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

JEFFREY D. LEISER

Plaintiff,

v.

DR. JOAN HANNULA, *et al.*,

Defendants.

ORDER

Case No. 15-cv-328-slc

Pro se plaintiff Jeffrey Leiser has filed a proposed complaint under 42 U.S.C. § 1983, in which he contends that the defendants failed to respond to his requests for treatment for his spinal and testicle pain, and they fired him from his bakery job, all in violation of the Eighth Amendment of the United States Constitution, the Americans with Disabilities Act ("ADA") and Wisconsin state law. The parties consented to magistrate judge jurisdiction, and on February 8, 2016, this case was reassigned to me. (Dkt. 16.) Having determined that Leiser may proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and that he has made his partial payment, his complaint is ready for screening under 28 U.S.C. § 1915A. As explained below, Leiser will be permitted to proceed on his Eighth Amendment and state law claims against some–but not all–of the defendants. I am not permitting Leiser to proceed on his ADA claim.

ALLEGATIONS OF FACT[1]

I. The Parties

During all relevant times, Leiser was held at the Stanley Correctional Institution ("SCI"), where he is currently incarcerated. Leiser names twenty defendants, sixteen of whom are SCI employees: Dr. Joan Hannula, the head doctor; July Bentley, a nurse practitioner; Sandra DeMars, Christine McCall and Jeanie Ann Voeks, the current and prior health services unit ("HSU") managers; Patty Scherreiks, Tracy Brunner and Ms. Thacker, nurses; Lon Becher, the nursing coordinator; Patrick Lynch, the ADA coordinator; Ms. Reimer, the food services manager; Ms. Bauer, the food service leader; Ms. Webster, the Work and Program Director; Kimberly Richardson, Holly Gunderson and Jodi Dougherty, inmate complaint examiners. The remaining four defendants are DOC employees that reviewed Leiser's inmate complaints: Welcome Rose, Charles Fracktor, Charles Cole and Cindy O'Donnell.

II. Treatment Timeline

Leiser has attached medical records to his complaint that show a history of chronic pain due to disc herniations. Leiser underwent lumbar fusion surgery in 1996 and a revision surgery in 2002. A 2006 scan did not reveal any loosening or failure from those procedures. (Progress Notes, dkt. 1-2.) Leiser arrived at SCI on October 28, 2010, at which point he submitted a health services request ("HSR"). He stated that he had spinal surgery in 2010, but that he is still having "pinching" pain on the left side and two herniated discs that cause "spasms and shooting

[1] For purposes of this order, the court assumes the facts above based on the allegations in Leiser's complaint, and will consider the documents he attaches to the complaint as incorporated therein. In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

pain." Since then, Leiser submitted many HSR's, and received treatment as a result. Here is a summary:

- November 4, 2010: Dr. Hannula saw Leiser, told him there was nothing she could do for the herniated disc, ordered a physical therapy evaluation and directed Leiser to go to HSU Physical Therapy. When Leiser told her that physical therapy had been unhelpful in the past, Dr. Hannula told him that physical therapy is the only thing she would do for him.

- January 3, 2011: Dr. Hannula saw Leiser for pain that radiated from his shoulders to his knees and prescribed ketoprofen, use of a glider and bike, and recommended that he wear an abdominal binder.

- February 15, 2011: Leiser had requested a second mattress to provide additional support to help deal with his back pain. Voeks, the acting HSU manager, denied his request because prison policy only permitted double thick mattresses when an inmate suffered from severe disabling degenerative joint disease, or following joint replacement surgery.

- May 28, 2011: Leiser was taken to HSU in a wheelchair due to severe lower lumbar and leg pain, and he was then sent to the emergency room. At the emergency room, he received a pain pill and was sent back to SCI with the recommendation that he "see a neurologist or neurosurgeon." (Dkt. #1-6.)

- May 29, 2011: Leiser reported continued severe lower back pain, difficulty starting and stopping his urine stream, numbness to his feet while standing, and that the pain medication did not alleviate all of his pain. Because it was a holiday, Leiser had to wait to see Dr. Hannula until May 31, 2011, at which point she ordered an x-ray, physical therapy and a follow up after the x-ray. (Dkt. 1-2.)

- June 28, 2011: Dr. Hannula ended Leiser's prescriptions for cyclobenzaprine and baclofen, medications he had been taking for three years while at Waupun Correctional Institution. Dr. Hannula told Leiser that the medications were meant to be used for a limited time only. Leiser complained about this to both Voeks and to the ICE, who denied his complaints.

- August 3, 2011: Dr. Hannula saw Leiser. He told her that he is in constant pain due to muscle spasms and pinching. She responded that there was nothing she would do for his back. Leiser filed complaints with Voeks, who did not find that Dr. Hannula did anything wrong.

- October 20, 2011: Leiser complained to Voeks that the ibuprofen that Dr. Hannula ordered for him was inadequate. Voeks responded by explaining to him that he had had 42 encounters with HSU in the past year, that HSU has responded to and had been sensitive to his health care needs, and that the decision not to prescribe narcotics was justified because narcotics "are neither recommended, nor are they safe for long-term use. They may work temporarily, but they can cause more problems than they are worth." (Dkt. #1-15.) Voeks recommended multiple ways for Leiser to ease his pain.

- December 2011: Becher interviewed Leiser as a part of his investigation of SCI's HSU. Leiser told Becher that his medical needs were not being met and described all of his symptoms. Becher responded on January 6, 2012, stating that he interviewed Voeks about the treatment decisions and agreed with most of them. (Dkt. 1-23.) Becher did note that he did not understand why Leiser's ibuprofen prescription was decreased, and suggested that Leiser submit an HSR or, if necessary, an inmate complaint.

- April 29, 2013: In the morning, Leiser was experiencing severe pain in his testicle. He asked correctional officers to go to HSU, but HSU told the CO's multiple times that HSU was too busy to see him. Defendant Thacker was one of the nurses who said that Leiser could not go. That afternoon, Leiser was told to go to HSU, where Leiser told Thacker about his testicle pain and that he believed he had an infection. Bentley was also present, and she diagnosed his infection, and prescribed ciprofloxican and gave him ibuprofen.

- Leiser filed a complaint with McCall, the HSU manager at the time, #SCI-2013-9660. He complained that his testicle pain was not treated as an urgent medical need. McCall did not respond.

- May 13, 2013: Dr. Hannula saw Leiser for his complaints of back pain that radiated into his right testicle and leg. He asked for pain medication that worked better than the NSAIDS he was receiving, but Dr. Hannula refused.

- May 25, 2013: Leiser was seen because he submitted another HSR complaining of the same group of symptoms, with the addition of stomach pain. The nurse that saw him gave him anti-gas pills and told him that Dr. Hannula was unavailable because it was Memorial Day weekend, but would see him after the holiday. He was also given a testicle sling. Leiser filed a complaint with McCall, complaining that he was not seen in a timely fashion.

- May 31, 2013: Bentley saw Leiser for right side and testicle pain, and he told her that the NSAIDs were not helping his pain. Bentley renewed certain medications and prescribed less baclofen, but Leiser alleges that he never made such a request. Bentley's notes also indicate that she recommended rest and ice as well as a follow up. Leiser filed another complaint with McCall, complaining that it took 26 days to receive his testicle sling and that the medications he received were ineffective. She did not respond.

- June 11, 2013: Dr. Hannula saw Leiser, who reported right side and testicle pain and told her that the medication was not helping. Dr. Hannula prescribed 0.4 mg of tamsulosin daily.

- June 25, 2013: Bentley ordered salsalate for Leiser's pain, but because he did not receive that medication, Leiser submitted an HSR on July 8, 2013. The medication was re-ordered that day.

- August 14, 2013: Leiser was taken to a hospital to see a general surgeon. In a letter to Bentley, the doctor noted that the problem may be neurological but that he would defer to a spinal specialist. (Dkt. 1-5.)

- September 10, 2013: Leiser saw Bentley and requested an MRI and Lyrica. Afterward, Bentley created a progress note describing her interview of Leiser, in which she stated she told Leiser that she "could not in good conscience offer narcotic analgesic as a solution," and that she would request Lyrica and an MRI for him. (Dkt. #1-8.)

- September 30, 2013: Bentley saw Leiser and they talked about how Leiser was reacting to the Lyrica. Apparently it was helping and he no longer had testicle pain. This caused Bentley to cancel the MRI request. (Dkt. 1-7.) Leiser contends that Bentley's statements that Leiser was feeling better were untrue.

- November 1, 2013: Bentley saw Leiser for his right side and testicle pain. Leiser complained that he was in constant pain, with increased pain when he defecated or twisted, that it hurt to urinate or to walk, sit or stand for more than ten minutes. Bentley requested a new MRI and discussed pain medication with Leiser, including that narcotic pain medication is not a recommended long-term treatment option. (Dkt. 1-9.)

- November 26, 2013: Leiser underwent an MRI ordered by Dr. Hannula. The MRI results noted that the degenerative disk disease was "most significant at L4-L5 with a small posterior disk protrusion and annula fissure," "mild to moderate central spinal stenosis," "mild narrowing of the lateral recesses bilaterally," and "mild bilateral neural foraminal narrowing." (Dkt. #1-4.)

- December 16, 2013: Bentley met with Leiser about the results of the MRI, and she told him that he would need to learn to live with the pain. Bentley's treatment plan involved weight loss, core stretching and strengthening, muscle rubs, acetaminophen, salsalate and levothyroxine. (*Id.*)

- January 7, 2014: Leiser filed inmate complaint #SCI-2014-1766 with HSU Manager DeMars, complaining that Bentley was incorrect when she told him that his disc issue was not causing him testicle pain. DeMars responded that she believed that his medical needs were being appropriately addressed. She did not investigate the complaint or review the MRI report.

- March 19, 2014: Dr. Hannula saw Leiser for pain in his testicle, right side, stomach and back. She told Leiser that there was nothing she could do for his back and that even a surgeon would not be able to help.

- June 26, 2014: Dr. Hannula saw Leiser and determined -- with a psychiatrist -- that Leiser should try duloxetine instead of citalopram, which he had been taking for almost ten years. The doctors did not wean him off citalopram, apparently because it was sufficiently similar to duloxetine.

- July 18, 2014: Leiser submitted an HSR complaining that the duloxetine was giving him chest pains. He was called to HSU, where Scherreiks gave him a refusal of medication form. Leiser told Scherreiks that he was not refusing the medication, but Sherreiks shut the door on him without examining him. Leiser signed the form, but also stated that it "gives [him] chest pains when my B/P is up." (Dkts. 1-11, 1-13.) Leiser filed an inmate complaint about this incident with DeMars and ICE. DeMars responded on August 14, 2014, affirming Scherreiks. (Dkt. #1-21.)

- July 23, 2014: Leiser asked a CO to call HSU and inform a psychiatrist that he was going through withdrawals from being taken off of duloxetine. The CO told him that Brunner would look into it for him. Three hours later, Leiser told the CO that he was experiencing pain, vomiting, sweats, shakes and mental distress. The CO called HSU, and Brunner told him that HSU would not see him. Brunner said that he could wait until morning to be seen.

- Leiser filed an inmate complaint with DeMars and ICE about Brunner's refusal to let him go to HSU. On August 15, 2014, DeMars responded that she reviewed his medical record, communicated with the appropriate staff and found no evidence of mistreatment. (Dkt. #1-19.)

- August 8, 2014: Leiser was seen by Brunner for back and testicle pain. She told him that he had to learn to live with the pain.

- August 28, 2014: Dr. Hannula saw Leiser about his back and testicle pain. Dr. Hannula concluded that surgery would not help, but she did discuss a nerve block to relieve Leiser's testicle pain.
- December 30, 2014: Leiser received his second injection from a doctor at the Black River Falls Hospital. He recommended physical therapy, which he was unable to start for four months.

III. Inmate Complaints

Leiser filed many inmate complaints related to his medical treatment. Leiser claims that, in addition to the HSU staff to whom he submitted complaints, defendants Richardson, Gunderson, Dougherty, Rose, Cole, O'Donnell and Facktor reviewed his complaints but failed to intervene on his behalf. These are Leiser's inmate complaints:

- #SCI-2013-9660. Leiser complained he was denied a thick mattress, and Richardson, Gunderson, Rose and Cole denied his request.
- #SCI-2011-12653. Leiser complained that Dr. Hannula let him suffer withdrawals, and Richardson and Gunderson denied his complaint.
- #SCI-2011-15922. Leiser complained that Dr. Hannula refused to give him proper medication for his herniated disc, and Richardon, Gunderson, Rose and Cole denied the complaint.
- #SCI-2011-22582. Lesier claimed that HSU denied adequate medication for Leiser's herniated disc, and Richardson and Gunderson denied his request for relief.
- #SCI-2013-9660. He complained to McCall that his testicle pain was not treated as an urgent medical need because he was told he could not go to HSU even though when he went later it did not appear busy. McCall did not respond to the complaint, and Richardson, Becher, Facktor and O'Donnell denied his requests for relief.

- #SCI-2013-11344. Leiser complained that Dr. Hannula and Bentley were ignoring his medical condition. Becher and Richardson reviewed the complaint, Leiser's treatment at Marshfield Clinic on June 21, 2013, and Bentley's treatment of Leiser on June 25, 2013. They affirmed the HSU staff decisions. Gunderson, Facktor and O'Donnell also affirmed those decisions.
- #SCI-2014-1766. Leiser complained that Bentley lied when she told him that his testicle pain was not caused by pinching from his herniated disc. Richardson, Becher, Facktor and O'Donnell denied him complaint.
- #SCI-2014015662 and #SCI-2014-15663. Leiser claimed that Brunner refused to treat his withdrawal symptoms and Scherreiks forced him to sign the refusal of medication form. Becher dismissed the complaints, and Dougherty, Becher, O'Donnell and Facktor denied Leiser's requests for relief.

Leiser alleges that as a result of defendants' failure to properly treat him or to intervene, he suffers a permanent spinal injury and severe testicle pain.

IV. Leiser's Bakery Job

On June 26, 2013, Leiser was fired from his bakery job. He claims that Reimer and Bauer told him that he could not work in the bakery because he could not lift forty pounds. Leiser claims that he has a fifty pound lifting restriction and that he had previously worked under this restriction without issue, although he does admit that he was unable to perform the task of lifting dough out of the big mixing bowls. Leiser claims that he submitted a reasonable accommodation request and informed Lynch, the ADA coordinator, that he was fired. Lynch interviewed Leiser and HSU about his request, and noted that the food service administrator told him that Leiser "was removed non-punitively based on the discovery that he has a moderate activity level," and that "Mr. Leiser did not document his restriction on his application when hired. He is eligible to apply for a job currently." (Dkt. 1-25.) Lynch denied Leiser's request for

accommodation. On July 8, 2013, Leiser appealed the decision to Webster, SCI's Program Director, and she denied his request for reinstatement and back pay. (Dkt. 24.)

OPINION

Leiser contends that the defendants violated his rights under the Eighth Amendment, the ADA and under state law. When he filed his complaint, Leiser also filed a Motion for a Preliminary Injunction, seeking an order requiring defendants to request that he be sent to a hospital to be evaluated by a neurosurgeon to diagnose the extent of nerve damage in his spine. (Dkt. 2.) To prevail on a motion for a preliminary injunction a litigant 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). If he meets the first three requirements, then the court must balance the relative harms that could be caused to either party. *Id.*

Leiser cites this standard, but in his attempt to establish that he is likely to succeed on the merits, he simply refers generally to the allegations in his complaint and states that he has "no other legal means to obtain this medical examination." While an injunction may be the only way for Leiser to obtain the examination he seeks, his motion has not followed this Court's Procedure to be followed on Motions for Injunctive Relief, which requires him to establish all of the facts that would warrant his request for immediate injunctive relief. Accordingly, his motion will be denied without prejudice, and a copy of the court's procedures will be provided to Leiser with this Order.

Leiser has also filed a Motion to Substitute Judge, which the court will construe as a request for recusal. (Dkt. 12.) In it, Leiser complains that the court has not yet issued a decision on his Motion for Preliminary Injunction, and that he is in constant pain. As this case has been recently reassigned to me, this motion is moot. Regardless of the reassignment, the motion would have been denied because Leiser did not allege or establish that the previously presiding judge was is in any way biased against him.

I. Eighth Amendment Deliberate Indifference

Prison employees violate an inmate's rights under Eighth Amendment if they are "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 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 disregard the risk by consciously failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

Under this standard, Leiser's Eighth Amendment claims require him to prove three elements: (1) Leiser needed medical treatment?; (2) The defendants knew that Leiser needed treatment; (3) Despite their awareness of Leiser's need(s), defendants consciously failed to take reasonable measures to provide the necessary treatment. Against this template I will screen Leiser's claims against each defendant:

A. Dr. Hannula

Leiser alleges that Dr. Hannula either saw him or prescribed some treatment for him thirteen times between when he first arrived at SCI in 2010, up until August of 2014. It is apparent from Leiser's medical records and allegations that he needed medical treatment and that Dr. Hannula knew this. The records also show that Dr. Hannula consistently provided treatment to Leiser but that Leiser frequently disagreed with her decisions and directives.

It is well established that "mere disagreement as to the proper medical treatment [does not] support a claim of an [E]ighth [A]mendment violation." *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro,* 834 F.2d 326, 346 (3d Cir. 1987); *see also Snipes v. DeTella,* 95 F.3d 586, 590-91 (7th Cir. 1996) ("Medical decisions that may be characterized as 'classic example[s] of matter[s] for medical judgment, such as whether one course of treatment is preferable to another, are beyond the [Eighth] Amendment's purview.") (internal citation omitted). On the other hand, Leiser's repeated allegations about the severity of his pain could allow the inference–at least at the preliminary screening stage–that Dr. Hannula's treatment decisions exhibited a conscious disregard for Leiser's medical needs. For example, on two occasions – May 13, 2013, and March 19, 2014 – when Leiser reported pain, Dr. Hannula told him that there was nothing she could

do for his pain. On another occasion Leiser had to wait multiple days to see him. *See Grieveson v. Anderson,* 538 F.3d 763, 779 (7th Cir. 2008) ("A delay in the provision of medical treatment for painful conditions – even non-life-threatening conditions – can support a deliberate-indifference claim."). Finally, Leiser was not weaned off citalopram because of the view that duloxetine was a sufficiently similar medication, but Leiser subsequently reported chest pains caused by the duloxetine. Leiser's adverse reaction to the abrupt change in medication allows an inference at the screening stage that Dr. Hannula's response to Leiser's complaints of pain was unreasonable. Accordingly, Leiser may proceed against Dr. Hannula on his Eighth Amendment claim.

At summary judgment or trial, however, it will not be enough for Leiser to show that he disagrees with defendant Dr. Hannula's conclusions about the appropriate treatment, *Norfleet v. Webster*, 439 F.3d 393, 396 (7th Cir. 2006), or even that she made a mistake, *Lee v. Young*, 533 F.3d 505, 511-12 (7th Cir. 2008). At that point in his lawsuit, Leiser will have to show that Dr. Hannula's medical judgment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. *Snipes*, 95 F.3d at 592.

B. Nurses Bentley, Scherreiks, Brunner and Thacker

Leiser may proceed with his claims against Bentley, Scherreiks, Brunner and Thacker. Bentley treated Leiser on seven occasions in 2013. She prescribed pain medication, rest and ice, and reviewed his MRI results and told Leiser he had to live with the pain. As noted in the previous section, it may be that Bentley's responses all were reasonable and appropriate, but for

the purposes of screening, Leiser's allegations allow the inference that Bentley's treatment decisions were inadequate in light of Leiser's reported symptoms.

The only incident related to Scherreiks occurred on July 18, 2014, when Leiser complained that he was having chest pains related to duloxetine. According to Leiser, Scherreiks would not treat him for his pain, instead having him sign a refusal of medication form as to the duloxetine. This allegation allows the inference that Scherreiks knew that Leiser was suffering severe pain and did nothing. Therefore, Leiser may proceed against Scherreiks.

Similarly, Leiser alleges that on July 23, 2014, Brunner told him he had to wait until the next morning for treatment; on August 8, 2014, Brunner told Leiser that he had to live with his testicle and back pain. These allegations suggest that Brunner did nothing in response to Leiser's severe pain. Therefore, Leiser may proceed against Brunner as well.

Finally, Leiser alleges that on April 29, 2013, he asked to go to HSU due to severe testicle pain, and Thacker responded that HSU was too busy to see him. Although circumstances may have justified Thacker's response, Leiser's allegations are sufficient at the screening stage to permit him to proceed on his deliberate indifference claim against Thacker.

All this being so, Leiser will have a significant burden at trial or in response to a summary judgment motion: he must prove that each nurse's decisions were so inappropriate that these decisions likely aggravated his condition. *Snipes*, 95 F.3d at 592.

II. Eighth Amendment Failure to Intervene

Leiser alleges that the following eleven defendants failed to intervene, despite knowledge that Leiser was receiving constitutionally deficient medical care: DeMars, McCall, Voeks, Becher, Richardson, Gunderson, Dougherty, Rose, Cole, O'Donnell and Factor. None of these defendants saw or treated Leiser; they reviewed the treatment decisions made by Dr. Hannula, Bentley and other HSU staff.

DeMars, McCall and Voeks, as HSU managers, and Becher, as the nurse coordinator, were routinely involved in medical care decisions, and thus would be familiar with proper treatment options as well as the resources available at SCI. DeMars, Voeks and Becher affirmed the decisions of HSU personnel on multiple occasions. Therefore, if any of those decisions were improper to the point that they constituted deliberate indifference, then these defendants might be liable for their failure to intervene. Additionally, Leiser claims that McCall did not respond to at least two complaints Leiser filed in which he complained that his testicle pain was not treated as an urgent medical need, that it took 26 days to receive his testicle sling and that his medications were ineffective. These allegations allow the inference that McCall knew that Leiser was suffering severe pain but did nothing to remedy it. Accordingly, Leiser may proceed on his failure to intervene claim against DeMars, McCall, Voeks and Becher.

Richardson, Gunderson, Dougherty, Rose, Cole, O'Donnell and Factor responded to the majority of the inmate complaints Leiser filed, and deferred to the judgment of the medical personnel that made the treatment decisions. Those decisions related to: whether Leiser would receive a second mattress, whether Leiser had to suffer medication withdrawals, whether Dr. Hannula refused to give Leiser proper medication for his herniated disc, whether Leiser received

sufficiently prompt treatment for his testicle pain, and whether Dr. Hannula and Bentley were ignoring Leiser's pain. None of the decisions so obviously included improper treatment that it would require one of these defendants to act in response. Rather, each of these decisions implicated discretionary decisions by medical professionals. Generally, non-medical administrative personnel are entitled to defer to those with more expertise. *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012); *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010). An exception to this rule arises where non-medical officers know or have reason to know that prison doctors or assistants are mistreating or not treating a prisoner. *King*, 680 F.3d at 1018 (citing *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008)). This exception does not apply here. Although Leiser disagrees with the treatment decisions in his inmate complaints, he has not alleged that this group of defendants had sufficient knowledge to infer that the treatment was improper. Accordingly, Leiser may not proceed on his failure to intervene claim against Richardson, Gunderson, Doughterty, Rose, Cole, O'Donnell or Factor.

III. ADA Claims Against Lynch, Reimer, Bauer and Webster

In his ADA claim, Leiser seeks reinstatement and back pay. The Americans with Disabilities Act prohibits discrimination against qualified persons with disabilities. Leiser cites to §§ 12112 and 12113, Title I of the act, but he has no claim under these statutes.

Title I is the exclusive remedy under the ADA for claims of disability discrimination in employment, and requires the plaintiff to satisfy administrative preconditions prior to filing suit. *Brumfeld v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013) (citing 42 U.S.C. §§ 12117(a),

2000e—5). Leiser has not submitted any information that would suggest he has fulfilled the pre-suit requirements of Title I. If he *has* fulfilled these requirements, then he is free to amend his complaint by including allegations that he fulfilled those requirements and attaching the corresponding documents. But even if Leiser were to have exhausted the administrative requirements, it remains unlikely that he would have a claim under Title I, first because he is a prison inmate, not an "employee," and second, because the Eleventh Amendment prohibits Title I monetary damages. *Neisler*, 807 F.3d at 228 (citing *Murdock v. Washington*, 193 F.3d 510, 512 (7th Cir. 1999) (Title I does not apply to an inmate), and *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 872-73 (7th Cir. 2006) (WDOC entitled to sovereign immunity in suit for money damages under Title I of the ADA)).

Reading Leiser's complaint generously, it may be that Leiser intended to assert a claim under Title II of the ADA. No matter; the result would be the same. Title II prohibits public entities from excluding a qualified individual with a disability from participating in or receiving the benefits of "services, programs, or activities" or otherwise subjecting that person to discrimination. 42 U.S.C. § 12132. However, because it does not apply to employment discrimination, "Title II of the ADA does not cover a prisoner's claim that he suffered workplace discrimination on the basis of a disability." *Neisler v. Tuckwell*, 807 F.3d 225, 227 (7th Cir. 2015) (citing *Brumfeld*, 735 F.3d at 622). Even if Leiser's claim is under Title II, he still may not pursue it because it is apparent from his allegations that he is alleging employment discrimination. Accordingly, Leiser may not proceed on his ADA claim due to the loss of his job at the bakery. Defendants Lynch, Reimer, Bauer and Webster will be dismissed from this lawsuit.

IV. State Law Claims

Although Leiser does not name any particular state law claims, it appears that he would like to pursue negligence-type claims against the defendants. The exercise of supplemental jurisdiction is appropriate when the state law claims are "so related" to the federal claims that "they form part of the same case or controversy." 28 U.S.C. § 1367(a). Here, Leiser's medical malpractice and negligence claims arise from the defendants' failure to respond to his requests for treatment, which share the same set of facts as his Eighth Amendment claims. Accordingly, the court will allow him to proceed on his state law claims, but only against certain defendants.

To prevail on a claim for medical malpractice or negligence in Wisconsin, a plaintiff must prove the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) injury or damages. *Paul v. Skemp*, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 (2001) (*citing Nieuwendorp v. Am. Family Ins. Co.*, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995)). Therefore, every claim for medical malpractice and negligence requires a negligent act or omission that causes an injury. *Id.*

Based on Leiser's allegations that Dr. Hannula, Bentley, Scherreiks, Brunner, Thacker, McCall, DeMars, Voeks and Becher either ignored his requests for treatment, provided improper treatment or failed to get involved when they learned about Leiser's failed requests for treatment, Leiser will be permitted to proceed on a negligence claim against them as well.

The court declines to exercise supplemental jurisdiction over the negligence and medical malpractice claims against the remaining defendants, namely Richardson, Gunderson, Doughterty, Rose, Cole, O'Donnell, Factor, Lynch, Reimer, Bauer and Webster. In determining whether to decline to exercise supplemental jurisdiction over state law claims, "a district court

should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state-law claims." *Wright v. Associated Ins. Companies Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). Because all of Leiser's federal claims against these defendants have been dismissed, it would be a waste of judicial resources to require these defendants to respond in this court only to Leiser's state law claims.

ORDER

IT IS ORDERED that:

1. Plaintiff Jeffrey Leiser's Motion for a Preliminary Injunction (dkt. 2) and Motion to Substitute (dkt. 12) are DENIED;

2. Plaintiff is GRANTED leave to proceed on his Eighth Amendment and Wisconsin state law claims against defendants Dr. Hannula, Bentley, Scherreiks, Brunner, Thacker, McCall, DeMars, Voeks and Becher for deliberate indifference and negligence.

3. Plaintiff is DENIED leave to proceed on his Eighth Amendment failure to intervene claim against Richardson, Gunderson, Dougherty, Rose, Cole, O'Donnell and Factor. He is also DENIED leave to proceed on his ADA claim against Lynch, Reimer, Bauer and Webster. Defendants Richardson, Gunderson, Doughterty, Rose, Cole, O'Donnell, Factor, Lynch, Reimer, Bauer and Webster are DISMISSED.

4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned the identify of lawyer(s) who will be representing the 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.

5. 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.

6. Pursuant to an informal 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 defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.

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

Entered this 9th day of March, 2016

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge