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

DESHAWN STATEN,

Plaintiff,

v.

STACY L. HOEM and
SCOTT RUBIN-ASCH,

Defendants.

OPINION AND ORDER

20-cv-219-wmc

Pro se plaintiff Deshaun Staten filed this lawsuit under 42 U.S.C. § 1983 against defendants Stacey L. Hoem and Scott-Rubin Asch, mental health care professionals working at the Wisconsin Secure Program Facility ("WSPF"). Staten claims that defendants violated his federal constitutional and state law rights, as well as the Americans with Disabilities Act and the Rehabilitation Act ("ADA"), in treating his mental health needs negligently and with deliberate indifference.[1] Under 28 U.S.C. § 1915A, the court will now grant Staten leave to proceed against both defendants on his claims of deliberate indifference, retaliation, and common law negligence.

ALLEGATIONS OF FACT[2]

Currently incarcerated at Columbia Correctional Institution ("Columbia"), plaintiff

[1] Staten recently submitted a letter in this case representing that he currently is engaging in a hunger strike, for which he is receiving no medical attention (dkt. #11), that principally relates to claims in his other lawsuit before this court. *See Staten v. Guske*, No. 20-cv-228-wmc (W.D. Wis.). Accordingly, the court has directed the clerk of court to file that letter in that lawsuit, and will address it in an accompanying opinion. Staten also recently filed a motion to amend (dkt. #13) that re-alleges some of the allegations from his original complaint. The court is denying that motion as unnecessary.

[2] In addressing any pro se litigant's complaint, the court must read the allegations generously,

Deshawn Staten was incarcerated at WSPF in 2017. At that time, defendants Stacy Hoem and Scott Rubin-Ash were both working as psychologists at WSPF.

Staten suffers from depression and schizophrenia. When he arrived at WSPF on June 20, 2016, Staten alleges he was having severe mental health issues and wanted to die. Indeed, starting in July of 2017, Staten stopped eating in an attempt to kill himself. Apparently sometime later in 2017, defendants Hoem and Rubin-Asch assured Staten that he would be sent to the Wisconsin Resource Center ("WRC"), since that facility could provide Staten with the kind of intensive mental health treatment that his issues required. Moreover, although Hoem and Rubin-Asch did not have the authority to *require* Staten's placement there, they could refer to the WRC prisoners who are dealing with serious mental health illnesses and could benefit from the treatment and programming available there.

Unfortunately, at some point after Hoem and Rubin-Asch allegedly agreed to make that referral, Staten had a dispute with a WSPF guard related to his food. Apparently, the guard told Staten to "enjoy" his food, which Staten interpreted to mean that the guard was tampering with his food (whether for good cause or by virtue of his schizophrenia). Therefore, Staten began a hunger strike and did not eat for six days to ensure that the guard would not be allowed to have contact with his food. Worse, Staten alleges, because of his complaints about the guard, defendants Hoem and Rubin-Asch retaliated against Staten by reclassifying him as *not* having a serious mental illness, effectively cancelling any

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drawing all reasonable inferences and resolving any ambiguities in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

referral of Staten for treatment at the WRC. Staten claims that Hoem's and Rubin-Ash's actions (1) deprived him of mental health treatment to which he was entitled and (2) caused him to commit self-harm in the form of biting his arms and cutting himself.

OPINION

In this lawsuit, plaintiff Staten seeks to proceed against defendants Hoem and Rubin-Ash on Eighth Amendment deliberate indifference, First Amendment retaliation, Wisconsin negligence, as well as violation of the ADA with Rehabilitation Act. The court addresses each of these claims in turn below.

I. Deliberate Indifference

The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" and insure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994). An inmate can prevail on a claim under the Eighth Amendment by proving that the defendant acted with "deliberate indifference" to a "substantial risk of serious harm" to his health or safety. *Id.* at 836. *Significant* acts of self-harm constitute "serious harm." *See Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). "Deliberate indifference" to a substantial risk of self-harm is present when an official is subjectively "aware of the significant likelihood that an inmate may imminently" harm himself, yet "fail[s] to take reasonable steps to prevent the inmate from performing the act." *Pittman ex rel. Hamilton v. County of Madison, Ill.*, 746 F.3d 766, 775-76 (7th Cir. 2014) (citations omitted); *see also Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 665 (7th Cir. 2012) ("officials have an

obligation to intervene when they know a prisoner suffers from self-destructive tendencies").

Similarly, the Eighth Amendment gives prisoners the right to receive adequate medical care, *Estelle v. Gamble*, 429 U.S. 97 (1976), which includes a right to appropriate mental health treatment. *See Rice ex. Rel. Rice v. Correctional Medical Servs.*, 675 F.3d 650, 665 (7th Cir. 2012). To establish deliberate indifference by denial of medical care under the Eighth Amendment, the plaintiff must prove that: (1) he had a serious medical need; (2) defendants knew that plaintiff needed medical treatment; and (3) defendants consciously failed to take reasonable measures to provide the necessary treatment. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

For screening purposes, the court will deem Staten's severe depression and schizophrenia as constituting serious medical conditions, and will further treat his tendency to self-harm as presenting a substantial risk of serious harm. Moreover, at this stage when the court draws every reasonable inference in Staten's favor, both defendants' allegedly unjustified decision to cancel his WRC referral supports a finding that they consciously disregarded his need for more intensive mental health treatment. Indeed, even though neither Hoem or Rubin-Asch could assure Staten a place at WRC, it is reasonable to infer that their referral could have been a meaningful first step in Staten getting the intensive mental health programming at WRC. Further, it is reasonable to infer that their decision to *reclassify* him (and cancel the WRC referral), which Staten claims was wholly lacking in justification and indeed intended to punish Staten, exhibited a conscious disregard for Staten's need for treatment. Accordingly, the court will grant Staten leave to

proceed against Hoem and Asch-Rubin on his Eighth Amendment deliberate indifference claims.

II. Negligence

Under Wisconsin common law, the elements of a negligence claim are: (1) a duty of care 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).

For the same reason Staten may proceed against both Hoem and Asch-Rubin on his Eighth Amendment deliberate indifference claims, he may also proceed against them on Wisconsin negligence claims. *See* 28 U.S.C. § 1367(a); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008) ("[T]he district court has supplemental jurisdiction over . . . claims pursuant to 28 U.S.C. § 1367(a) so long as they derive from a common nucleus of operative fact with the original federal claims.") (citations omitted). Indeed, it is reasonable to infer that: (1) they each owed Staten a common duty of care as treating psychologist; (2) their cancellation of the WRC referral breached that duty; (3) causing Staten to be denied needed medical treatment and commit further self-harm; and (4) physically injuring himself and suffering unnecessarily.

III. Retaliation

Next, to state a claim for retaliation under the First Amendment, a plaintiff must allege that: (1) he engaged in an activity protected by the Constitution; (2) the defendant

subjected the plaintiff to adverse treatment because of his constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the same protected activity in the future. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

To start, Staten does not allege clearly what constitutionally protected activity defendants punished him for, but it appears that he lodged a complaint about the guard who told him to enjoy his food. Regardless of whether Staten wrote down his complaint, the court will also infer that Staten acted in accordance with prison policy in doing so. *See Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) ("A prisoner has a First Amendment right to make grievances about conditions of confinement.") (citing *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1005 (7th Cir. 2005)). While fact-finding may establish that Staten's method of complaining about the guard did not involve a protected grievance, or otherwise failed to comply with prison policy, the court will also infer at this stage that Staten complained about the guard in a constitutionally protected manner.

As to the second element of his retaliation claim, it is reasonable to infer that defendants' decision to essentially refuse Staten of mental health treatment would deter a prisoner of ordinary firmness from lodging a complaint again.

As for the last element, Staten's allegation that defendants changed his mental health requirement and cancelled any WRC referral to punish him for complaining about the guard is sufficient to state a retaliation claim in this circuit. *See Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (so long as plaintiff alleges the constitutionally protected

activity and the act of retaliation, plaintiff satisfies the pleading requirement for a First Amendment retaliation claim). Accordingly, the court will grant Staten leave to proceed against defendants on a retaliation claim.

IV. ADA and Rehabilitation Act

Finally, the ADA prohibits discrimination against qualified persons with disabilities. To establish a violation of Title II of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (*citing Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) & 42 U.S.C. § 12132). The Rehabilitation Act is substantially identical, except that a claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance. *See Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671-72 (7th Cir. 2012).

The court will construe this claim as one arising under the Rehabilitation Act only because it is an open question in the Seventh Circuit whether ADA violations *not* implicating constitutional rights may proceed in federal court. *Norfleet v. Walker,* 684 F.3d 688, 690 (7th Cir. 2012). "Refusing to make reasonable accommodations is tantamount to denying access; although the Rehabilitation Act does not expressly require accommodation, 'the Supreme Court has located a duty to accommodate in the statute

generally.'" *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012).

At the pleading stage, the court again accepts that Staten's mental illnesses render him disabled as defined by the ADA and Rehabilitation Act, but his current allegations do not satisfy either the second or third elements of a prima facie case. Although WSPF is considered a "public entity," Staten does not claim to be excluded from any service, program, or activity offered to other prisoners *because* of his mental illness. 42 U.S.C.A. § 12132. Rather, he claims that he is being denied access to particular programming he needs to address his mental health issues. Since Staten has provided no allegations suggesting that he is being denied proper mental health treatment *because* he is mentally ill, he may not proceed on a claim under the ADA or the Rehabilitation Act.

ORDER

IT IS ORDERED that:

1. The clerk of court is DIRECTED to file plaintiff Deshaun Staten's May 10, 2020, submission (dkt. #11) in *Staten v. Guske*, No. 20-cv-228-wmc (W.D. Wis.).

2. Plaintiff Deshaun Staten is GRANTED leave to proceed on Eighth Amendment deliberate indifference, First Amendment retaliation and Wisconsin negligence claims against defendants Stacy Hoem and Scott Rubin-Ash.

3. Plaintiff is DENIED leave to proceed on any other claims.

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 state 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 defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be

representing defendants, he should serve the lawyer directly rather than 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 defendants 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.

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 is unable to locate him, his case may be dismissed for failure to prosecute.

8. Plaintiff's motion to amend (dkt. #13) is DENIED as unnecessary.

Entered this 10th day of June, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge