

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

JAMES L. KIRK,

Plaintiff,

v.

OPINION AND ORDER

18-cv-110-bbc

LIZZIE TEGELS, TAMMI MAASSEN, W. BRAD MARTIN,
DEBRA TIDQUIST, CHERYL MARSOLEK, KRISTINE PRALLE,
GEORGIA KOSTOBYZ, CHERYL MIDDLETON, MIR R. SUBLA,
SAMPOORNIWA SETTY, MICHAEL WITCIK, CHIH-SHENG J. CHIANG,
JOHN DOE SONOGRAPHER and WARD M. BROWN,

Defendants.

Pro se plaintiff James L. Kirk is incarcerated at Jackson Correctional Institution. He filed this proposed civil action under 42 U.S.C. § 1983, contending that he has been denied adequate medical treatment for a serious heart condition. Because plaintiff is incarcerated, his complaint must be screened under 28 U.S.C. § 1915A. After reviewing the complaint, I conclude that plaintiff may proceed with his claims under the Eighth Amendment against defendants W. Brad Martin, Debra Tidquist, Cheryl Marsolek, Georgia Kostobyz and Tammi Maassen. However, plaintiff may not proceed against defendants Kristine Pralle, Cheryl Middleton or Lizzie Tegels, as his allegations are not sufficient to state a claim for relief against them. Additionally, plaintiff may not proceed against defendants Mir R. Subla, Sampoorniwa Setty, Michael Witcik, Chih-Sheng J. Chiang, Ward M. Brown or John Doe, as plaintiff's allegations do not suggest that these defendants were acting under color of law

such that they may be sued under § 1983.

OPINION

A. Eighth Amendment Claim

Plaintiff alleges that he has a serious heart condition. Before he was placed in the custody of the Wisconsin Department of Corrections in 2015, his heart condition was well-controlled. In his complaint, plaintiff provides a detailed, 20-page account of the medical treatment he has received for his heart condition since being incarcerated. In short, plaintiff alleges that since his incarceration, prison staff has failed to take his condition seriously. Instead, prison staff has denied him medication he needs, discounted his complaints of chest pain, weakness and other symptoms, and refused to authorize testing that could explain the nature of his medical condition. Plaintiff states that he is suing defendants for violation of his constitutional rights.

Plaintiff's claim arises under the Eighth Amendment. An official may violate the Eighth Amendment 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" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a layperson. 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 person 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 disregard this need by consciously failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Consistent with this standard, plaintiff’s medical treatment claims have three elements: (1) Did plaintiff need medical treatment?; (2) Did defendants know that plaintiff needed treatment?; and (3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

Plaintiff’s allegations that he has a serious heart condition are sufficient to support an inference that he has a serious medical need. His allegations are also sufficient to permit an inference that several of the named defendants were deliberately indifferent to plaintiff’s serious medical need. In particular, plaintiff’s allegations are sufficient to state the following claims:

- defendants W. Brad Martin, a prison doctor, and Debra Tidquist, a nurse practitioner at the prison, refused to provide medical treatment for plaintiff’s chest pain and refused to recommend sending plaintiff to the hospital or a specialist, on several occasions;
- defendants Cheryl Marsolek and Georgia Kostohyz, who are nurses at the prison, failed to treat plaintiff’s chest pain and other symptoms on several occasions, lied about the results of an electrocardiogram, rescinded his

authorization for a wheelchair and cane and refused to recommend sending him to a hospital; and

- defendant Tammi Maassen, the health services unit manager, ignored plaintiff's complaints about inadequate medical treatment.

Therefore, plaintiff may proceed with Eighth Amendment claims against defendants Martin, Tidquist, Marsolek, Kostohyz and Maassen.

However, plaintiff's allegations are not sufficient to state a claim against any of the other defendants. Plaintiff names two other prison nurses as defendants, Kristine Pralle and Cheryl Middleton, but his only allegations relating to these defendants concern nursing visits at which they assessed his complaints and either provided treatment or scheduled him to see a health care provider. Plaintiff's allegations involving these defendants do not permit an inference that they were deliberately indifferent to plaintiff's medical needs.

Plaintiff also names defendant Lizzie Tegels, the warden of Jackson Correctional Institution, but only in her official capacity for the purposes of obtaining injunctive relief. However, plaintiff's allegations do not support an inference that Tegels would be responsible for providing the injunctive relief plaintiff seeks, namely, approving plaintiff's request to be seen by an outside cardiologist. Rather, the inclusion of plaintiff's physician, defendant Ward, and the health services manager, defendant Maassen, is sufficient.

Finally, plaintiff also names as defendants several privately-employed medical care providers. Specifically, he names individuals employed at Gunderson Lutheran Medical Center, Inc., in La Crosse, Wisconsin, including Mir R. Subla, Sampooraniwa Setty and

Michael Witcik, cardiologists; Chih-Sheng J. Chiang, a doctor; and John Doe, a sonographer. Plaintiff also names Ward M. Brown, a cardiologist at Black River Falls Memorial Hospital. However, a defendant may be held liable under the Eighth Amendment only if he or she was acting “under color of law” within the meaning of 42 U.S.C. § 1983, which is the statute that allows plaintiffs to sue for constitutional violations. Generally, this means that the defendant had an employment relationship with the government, London v. RBS Citizens, N.A., 600 F.3d 742, 746 (7th Cir. 2010). Individuals without a direct employment relationship may be found to be acting “under color of law” if their actions are “fairly attributable to the state,” Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 823 (7th Cir. 2009), but not if their relationship is only “incidental or transitory.” Shields v. Illinois Dept. of Corrections, 746 F.3d 782, 798 (7th Cir. 2014). Thus, in Shields, the court of appeals explained that privately-employed medical care providers who examined and treated an inmate on a one-time basis after referral from the prison could not be considered state actors because their relationship with the penal system was only “incidental and transitory.” Id. See also Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 671-73 (7th Cir. 2012) (noting various factors to consider when determining whether health care providers are acting under color of law).

The same is true in this case. Plaintiff’s allegations do not suggest that any of the defendants employed by Gunderson Lutheran Medical Center or Black River Falls Memorial Hospital had anything beyond an incidental and transitory relationship with the prison. These defendants were not plaintiff’s primary physicians. Instead, they treated plaintiff on

a single occasion when he was referred to them by the prison. Accordingly, plaintiff's allegations do not permit an inference that these defendants were acting under the color of law. Therefore, plaintiff may not proceed with claims against defendants Mir R. Subla, Sampooraniwa Setty, Michael Witcik, Chih-Sheng J. Chiang, Ward M. Brown or John Doe.

B. Motion for Assistance in Recruiting Counsel

Plaintiff has requested that the court recruit counsel to assist him with his case. He alleges that he is unable to afford counsel, imprisonment will limit his ability to litigate, he has poor health and his case is complex but likely to succeed on the merits. Plaintiff has shown that he made reasonable efforts to obtain counsel on his own by contacting several lawyers about this case. Dkt. #11.

In determining whether to recruit counsel for a pro se litigant, the relevant question is whether the complexity of the case exceeds the plaintiff's ability to litigate it. Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007). It is too early to make that determination in this case. Plaintiff's complaint was clear, thorough and identified relevant facts and legal standards. His additional filings have likewise been coherent and useful. I have seen no indication that plaintiff's health is negatively affecting his ability to advocate for himself. Additionally, many of the documents necessary to present plaintiff's claims should be contained in plaintiff's medical file at the prison, which he may review upon request. In fact, he submitted many of these records already, showing that he knows how to obtain them. Dkt. #4-2. Finally, at the preliminary pretrial conference, plaintiff will receive a substantial

amount of information about how to proceed with his case. Thus, although plaintiff's claims raise potentially-complicated questions about medical treatment, I have no reason, at this stage, to believe that plaintiff will be unable to litigate this case on his own. Accordingly, I will deny plaintiff's request for counsel without prejudice. He may renew his motion at any time should this case turn out to be more complex than it appears to be at this time.

C. Motions for Preliminary Injunctive Relief

Finally, plaintiff has filed a motion for preliminary injunctive relief, seeking to be referred immediately to an independent cardiologist for an evaluation. Dkt. #2. To prevail on a motion for a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. Lambert v. Buss, 498 F.3d 446, 451 (7th Cir. 2007).

I will deny plaintiff's requests for preliminary injunctive relief at this time because plaintiff has yet to show a likelihood of success on the merits of his claims. Plaintiff contends that defendants violated his Eighth Amendment rights by failing to provide him adequate treatment for his heart condition. However, although plaintiff submits several exhibits from his medical records, the records do not establish that defendants failed to provide him treatment. Instead, the records show that defendants disagree with plaintiff about his underlying condition and needs. They have provided a variety of treatments for plaintiff over the years, including referring him to outside cardiologists, but have not

provided the particular treatment plaintiff thinks is necessary. Although plaintiff disagrees with defendants' assessment, he has not submitted enough evidence to support a conclusion that defendants' assessments are wrong. This is not enough to show a likelihood of success on his Eighth Amendment claim. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (prisoner's disagreement with treatment not sufficient to show Eighth Amendment violation). Although plaintiff's allegations are sufficient to pass the screening stage, his submissions fall far short of showing that he needs the extraordinary relief that he seeks. Accordingly, he is not entitled to injunctive relief.

ORDER

IT IS ORDERED that

1. Plaintiff James L. Kirk is GRANTED leave to proceed on his claims under the Eighth Amendment that defendants W. Brad Martin, Debra Tidquist, Cheryl Marsolek, Georgia Kostohyz and Tammi Maassen failed to provide him adequate treatment for his heart condition.
2. Plaintiff is DENIED leave to proceed on any other claim. Defendants Kristine Pralle, Cheryl Middleton, Lizzie Tegels, Mir R. Subla, Sampooraniwa Setty, Michael Witcik, Chih-Sheng J. Chiang, Ward M. Brown and John Doe are DISMISSED from this case.
3. Plaintiff's motion for preliminary injunctive relief, dkt. #2, is DENIED.
4. Plaintiff's motion for assistance in recruiting counsel, dkt. #9, is DENIED without prejudice.

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

6. 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 defendants' attorney. 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 defendants.

7. 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.

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

Entered this 4th day of April, 2018.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge