

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

JOHN BOUCHER,

Plaintiff,

v.

OPINION and ORDER

DR. MARTIN and DEBRA TIDQUIST,

18-cv-760-jdp

Defendants.

Pro se plaintiff John Boucher is a prisoner at Jackson Correctional Institution. He has filed a complaint in which he alleges that defendants Dr. Martin (a prison physician) and Debra Tidquist (a prison nurse) failed to provide adequate medical care for a shoulder injury that he sustained in a car accident just before he was incarcerated. Specifically, he says that they refused to perform an MRI or provide a referral to an orthopedist for so long that the damage was “irreparable” by the time he received that treatment after 17 months. He brings claims under the Eighth Amendment and the common law of negligence.

Boucher has made an initial partial payment of the filing in accordance with 28 U.S.C. § 1915(b)(1), so the complaint is ready for screening under 28 U.S.C. §§ 1915 and 1915A. I will allow Boucher to proceed against both defendants under both his federal and state law theories.

ANALYSIS

Boucher’s claim is relatively straightforward: Martin and Tidquist violated his rights under the Eighth Amendment and Wisconsin’s common law of negligence by refusing to

diagnose and treat his shoulder injury for such a long period of time that the damage became irreparable.¹ I conclude that Boucher has stated a claim under both federal and state law.

A prison official violates a prisoner's Eighth Amendment right to medical care if the official is "deliberately indifferent" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). A "serious medical need" is 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). The condition does not have to be life threatening. *Id.* A medical need may be serious if it "significantly affects an individual's daily activities," *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, *Cooper v. Casey*, 97 F.3d 914, 916–17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by consciously failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, a claim under the Eighth Amendment for failing to provide adequate medical care has three elements:

- (1) Did the prisoner need medical treatment?
- (2) Did the defendant know that the prisoner needed treatment?
- (3) Despite his or her awareness of the need, did the defendant consciously fail to take reasonable measures to provide the necessary treatment?

¹ Boucher discusses other medical issues and other prison staff members in his complaint, but he does not name other defendants in his caption and he does not include other issues in his "causes of action" at the end of his complaint, so I do not understand Boucher to be raising claims about these other issues or staff members.

Wisconsin law defines medical negligence as the failure of a medical professional to “exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances.” *Sawyer v. Midelfort*, 227 Wis.2d 124, 149, 595 N.W.2d 423, 435 (1999); *Schuster v. Altenberg*, 144 Wis. 2d 223, 229, 424 N.W.2d 159, 161-62 (1988). Like all claims for negligence, a claim for medical malpractice includes the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) harm to the plaintiff. *Paul v. Skemp*, 2001 WI 4217, 242 Wis. 2d 507, 625 N.W.2d 860 (2001). Thus, to establish a prima facie medical negligence claim, a plaintiff must show that the defendants failed to use the required degree of skill exercised by an average respective medical professional, that plaintiff was harmed and that there is a causal connection between the defendants’ failure and plaintiff’s harm. Wis. JI Civil 1023.

Boucher has adequately alleged each element of his claims. As to his Eighth Amendment claim, he alleges that his shoulder injury caused him great pain since even before he was placed at Jackson in May 2015, that he could not lift his right arm, and that his injury became so severe over time that surgery was no longer an option. It is reasonable to infer from those allegations that Boucher suffered from a serious medical need.

As to the second element of his Eighth Amendment claim, he alleges that Martin began treating him in May 2015 and Tidquist began treating him in June 2016 and that he informed both of them that his shoulder was in great pain. Those allegations are sufficient to show at the pleading stage that Martin and Tidquist were aware that Boucher had a serious medical need.

As to the third element, Boucher alleges that he asked both Martin and Tidquist for an MRI and a referral to a specialist, but both of them refused those requests and failed to provide any other meaningful treatment until September 2016 when they scheduled an MRI and orthopedic consult. “A delay in treatment may show deliberate indifference if it exacerbated the inmate’s injury or unnecessarily prolonged his pain.” *Perez v. Fenoglio*, 792 F.3d 768, 777-78 (7th Cir. 2015). Because Boucher alleges that defendants both prolonged his pain and exacerbated his injury, he has adequately pleaded this element as well.

I will also allow Boucher to proceed on his negligence claim. Because the standard under the Eighth Amendment is more demanding than the standard for negligence, it follows that Boucher’s allegations state a claim for medical negligence as well.

At summary judgment or trial, it will be Boucher’s burden to show that a reasonable jury could find in his favor on each element of his claims. *Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999). To prove his Eighth Amendment claim, it will not be enough for Boucher to show that he disagrees with defendants’ conclusions about the appropriate treatment, *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment. *Lee v. Young*, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, he will have to show that defendants knew about obvious, reasonable alternatives—and had the authority to provide them—but refused to take reasonable steps to give Boucher the treatment he needed. *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997); *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996).

ORDER

IT IS ORDERED that:

1. Plaintiff John Boucher is GRANTED leave to proceed on his claims that defendants Dr. Martin and Debra Tidquist unnecessarily delayed treatment for Boucher's shoulder injury, in violation of the Eighth Amendment and Wisconsin's common law of negligence.
2. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of Boucher's complaint and this order are being sent today to the Attorney General for service on defendants. Boucher should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing of his order to answer or otherwise plead to Boucher's complaint if it accepts service for defendants.
3. For the time being, Boucher must send defendants a copy of every paper or document that he files with the court. Once Boucher learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents Boucher submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.
4. Boucher 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 Boucher 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 are unable to locate him, his case may be dismissed for failure to prosecute.

Entered October 15, 2018.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge