missed the appointment. On April 3, 2017, HSU Manager Warner responded by repeating the assertion that an appointment slip was sent out on March 30, 2017, for an appointment with the doctor on March 31, 2017. Worse, Warner also asserted that the housing unit was called to have Page report to HSU on March 31, 2017, but Page had shown up 30 minutes late. Without addressing his need to be seen by a doctor, Warner then allegedly instructed Page to take the issue up with Unit Manager Tracy Navis.

On March 31, 2017, Page also filed a formal complaint stating that he was denied the right to see a doctor during his HSU appointment. Page also referred to the nurses' repeated failures to address his injury, and again denied that he received an appointment slip on March 30, 2017, as HSU claimed. In response to Page's complaint, Unit Manager

Navis allegedly emailed a sergeant from Page's unit asking whether an appointment slip had been sent for Page by HSU on March 30; Navis later e-mailed Warner that the sergeant did not recall Page receiving an appointment slip on March 30, but did recall receiving a call from HSU on March 31, 2017, and telling Page to report to HSU.

More than two months after requesting to again be seen by a doctor, and two and a half months after first seeking an MRI, Doctor Hoffman apparently ordered an MRI on May 1, 2017. Plaintiff later received an MRI with an attached report which was signed by Doctor Hoffman, indicating that plaintiff suffered from "glenohumeral joint osteoarthritis with loss of articular cartilage and large marginal oesteophytes, as well as a damaged humeral and glenoid." As a result, Hoffman continued to prescribe Tylenol and Meloxicam, rather than granting plaintiff's requests for stronger medication.

On August 18, 2017, Dr. O'Brien also met with plaintiff to discuss the results of the May 1st MRI. Acknowledging plaintiff's condition, O'Brien ordered additional x-rays, but would not prescribe stronger medication. Doctor O'Brien further refused plaintiff's requests to schedule an orthopedic consultation. Plaintiff received more x-rays and a cortisone injection in his shoulder, but claims that the pain continued. He also filed additional requests for stronger medication, which went unacknowledged.

Plaintiff further submitted a request to the HSU on December 11, 2017, alleging that he experienced knee pain, without describing the precipitating cause of this pain. Page also filed additional complaints with the HSU and its then manager Barker, alleging "deliberate indifference" on January 25, 2018, February 2, 2018 and March 5, 2018. In response to these claims, Doctor Hoffman met with plaintiff on March 16, 2018. After

plaintiff repeated his requests for stronger medication, Doctor Hoffman denied his request and suggested another cortisone injection to the shoulder. He also refused to order an MRI for plaintiff's knee pain and refused to administer a cortisone injection to both knees.

Page contacted defendant Barker on April 22, 2018, complaining of both chronic knee pain and deliberate indifference, and suggesting that he was in need of surgery. This complaint was not responded to, and Page filed a final complaint on May 18, 2018, but does not state whether this claim was acknowledged by the HSU.

OPINION

Plaintiff seeks leave to proceed against all of the defendants on Eighth Amendment deliberate indifference claims and against defendants Hoffman, O'Brien and Warner on Wisconsin state law tort claims. The court will address these claims separately.

I. Eighth Amendment Deliberate Indifference Claims

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); *see also Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997)(same). "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" requires 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 constitute deliberate indifference to serious medical condition in violation of the Eighth Amendment if the alleged delay caused the inmate's condition to worsen or unnecessarily prolonged his pain. *Estelle*, 429 U.S. at 104–05, (1976); *see* also *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); *Grieveson 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 Eighth Amendment claim for deliberate indifference basically has three elements:

1. Did plaintiff objectively need medical treatment?
2. Did defendants know that plaintiff needed treatment?
3. Despite their awareness of that need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

For the purposes of screening, plaintiff's allegations that he suffered from debilitating and excruciating pain in his right shoulder support a reasonable inference that he had an objectively serious medical need. The operative questions for screening, therefore, turn on

whether plaintiff has alleged sufficient facts to find (or reasonably infer) that each of the individual defendants *knew* about the pain the plaintiff was allegedly experiencing *and* how they acted with indifference despite being in a position to take steps to relieve it.

A. Nurses Dobbert and Hentz

As for defendants Dobbert and Hentz, plaintiff has not pleaded factual allegations sufficient to answer either of the operative questions affirmatively under §1983. In particular, neither of these defendants were involved in any of the evaluation or treatment decisions comprising plaintiff's claim, so they cannot be held liable under §1983. *See Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). The fact that many of plaintiff's allegations refer generally to "HSU staff" does not cure this defect as he may not rely on "[v]ague references to a group of 'defendants,' without specific allegations tying the individual defendants to the alleged unconstitutional conduct." *Grieveson*, 538 F.3d at 778. In this case, there are no allegations linking Dobbert and Heinz to Page's medical care. Accordingly, the court must dismiss these defendants.[3]

B. Nurse Frisk

It is at least reasonable to infer that defendant Frisk knew about plaintiff's shoulder injury and claims of debilitating pain. The relevant question is whether Frisk took reasonable measures in response to plaintiff's treatment needs. As an initial matter, Frisk provided Tylenol, a pillow and ice, and assured plaintiff that she would inform Doctor

[3] In the event that plaintiff unintentionally omitted allegations implicating these two defendants, he may file a motion to amend his complaint. In doing so, plaintiff should include as an attachment a proposed amended complaint, which the court will screen as required by §1915A.

Hoffman about his injury. As a nurse, these responses appear appropriate enough. However, plaintiff also describes a delay in follow up treatment; he was not seen by a doctor until mid-January, even though he reported severe pain in late November and throughout December. These facts alone might support an inference that Frisk neglected to inform Doctor Hoffman of plaintiff's condition. Under the circumstances, such inaction *could* be perceived as unreasonable depending upon the specific circumstances that are at this point still unknown. *See Grieveson,* 538 F.3d at 779; *Edwards*, 478 F.3d at 830–31.

To be sure, it is quite possible that Frisk took all necessary steps to ensure plaintiff received prompt care, and that the delay was justified. However, at the pleading stage all inferences are viewed in the light most favorable to the plaintiff. Because one could reasonably infer that Frisk failed to notify Doctors Hoffman and O'Brien (or at least follow up with them to insure Page was being seen), thus neglecting to pass plaintiff's complaints up the chain of command, the court will allow plaintiff to proceed on deliberate indifference claim regarding actions taken before plaintiff's initial examination by a medical doctor.

While the court will permit plaintiff to proceed on a deliberate indifference claim related to the December delay, he may not proceed on any other claim. Indeed, subsequent allegations involving defendant Frisk on February 2, 2017, and on February 28, 2017, do not clearly specify whether she or Nurse Johnson failed to grant plaintiffs' subsequent requests to see a doctor despite reports of extreme pain. (Pl.'s Cmpl. (dkt. #1) 67, ¶¶ 37 & 45.) In the event plaintiff amends his complaint to indicate whether either one or both failed to provide appropriate care after his initial examination by a doctor in mid-January,

he may be granted leave to proceed on that claim as well. At this point, however, plaintiff may proceed against defendant Frisk only with respect to the December delay.

C. Nurse Johnson

In contrast, Johnson must be dismissed because none of plaintiff's allegations support a finding that she was deliberately indifferent or that she failed to take reasonable measures to provide necessary treatment. In particular, although Johnson was allegedly aware of plaintiff's shoulder injury, as well as debilitating pain, she also is alleged to have taken steps to inform Doctor Hoffman of the plaintiff's pain and the inefficacy of prescribed drugs to resolve it after it was initially reported to her on December 11, 2016. Johnson also is alleged to have addressed plaintiff's request for stronger medication by scheduling a meeting with the doctor and by ordering x-rays. These actions demonstrate that she took plaintiff's descriptions of pain seriously and responded to them, particularly since she does not appear to have the qualifications necessary to diagnose defendant's condition or prescribe stronger pain medication. Because she apparently took reasonable measures during this initial period, plaintiff's claim against Johnson related to her December 2016, treatment decisions may not proceed. *See Forbes v. Edgar*, 112 F.3d 262, 265 (7th Cir. 1997).

Similar to Frisk, the court is unable to grant plaintiff leave to proceed on any claims related to the February 2 and February 28 treatment decisions because of his failure to specify whether Nurse Frisk or Nurse Johnson failed to grant or follow up on his ongoing requests to see a doctor after a first visit in mid-January. Again, while plaintiff may file a motion to amend his complaint to indicate whether Johnson played some role in his

treatment during December or failed to provide appropriate care after the initial examination with Doctor O'Brien took place in mid-January, he may not proceed on this claim as currently pleaded.

D. Nurse Mellisa

Plaintiff has also alleged that "Nurse Mellisa" was made aware of Page's shoulder injury and ongoing pain, so the question is whether she failed to take reasonable measures in responding to his requests to be seen on March 31. As currently alleged, Mellisa intentionally prevented him from seeing a doctor that day despite his repeated pleas to do so given his constant pain, which is sufficient by itself to permit a reasonable inference of deliberate indifference. While Mellisa claimed that plaintiff received notification of an appointment on March 30, 2017, informing him of the time of his appointment the following day, and was simply too late, plaintiff denies receiving such a notification or being late. Additionally, after plaintiff informed Mellisa that he had not received an appointment slip and was in constant pain, Mellisa would still not allow plaintiff to visit the doctor, but instead told him to file a complaint with HSU Manager Warner.

Viewing these facts in the light most favorable to the plaintiff, the allegations support an inference that Mellisa was deliberately indifferent to plaintiffs' serious medical need, including allegedly turning him away without evaluating whether he needed to be seen by a doctor that day.

The complaint also suggests a worsening in the severity of the plaintiff's pain after first being seen by Doctor O'Brien mid-January until filing the lawsuit. Specifically, he complained of increased, throbbing pain after the initial examination. Given plaintiff's

reports of increased pain, his belief that an MRI was required to determine the cause of his pain, and the impossibility of performing an MRI without an initial doctor's visit, it is reasonable to infer that Nurse Mellisa's refusal to facilitate Page's meeting with a doctor on March 31, 2017, exhibited deliberate indifference. At this stage, therefore, plaintiffs' allegations are sufficient to raise a claim that Nurse Mellisa was deliberately indifferent to plaintiff's serious medical need.

E. Doctor Hoffman

As for Doctor Hoffman, plaintiff alleges that he was made aware of plaintiff's shoulder injury and pain in early 2017 through various communications with nurses. Hoffman is even alleged to have been tangentially involved in December 2016 treatment decisions, having ordered and reviewed x-rays at that time. He also issued a signed x-ray report later in December or early January that included a tentative diagnosis of glenohumeral arthritis. Finally, Hoffman allegedly ordered an MRI and diagnosed the plaintiff in May of 2017. However, these allegations are insufficient to permit an inference that Hoffman delayed care or refused to see plaintiff.

To the contrary, by ordering x-rays, an examination and an MRI to confirm the nature and severity of plaintiff's condition, Doctor Hoffman arguably acted reasonably under the circumstances. *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016) ("By definition a treatment decision that's based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment."). Regardless, plaintiff has not alleged that Dr. Hoffman refused to see him sooner, much less that he was made aware

of plaintiff's repeated requests to see a doctor or reports of severe pain. Accordingly, plaintiff has not alleged allegations sufficient to support a reasonable inference that Doctor Hoffman acted with deliberate indifference to plaintiff's medical condition *before or after* the initial x-rays and examination.[4]

Finally, to the extent that plaintiff seeks to proceed against Hoffman in a supervisory capacity, his claim is a non-starter based on the current allegations. Supervisors cannot be held liable under §1983 on a theory of *respondeat superior* unless the superior either knew about unconstitutional "conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what she might see" *Matthews v. City of East St. Louis,* 675 F.3d 703, 708 (7th Cir. 2012). A supervisor might also be held liable for flawed policies or deficient training, over which the supervisor had control, if the policies or training amount to deliberate indifference. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). Neither situation applies here. Plaintiff has not alleged that Dr. Hoffman knew about deliberate indifference on the part of employees he supervised, nor that Dr. Hoffman knew about or condoned policies or trainings that amounted to deliberate indifference.

Based on the facts as pleaded, therefore, plaintiff may not proceed against Doctor Hoffman on a deliberate indifference claim. Again, should plaintiff uncover a basis to prove Hoffman's actual knowledge of his worsening condition and actual indifference to it, he may move to amend.

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[4] Although Doctor Hoffman allegedly refused to grant plaintiff's requests for stronger medication, he prescribed medication that he believed was appropriate, given his professional judgment, and without more this is insufficient for a reasonable finding of deliberate indifference.

F. Doctor O'Brien[5]

In contrast to Dr. Hoffman, Dr. O'Brien was allegedly aware of plaintiffs' medical condition, both examining Page's arm injury in mid-January 2017 and concluding that (1) plaintiff had no breaks or fractures and (2) his pain was likely the result of arthritis or a strain. Thus, the question becomes whether O'Brien's treatment, prescribing the Tylenol regimen, ordering physical therapy, and ordering additional x-rays following plaintiff's MRI, was blatantly inappropriate or abandoned all professional judgment, either at the time or subsequently. On these facts alone, Doctor O'Brien took reasonable measures to provide plaintiff with appropriate medical care in mid-January. She used her expert medical judgment to render a preliminary diagnosis, and it appears that she increased the medical dosage provided to plaintiff in an effort to alleviate his pain. Even if this treatment decision would not have been followed by physicians generally, it is sufficient to foreclose the possibility of a constitutional violation. *See Estelle v. Gamble*, 429 U.S. 97, 97 (1976) ("medical malpractice does not become a constitutional violation merely because victim is a prisoner"). Indeed, rather than being indifferent to the plaintiff's condition, Doctor O'Brien gave Page medication and prescribed physical therapy to alleviate his pain.

As for Dr. O'Brien's responses to Page's later claims of ongoing and at times excruciating pain, the allegations are far more muddled, both as to O'Brien's knowledge of these facts and decisions, if any, she made in response. What is known is that Dr. O'Brien ordered additional x-rays in mid-August after plaintiff repeatedly complained that his

[5] Although not listed in the "parties" section of the complaint, Dr. O'Brien is listed as a party in the caption of the complaint, and an Eighth Amendment violation is alleged against him in the "Legal Theory or Appropriate Authority" section of the complaint. (Compl. (dkt. #1) 11.)

medication was ineffective. Again, on these facts, Doctor O'Brien's refusal to grant plaintiff's requests for stronger medication or an orthopedic consultation does not rise to the level of deliberate indifference, at least absent allegations that O'Brien had been told of Page's complaints of continuing, even worsening, debilitating pain to his should. Absent this level of involvement, the facts alleged do not support a finding of deliberate indifference. Accordingly, Page may not proceed against her, and Dr. O'Brien will also be dismissed.

G. HSU Manager Candice Warner

With regard to defendant Warner, plaintiff alleged that she was aware of plaintiff's pain and medical condition and, indeed, she handled some of his HSU requests. As with other defendants, the relevant question is whether Warner failed to take reasonable measures to provide plaintiff with adequate treatment. First, in his communication with Warner, plaintiff denied receiving notification of an appointment on March 31, 2017. Although Warner claimed a communication slip was sent, plaintiff denies receiving it. Plaintiff was also told to address that issue with Unit Manager Tracy Navis. Further communication established that the on duty officer did not recall plaintiff receiving an appointment slip. However, in spite of this fact, defendant Warner refused to reschedule a plaintiff for another appointment.

Viewing the facts in the light most favorable to the plaintiff, the pleadings support an inference that Warner ignored the legitimate possibility that plaintiff did not receive an appointment slip on March 31, 2017, and, even more importantly, his need to be seen by a doctor to address his ongoing debilitating pain. On these facts, it is reasonable to infer

that Warner unfairly and unreasonably prevented him from seeing a doctor indeliberate indifference to Page's medical needs. Accordingly, plaintiff may proceed on his Eighth Amendment claim as to Warner.

H. **HSU Manager Barker**

In contrast, plaintiff's allegations convey that HSU Manager Barker played a relatively limited role in the events giving rise to this litigation, evidenced in part by her only recent inclusion in plaintiff's amended complaint. Even now, the pleadings do not expressly allege that Barker failed to respond to plaintiff's medical need. If anything, plaintiff's meeting on March 16, 2018, seems to have been facilitated by defendant Barker in response to Page's repeated requests for stronger medication. In particular, after Doctor Hoffman denied these requests, plaintiff proceeded to file more complaints against the HSU, seeking essentially the same relief. Regardless, as discussed above, it was within the bounds of Doctor Hoffman's medical discretion to deny these requests. Because plaintiff has not alleged any substantive changes in his condition after defendant Barker's initial facilitation of contact with Doctor Hoffman, Barker was justified in not responding to additional requests and he, too, will be dismissed.

II. Wisconsin State Law Claim

Finally, plaintiff seeks to proceed on state law claims against defendants O'Brien, Hoffman and Warner. Jurisdiction is proper over these claims under 28 U.S.C. §1367(a) ("district 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"). Here, plaintiff claims that he is entitled to relief against defendants O'Brien, Hoffman and Warner under Article I, Section 6 of the Wisconsin State Constitution. However, Wisconsin state law does not recognize a §1983 equivalent claim for violations of the state constitution. *See Zinn v. State*, 112 Wis. 2d 417, 437, 334 N.W.2d 67 (1983); *Jackson v. Gerl*, 2008 WL 753919, *6 (W.D. Wis. 2008). Accordingly, plaintiff's allegations must state a viable negligence claim under Wisconsin common law against at least as to some defendants to be allowed to proceed past screening.

Under Wisconsin law, the specific 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). As an initial matter, because the Eighth Amendment claims against Doctor O'Brien and Doctor Hoffman are dismissed, the court will decline to exercise jurisdiction over state negligence claims against these defendants. *See, e.g., Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) (affirming trial court's dismissal of plaintiff's state law claims for lack of jurisdiction after parallel federal claims had been dismissed). However, plaintiff may proceed on a negligence claim against defendant Warner, who at least arguably owed plaintiff a duty of care arising from his status as an inmate at NLCI and her relationship with him as manager of the HSU. For reasons already discussed, it is also plausible that Warner breached this duty by failing to

take plaintiff's statements regarding his pain at face value and by ignoring the possibility that plaintiff had been unfairly denied the opportunity to see a doctor. Finally, it follows that the plaintiff's pain and suffering may have been proximately caused by her breach. Accordingly, this single negligence claim will be allowed to proceed.

ORDER

IT IS ORDERED that:

1. Plaintiff Emmanuel Page's motion to amend (dkt. #6) is GRANTED.

2. Plaintiff is GRANTED leave to proceed on Eighth Amendment deliberate indifference claims against defendants Frisk, Mellisa and Warner. Plaintiff is also GRANTED leave to proceed on a Wisconsin state law negligence claim against defendant Warner.

3. Plaintiff is DENIED leave to proceed on Eighth Amendment deliberate indifference claims against defendants Dobbert, Hentz, Johnson, Hoffman and O'Brien, who are DISMISSED from this lawsuit. Plaintiff is DENIED leave to proceed on Wisconsin state law negligence claims against defendants Hoffman and O'Brien.

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 the 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 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 defendant or to the 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.

Entered this 28th day of January, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge