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

DAVID WILLIAMS,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, TIMOTHY THOMAS, DAN HUNEKE, ERIC PETERS, LARRY FUCHS & ROSLYN HUNEKE,

Defendants.

OPINION AND ORDER

19-cv-681-wmc

Plaintiff David Williams, an inmate at the New Lisbon Correctional Institution ("NLCI"), brings this lawsuit against the Wisconsin Department of Corrections ("DOC") and five individual defendants, who are being sued in both their official and personal capacities. Williams, who is legally blind, alleges generally that his continued placement in a double-occupancy, as opposed to single-occupancy, cell is a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1288, the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794a, and the Eighth Amendment. Although Williams has counsel, the court must screen his complaint under 28 U.S.C. § 1915 to determine whether he may proceed.

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

As an initial matter, the court addresses plaintiff's motion for leave to file an amended complaint. (Mot. Leave File Am. Compl. (dkt. #4).) In his motion, plaintiff explains that he no longer wishes to pursue injunctive relief and asks to file an amended complaint striking those requests. (*Id.* ¶¶ 7-9.) His proposed complaint is otherwise identical to his original complaint. (*Compare* dkt. #1, *with* dkt. #4-1.)

Leave to file an amended complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has further explained that:

> In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of a movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. -- the leave sought should, as the rules require be freely given.

Foman v. Davis, 371 U.S. 178, 182 (1962). Here, no apparent or declared reason stands in the way of plaintiff's request to amend his complaint. Indeed, denying plaintiff's motion would prejudice both parties as it would require him to pursue injunctive relief he no longer desires. Accordingly, the court will grant plaintiff's motion to amend his complaint, making his proposed complaint at docket #4-1 the operative pleading.

ALLEGATIONS OF FACT

At all times relevant to this case, plaintiff David Williams has been an inmate at NLCI. Plaintiff brings this action against six defendants: the Wisconsin DOC; Timothy Thomas, Deputy Warden at NLCI; Dan Huneke, Psychological Services Unit ("PSU") Supervisor at NLCI; Eric Peters, supervisor of Williams' unit at NLCI; Larry Fuchs, Security Director at NLCI; and Roslyn Huneke, Health Services Unit ("HSU") Supervisor at NLCI. All of the individual defendants are sued in both their personal and official capacities. Plaintiff clarifies that his claims for money damages are brought only against the individual defendants in their personal capacity, and that his ADA and Rehab Act claims are brought against the DOC and the individual defendants in their official capacity.

Williams alleges that he is "visually impaired to the point of legal blindness," and more specifically, that his "left eye is prosthetic" while his "right eye has no lens, a non-dilating pupil, and offers extremely poor peripheral vision." (Am. Compl. (dkt. #4-1) ¶¶ 16-17.) Williams' medical doctors have "consistently and repeatedly informed him that trauma to his head could result in the detachment of his retina, causing permanent blindness," and they have warned him that he must take all possible steps to avoid hitting his head. (*Id.* ¶ 18.) Since he arrived at NLCI, Williams has been assigned to a double-occupancy cell, although due to his disability, he sleeps on the lower bunk. (*Id.* ¶ 43.) According to Williams, this arrangement creates a risk of him hitting his head when he gets in and out of bed, as well as when he sits up in bed.

Further, Williams alleges that his double-occupancy cell creates trip hazards. Specifically, the legs of one of the two chairs in the room protrude into the main area of the cell, and Williams "repeatedly kicks the legs of the second chair when moving around in the cramped confined of his double-occupancy cell." (*Id.* ¶ 45.) Also, his current cellmate uses a floor rug for religious purposes and sometimes leaves items such as shoes in inconsistent locations, creating additional trip hazards. His double-occupancy cell also "causes a danger that he will collide with his cellmate, which occurs with some frequency." (*Id.* ¶ 49.)

Finally, Williams claims that he is at risk of being threatened or harmed by his cellmates. For example, the overhead light in Williams' cell must on at all times, other than during lights out, because he otherwise cannot see anything in his cell. When Williams' cellmate is in the top bunk, this light shines directly into his face, and according

to Williams, "[i]t is not unusual for the inmate with whom Plaintiff Williams is celled to become aggrieved at his need for the overhead light to be constantly illuminated." (*Id.* ¶ 54.) Further, in April of 2018, Williams' eye doctor prescribed an ophthalmic ointment to be applied to his right eye at bedtime, which renders him totally blind and makes him vulnerable to his cellmate. (*Id.* ¶¶ 82-86.)

In addition to the increased risk of head trauma, trip hazards, and other personal safety risks allegedly present in his double-occupancy cell, Williams explains that a double-occupancy cell creates problems for his electronic video magnifying devices. Because Williams does not read brail, he relies on electronic devices to read and write, which have been approved in the form of a desktop video magnifier and a smaller, handheld video magnifier. (*Id.* ¶¶ 20-21.) Without these magnifiers, Williams allegedly could not participate in various activities, including educational programming, "assessed" institutional programming, clerical jobs, tutoring, or teaching chapel. He also relies on these magnifiers to accomplish tasks, such as completing HSU forms to obtain medical treatment, reading posted notices at NLCI, and reading legal correspondence and literature from the NLCI law library, among other tasks.

Williams' desktop magnifier is portable but designed to remain open on a flat surface. According to Williams, it is neither designed to be frequently put up and taken down nor to be stored on its side. (*Id.* ¶ 37.) As a result, in his double-occupancy cell, he alleges that there is no place for Williams to keep his desktop magnifier open and safe from damage. (*Id.* ¶ 55.) To use it, therefore, Williams must set it up on his lower bunk and take it down afterward. This repeated assembling and collapsing causes wear and tear on

the device. To store it, Williams has also put the magnifier on its side in the cabinet, risking damage if it were to fall over. Additionally, both of the magnifiers must be charged for approximately five to eight hours a day, and do to the cells configuration, the charging cable has to be stretched across the cell, creating a trip hazard for both Williams and his cellmate. Finally, when the devices are plugged in, "excessive force on the power cable risks damage to the charging port of the charger, possibly rendering the device unchargeable and thus inoperable." (*Id.* ¶ 35.) Relatedly, Williams explains that his cellmates pose a risk to his magnifiers. For example, while Williams' was using his magnifier in the lower bunk, he relates how his cellmate spilled a bowl of cereal from the upper bunk onto the magnifier. Additionally, some of Williams' cellmates have threatened to damage his magnifiers. If damaged, Williams would have to send the magnifier off-site to be serviced. (*Id.* ¶ 32.) Previously, when Williams sent in one of his devices for servicing, he was without it for several weeks. Williams only has access to the two magnifying devices; he does not have a back-up.

Williams alleges that a single-occupancy cell would eliminate or reduce many of these risks:.there would be no top bunk against which Williams could hit his head; he could keep the floor clear of clutter; there would be no second chair protruding into the main area of the cell; he could place his magnifiers in the cabinet along the same wall as the outlet to charge them, meaning that the power cord would not stretch across the cell; he could leave his desktop magnifier set up in the cabinet and would not have to assemble/disassemble it; and he and his devices would not be at risk of violence from his cellmate.

Williams claims that he has made a number of attempts to be placed in a single-occupancy cell, but that defendants have refused to accommodate his requests. In particular, on June 27, 2017, one week after he arrived at NLCI, Williams met with defendants Larry Fuchs and Dan Huneke, among others, to discuss accommodations for his disability (he does not allege but the court will infer that he requested a single-occupancy cell around this time). The following day, HSU Director Candace Warner sent Williams a letter summarizing the content of the June 27 meeting; she copied defendants Fuchs, D. Huneke, and Timothy Thomas on the letter.

On January 21, 2018, Williams wrote a letter to Thomas directly, again seeking accommodations for his disability, and on March 25, 2018, Williams submitted a disability accommodation request. In both letters, he requested placement in a single-occupancy cell, explaining that such an accommodation was needed to protect his video magnifiers. On March 28, 2018, the ADA coordinator informed Williams that his request was outside of the scope of the ADA and directed him to address his concerns with his unit supervisor.

On April 4, 2018, Williams met with an eye doctor at NLCI. Following that appointment, the doctor wrote in Williams' "Chronological Record of Eyecare Case Management" that she was recommending Williams be placed in a single-occupancy cell. Williams met with another doctor in April of 2018, who ordered that Williams apply an ophthalmic ointment to his right eye at bedtime. On May 2, 2018, a second note was made (although it is unclear by whom) in Williams' Chronological Record of Eyecare Case Management, which directed NLCI to consider placing Williams in a single-occupancy cell.

After these appointments, Williams wrote to Fuchs on May 7, 2018, requesting a single-occupancy cell, explaining in particular that the application of his ointment rendered him totally blind and vulnerable to his cellmate, creating a security risk. The following day, Fuchs denied Williams request "on the grounds that other inmates with like concerns had not been given a single-occupancy cell." (*Id.* ¶ 87.) The day after, Williams filed an inmate complaint, again complaining that the application of his ointment made him vulnerable and fearful, as well as noting that his eye doctors had recommended that he be placed in a single-occupancy cell. After his complaint was dismissed, Williams appealed the denial of this complaint, but his appeal was also dismissed, and on July 13, 2018, the decision was upheld by the DOC Secretary.

On December 5, 2018, Williams met with Dr. Pastryk, an eye doctor, who once again recommended that Williams be housed in a single-occupancy cell. Dr. Pastryk recorded this recommendation in Williams' medical record. Williams had another appointment with another eye doctor -- Dr. Patel -- on February 7, 2019. According to Williams, Dr. Patel wrote that "a single-occupancy cell was requested to reduce the risk of trauma due to Plaintiff Williams' history of retinal detachment." (*Id.* ¶ 97.) Dr. Patel's reports were received by the NLCI HSU on February 11, 2019.

On May 1, 2019, defendant Rosyln Huneke further completed a "Single Occupancy Cell Recommendation of Inmate form" for Williams. Huneke wrote that she was completing the form on behalf of Williams and Drs. Pastryk and Patel. On the form, when asked to indicate which situations served as justification for the request, Huneke checked

"vulnerable inmate," "medical needs," and "other," as well as explained "patient is at risk of retinal detachment." (*Id.* ¶ 101.) Huneke further wrote:

> Williams reports he needs a single cell due to being vulnerable as a result of an eye condition. He is concerned that if he were assaulted he is at increased risk of a detached retina and therefore needs a single cell to mitigate this risk. He has spoken with and had both optical providers document the request as well.

(*Id.* ¶ 102.)

Defendants R. Huneke, D. Huneke, Peters, and Fuchs served as the review team to decide whether to approve plaintiff's single-occupancy cell request. They ultimately decided that Williams was not entitled to a single-occupancy cell, writing that:

> [t]here is risk inherent in incarceration and a single cell would not, in the team's assessment, mitigate this risk as an assault can happen anywhere. It is further noted that having a cellmate can be a protective factor in many ways. Noting that Mr. Williams does have some level of vulnerability a pair with care will be added to WICS in order to help ensure that he is celled with an inmate with a low likelihood of violence. It should be noted that the step of allowing Mr. Williams to cell with someone he is comfortable with has already been taken and Mr. Williams has not noted any concerns in this regard.

(*Id.* ¶ 110.) This decision was affirmed by the warden or the warden's designee.

OPINION

In this case, plaintiff alleges that defendants violated his rights under the ADA, Rehab Act, and Eighth Amendment by continuing to house him in a double-occupancy cell, as opposed to a single-occupancy cell.

I. ADA and Rehab Act

Plaintiff states at various points in his complaint that he is bringing this lawsuit under both the ADA and the Rehab Act. (*See* Am. Compl. (dkt. #4-1) ¶¶ 1, 9-14, 127.) However, plaintiff omits the Rehab Act from his formal counts, asserting only violations of the ADA and the Eighth Amendment. (*Id.* at 19, 23.) Plaintiff explains in a footnote:

> Plaintiff would also have the same legal claims under § 504 of the Rehab Act -- 29 U.S.C. § 794. The substantive provisions and protections of the two statutes are nearly identical and DOC does receive federal funding. The assertion of § 504 claims would add complexity and is not necessary . . . .

(*Id.* ¶ 130 n.1.)

Plaintiff is correct in noting that he asserted the same claims under the ADA and the Rehab Act. Indeed, the Seventh Circuit has explained that "the analysis governing each statute is the same except that the Rehab Act includes as an additional element the receipt of federal funds, which all states accept for their prisons." *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 671 (7th Cir. 2012). However, plaintiff's apparent decision to forego his Rehab Act claim in lieu of an ADA claim is backwards -- better he proceed under the Rehab Act rather than the ADA because it is currently unsettled as to whether states are immune from suits for damages that violate the ADA but not the U.S. Constitution. *United States v. Georgia*, 546 U.S. 151, 159 (2006). To avoid this question of sovereign immunity, therefore, the Seventh Circuit has encouraged courts to dispense with a plaintiff's coextensive ADA claim in favor of his Rehab Act claim. *See Jaros*, 684 F.3d at 672 ("As a practical matter, then, we may dispense with the ADA and the thorny question of sovereign immunity, since Jaros can have but one recovery."); *see also Norfleet v. Walker,* 684 F.3d

688, 690 (7th Cir. 2012) (substituting a prisoner's claims under the ADA for Rehab Act claims).

Plaintiff's decision to pursue relief under the ADA and not the Rehab Act, however, does not affect the viability of his claims as "courts are supposed to analyze a litigant's claims and not just the legal theories that he propounds." *Norfleet*, 684 F.3d at 690 (citing *Hatmaker v. Memorial Medical Center,* 619 F.3d 741, 743 (7th Cir. 2010)). *See also Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)) ("A complaint may not be dismissed unless no relief could be granted 'under any set of facts that could be proved consistent with the allegations.'"). Accordingly, the court will proceed to consider whether plaintiff has stated a claim under the Rehab Act.

The Rehab Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To state a claim under the Rehab Act, therefore, Williams must allege that he is a qualified person with a disability and that the DOC denied him access to a service, program, or activity because of his disability.[1] *Jaros*, 684 F.3d at 671.

To establish a disability, plaintiff must show that he "(i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a

[1] The Rehab Act also requires that the program or activity receives federal financial assistance, but as discussed above, this element is met because all states accept federal funds for their prisons. *Jaros*, 684 F.3d at 671.

record of such an impairment, *or* (iii) is regarded as having such an impairment." *Knapp v. Nw. Univ.*, 101 F.3d 473, 478 (7th Cir. 1996) (quoting 29 U.S.C. § 706(8)(B) (emphasis added)). "Major life activities" are defined as the "basic functions of life 'such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.* (quoting 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii)). Here, plaintiff has alleged that he is "visually impaired to the point of legal blindness." (Am. Compl. (dkt. #4-1) ¶ 16.) Specifically, he alleges his "near total blindness is a physical impairment that substantially limits his major life activity . . . namely his ability to see." (Am. Compl. (dkt. #4-1) ¶ 119.) Plaintiff has certainly pleaded sufficient facts to meet this element of his Rehab Act claim.

As to the denial of access to a program or activity, "[r]efusing to make reasonable accommodations is tantamount to denying access." *Jaros*, 684 F.3d at 672 (citing *Wis. Cmty. Serv. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir. 2006)). Here, plaintiff alleges that the DOC denied him the allegedly reasonable accommodation of a single-occupancy cell. Specifically, plaintiff appears to suggest that his double-occupancy cell poses a significant risk to, and inconveniences his use of, his magnifying devices, which he needs in order to read and write. Certainly, denial of access to reading, writing, and other education materials may qualify as a denial of a program under the Rehab Act. *See Crawford v. Indiana Dep't of Corr.*, 115 F.3d 481, 483 (7th Cir. 1997), *abrogated on other grounds by Erickson v. Bd. of Governors of State Colleges & Universities for Ne. Illinois Univ.*, 207 F.3d 945 (7th Cir. 2000). Moreover, this court has previously recognized that "at some point an accumulation of inconveniences turns into a *de facto* denial of opportunities." *Anderson*

v. Wis. Dep't of Corr., 12-cv-684-wmc (W.D. Wis. Oct. 15, 2013). At this screening stage, therefore, the court will permit plaintiff to proceed on this claim.

Finally, because there is no personal liability under the Rehab Act, the court observes that plaintiff was correct not to sue any defendants in their individual capacity under that claim. *Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303*, 783 F.3d 634, 644 (7th Cir. 2015). Accordingly, plaintiff will be permitted to proceed on his Rehab Act claim against the Wisconsin DOC and the individual defendants in their official capacities.

II. Eighth Amendment

Plaintiff additionally brings an Eighth Amendment claim under 42 U.S.C. § 1983. The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" and to 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 may prevail on a claim under the Eighth Amendment by showing that the defendant acted with "deliberate indifference" to a "substantial risk of serious harm" to his health or safety. *Id.* at 836. "Deliberate indifference occurs when a defendant realizes that a substantial risk of serious harm to a prisoner exists, but then disregards that risk." *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015) (citing *Farmer*, 511 U.S. at 837). A substantial risk of serious harm is "so great" that it is "almost certain to materialize if nothing is done." *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005).

With regard to the risk of harm element, plaintiff claims that his medical doctors have informed him that any trauma to his head may result in the detachment of his retina, causing permanent blindness. He further claims that a double-occupancy cell presents

numerous risks of head trauma, such as a top bunk on which Williams may hit head, various trip hazards, and clashes with cellmates. These allegations are also sufficient at the screening stage to state a claim that Williams' continued placement in a double-occupancy cell creates a substantial risk of serious harm.

With regard to the deliberate indifference prong, plaintiff's allegations show that as of June 2017, Fuchs, D. Huneke, and Thomas were all generally made aware of plaintiff's disability, although he does not allege that he made any specific requests as to single cell occupancy at that time. However, in 2018, Williams wrote to Fuchs and Thomas requesting a single-occupancy cell, which were denied. Finally, in 2019, all five individual defendants were on the review team that denied Williams' single-occupancy cell request. In reviewing this request, the defendants had access to R. Huneke's recommendation form, which was completed on behalf of Williams and his doctors and discussed the risks he faced by being housed in a double-occupancy cell. The form also referenced the recommendations from Williams' eye doctors that he be housed in a single-occupancy cell. Read generously, these allegations are sufficient to show that each of the individual defendants knew of the substantial risk of harm posed to Williams by his placement in a double-occupancy cell and consciously disregarded that risk when they denied his request.

ORDER

IT IS ORDERED that:

1) Plaintiff David Williams' motion for leave to file an amended complaint (dkt. #4) is GRANTED.

2) Plaintiff is DENIED leave to proceed on his claim under the Americans with Disabilities Act, 42 U.S.C. § 1288. (*See* dkt. #4-1.)

3) Plaintiff is GRANTED leave to proceed on his remaining claims. (*See* dkt. #4-1.)

Entered this 16th day of August, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge