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

TIMOTHY TALLEY,

Plaintiff,

v. ORDER

MICHAEL DITTMAN, DAVID MELBY, and KARL HOFFMAN, 14-cv-783-jdp

Defendants.

Pro se plaintiff Timothy Talley, an inmate at the Columbia Correctional Institution (CCI), filed this proposed civil action in the Columbia County Circuit Court regarding prison staff members' deliberate indifference to his pain and physical condition following back surgery. After defendants Michael Dittman, David Melby, and Karl Hoffman removed the lawsuit to this court, plaintiff asked for leave to submit an amended complaint, which I granted. But plaintiff's amended complaint, Dkt. 10, which added several new defendants and new claims about mistakes in the provision of his medication, did not comply with Federal Rule of Civil Procedure 20, because plaintiff's claims concerned unrelated events against different defendants. I gave plaintiff a chance to decide which sets of claims he wished to bring in this lawsuit. *See* Dkt. 19.

Plaintiff responded by filing a motion for reconsideration of that decision, Dkt. 22, but in that motion he does not raise any persuasive reason for allowing him to bring all of his claims together in one lawsuit. However, I will deny this motion as moot, because plaintiff followed with a motion to dismiss his claims about mistakes in the provision of his medication. Dkt. 27. I will grant that motion, dismiss those claims without prejudice, and screen the remainder of the claims in his amended complaint.

I must consider the allegations of plaintiff's amended complaint generously. *Aee Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). I will allow him to proceed on claims that prison officials violated his Eighth Amendment rights by discontinuing prescribed pain medication, failing to provide him accommodations for his inability to move around without a cane or other assistance, and placing him in general population, where he faced the threat of gang violence. I will also allow him to proceed on a claim under the Rehabilitation Act for prison staff's failure to provide him access to showers.

ALLEGATIONS OF FACT

In November 2012, plaintiff was taken to the University of Wisconsin Hospital in Madison for spinal surgery. The procedure was initially going to be a "spinal fusion" surgery, in which a bone chip was removed from plaintiff's hip and placed between two of his vertebrae to "alleviate his constant, debilitating back pain." Dkt. 10, at 25. But during surgery, doctors discovered more serious problems with plaintiff's back. They fused another set of vertebrae and inserted two titanium rods, six pins, and "an unknown number of screws" into plaintiff's back, "holding everything together." *Id*.

Plaintiff received discharge orders covering the 30 days until his follow-up at UW Hospital. Plaintiff's discharge medication list included Valium, Gabapentin, Morphine, Oxycodone, and Clonazepam. Plaintiff received these medications for 11 days while at CCI, but defendant Dr. Dalia Suliene cancelled the prescriptions. Plaintiff told a prison psychiatrist about Suliene's actions, and the psychiatrist talked to Suliene and the Health Services Unit, but they refused to reinstate the medications. Plaintiff suffered severe withdrawal symptoms and pain.

For the next 14 months, plaintiff received only "low-level (non-opiate) nerve damage pain medications." *Id*. at 27. Plaintiff "became more physically disabled," by which I take him to be saying that his spinal pain was so severe that he could not walk. Instead, he was forced to crawl "to get food, use the bathroom, and move around the cell." *Id*. Because of plaintiff's struggles to move around, he fell several times, injuring himself further and resulting in trips to Divine Savior Hospital. Hospital staff prescribed pain medication for plaintiff but Suliene and the HSU manager would not allow plaintiff to have these medications. Plaintiff believes he fell because defendants Suliene, unit manager David Melby, and the members of the "Special Needs Committee" at CCI would not give him a cane, walker, or wheelchair. Similarly, defendants Melby and the Special Needs Committee would not place plaintiff in a unit with "handicap showers" containing grab bars and other accommodations, and no stairs. He was not able to shower because of this.

Because of the constant severe pain, plaintiff made several suicide attempts. Plaintiff ended up in "disciplinary units" because of these attempts. Although plaintiff was found to be suffering from mental illness, he received no treatment. Defendant Suliene "continued to refuse to treat [plaintiff's] pain." *Id*. at 29.

Suliene retired in 2013. Two part-time doctors (non-defendants Drs. Heinzl and Martin) filled in while a full-time replacement was being hired. Those doctors diagnosed plaintiff as suffering from "Sacroiliitis Post Lysectomy Syndrome" from the fusion surgery, and referred plaintiff to the Comprehensive Pain Management Clinic in Appleton. Staff there recommended that plaintiff undergo "Spinal Cord Stimulator Surgery" to alleviate plaintiff's pain. This surgery has been approved but has not yet been performed.

Drs. Heinzl and Martin received permission from defendant Dr. Kenneth Adler and the "oversight committee" to give prescribe long-term opiate medications to plaintiff to help with plaintiff's pain. But HSU staff did not tell Heinzl and Martin about the approval, so there was a long delay in plaintiff receiving this medication. Plaintiff ultimately received methadone, which helped him, although he says he never reached "full therapeutic target levels." *Id*. at 31.

Defendant Dr. Karl Hoffman replaced Heinzl. Upon meeting with plaintiff, Hoffman decided to wean plaintiff off of methadone. Plaintiff asked Hoffman if he knew how bad his pain was. Hoffman replied that he had not read plaintiff's file yet. Plaintiff was ultimately completely weaned off of methadone, even though it caused to him to suffer severe pain without that medication. Plaintiff now is in severe pain, he is "unsteady" standing, and he "is no longer able to fully function in the prison setting." *Id*. at 32.

Plaintiff's inability to function has further ramifications for his safety. Prison officials are aware that plaintiff is the retired leader of a Chicago gang, and that there are other gang-affiliated prisoners who would harm plaintiff if given the chance, yet defendants Warden Michael Dittman and Melby moved plaintiff into general population, where he faces the threat of harm.

ANALYSIS

A. Provision of medication

Plaintiff alleges that defendant Suliene and the "Health Services Unit manager" discontinued the pain medication prescribed upon discharge from UW Hospital, which caused him to suffer severe pain and withdrawal symptoms. He also alleges that Divine

Savior Hospital staff later prescribed him pain medication, but Suliene and the HSU manager would not allow plaintiff to have it.

The Eighth Amendment prohibits prison officials from acting with deliberate indifference toward prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (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). A medical need may be serious if it is life threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). For a defendant to be deliberately indifferent to such a need, he or she must know of the need and disregard it. *Id*. at 834.

Because plaintiff alleges that Suliene and the HSU manager repeatedly refused to allow plaintiff to have stronger pain medication even though he suffered severe pain and withdrawal symptoms, I will allow him to proceed on Eighth Amendment claims against Suliene and the HSU manager. Plaintiff gives the names of three different defendants who he says acted as the HSU manager (Karen Anderson, Keisha Perrnoud, and Meredith Mashak), but he does not explain which of these defendants took part in the decisions denying him these medications. I will allow plaintiff to proceed against the HSU manager as a "Jane Doe" defendant, and he will have to use this court's discovery procedures to identify the defendant (or defendants) named in this claim. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to

use discovery to identify the name of the Doe defendants and to amend the complaint to include the proper identity of those defendants.

B. Disability and falls

Plaintiff alleges that he became physically disabled after his surgery, was in pain, had extreme difficulty moving around, and fell several times because of prison officials' refusal to accommodate his disability by giving him a cane, walker, or wheelchair. In particular, plaintiff states that defendants Suliene, HSU manager Doe, and David Melby were responsible for failing to accommodate plaintiff's problems. I will allow plaintiff to proceed on Eighth Amendment medical care claims against each of these defendants for failing to property treat his medical problem.

I will also consider these claims under an Eighth Amendment theory that these defendants failed to protect plaintiff from the harm that occurred from his falls. To succeed on this theory, a plaintiff must show that that (1) he faced a "substantial risk of serious harm" and (2) the named prison officials acted with "deliberate indifference" to that risk. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005). I will allow plaintiff to proceed on failure to protect claims against Suliene, Doe HSU manager, and Melby because I can infer that they continued to withhold accommodations from plaintiff despite the injuries he suffered.

For both of these Eighth Amendment theories, plaintiff also alleges that members of the CCI Special Needs Committee were involved in the decision not to give him proper accommodations. Plaintiff does not explain whether Suliene, HSU manager Doe, Melby, or any other of the defendants he names in his amended complaint were on the committee, nor does he name Doe committee members as defendants. For now I will grant him leave to

proceed against Suliene, HSU manager Doe, and Melby. Plaintiff remains free to amend his complaint to include specific members of the committee.

Plaintiff also states that he could not shower because he was not placed in a unit with "handicap showers" and states that he would like to bring a claim under the Americans with Disabilities Act ("ADA"). Title II of the ADA provides that qualified individuals with disabilities may not "by reason of . . . disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. State prisons are considered "public entities," *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206-09 (1998), and state prison officials can be sued under the ADA for declaratory and injunctive relief, *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 606 (7th Cir. 2004). However, given the uncertainty about the availability of damages under Title II, the Court of Appeals for the Seventh Circuit has suggested replacing a prisoner's ADA claim with a parallel claim under the Rehabilitation Act, 29 U.S.C. § 701 et seq., where damages are available against a state that accepts federal assistance for prison operations.[1] *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) ("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) ("courts are supposed to analyze a litigant's claims and not just the legal theories that he propounds—especially when he is litigating pro se." (citations omitted)).

Claims under the Rehabilitation Act require the plaintiff to allege that "'(1) he is a qualified person (2) with a disability and (3) the [state agency] denied him access to a

[1] Courts have repeatedly taken judicial notice that every state accepts federal assistance for prison operations. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005).

program or activity because of his disability.'" *Wagoner v. Lemmon*, No. 13-3839, 2015 WL 449967, at *5 (7th Cir. Feb. 4, 2015) (quoting *Jaros*, 684 F.3d at 672). "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap, with reasonable accommodation." *Knapp v. Northwestern Univ.*, 101 F.3d 473, 482 (7th Cir. 1996) (internal quotation omitted). Disability includes the limitation of one or more major life activities, which includes caring for oneself, *see* 42 U.S.C. § 12102(2)(A). I take plaintiff to be saying that his ability to care for himself by showering has been limited by his back injuries. "Refusing to make reasonable accommodations [for a program or activity] is tantamount to denying access." *Jaros*, 684 F.3d at 672. I will allow plaintiff to proceed on a Rehabilitation Act claim for access to showers. *See id*. ("Although incarceration is not a program or activity . . . showers made available to inmates are."); *Kearney v. N.Y.S. DOCS*, 2012 WL 5197678, at *4 (W.D.N.Y. Oct. 19, 2012) (prisoner allowed to maintain claim for being "unable to access services, programs and activities, such as showers, dental care and recreation.").

The proper defendant for claims under the Rehabilitation Act is the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(B); *Jaros*, 684 F. 3d at 670 n.2. Plaintiff names two former secretaries of the DOC as defendants in his amended complaint. I will substitute Jon E. Litscher, the current secretary, as the defendant for this claim in his official capacity.

C. Psychiatric care

Plaintiff alleges that he became suicidal as a result of the severe pain he suffered, but that "CCI officials" did not treat his mental health problems, and instead disciplined him. But plaintiff does not describe who took these actions, so I cannot allow him to proceed on

claims about his psychiatric treatment. Plaintiff is free to amend his complaint to allege who took these actions.

D. Long-term opiate medications

Plaintiff alleges that non-defendant doctors Heinzl and Martin received permission from defendant Dr. Adler and the "oversight committee" to give prescribe long-term opiate medications to plaintiff, but provision of these medications was delayed because HSU staff did not tell Heinzl and Martin that the medications were approved. But plaintiff does not explain who failed to tell Heinzl and Martin, so he cannot proceed on claims about this issue.

Plaintiff also alleges that after he received these medications, defendant Dr. Hoffman weaned him off of them, resulting in plaintiff against experiencing severe pain. I will allow plaintiff to proceed on an Eighth Amendment claim against Hoffman for eliminating these medications.

E. Threat of gang violence

Plaintiff alleges that he was placed into general population by defendants Dittman and Melby despite their knowledge of plaintiff's weak physical state and threats of gang violence against him. For now, I conclude that plaintiff may proceed on an Eighth Amendment failure to protect claim because he has done enough to allege that he faces a substantial risk of physical harm in general population. As the case moves forward, plaintiff will have to explain in more detail the precise nature of threats he has received and how prison officials have responded to those threats.

F. Criminal allegations

Finally, plaintiff asks this court to initiate a "John Doe" criminal investigation under Wisconsin law to determine whether defendants and other prison officials have violated the

Wisconsin criminal statute against abusing prison inmates, Wis. Stat. § 940.29. However, this court cannot initiate criminal proceedings. State judges, not federal judges, preside over John Doe proceedings brought under Wis. Stat. § 968.26. If plaintiff wants to pursue criminal charges against defendants, he will have to contact law enforcement authorities or try to pursue John Doe proceedings in state court.

ORDER

IT IS ORDERED that:

1. Plaintiff Timothy Talley's motion for reconsideration of the court's September 15, 2015 order, Dkt. 22, is DENIED as moot.

2. Plaintiff's motion to dismiss without prejudice his claims about mistakes in the provision of his medication, Dkt. 27, is GRANTED.

3. Plaintiff is GRANTED leave to proceed on the following claims:

    - Eighth Amendment medical care claims against defendants Dalia Suliene and HSU manager Jane Doe for discontinuing plaintiff's pain medications prescribed by hospital staff.

    - Eighth Amendment medical care claims against defendants Suliene, HSU manager Doe, and David Melby for failing to provide plaintiff accommodations for his inability to move around.

    - Eighth Amendment failure to protect claims against defendants Suliene, HSU manager Doe, and David Melby for failing to provide accommodations.

    - A Rehabilitation Act claim against defendant Jon E. Litscher.

    - An Eighth Amendment medical care claim against defendant Karl Hoffman for weaning plaintiff off long-term opiate medication.

- Eighth Amendment failure to protect claims against defendants Michael Dittman and Melby for failing to protect plaintiff from the threat of gang violence in general population.

4. The caption will be amended to include defendants Dalia Suliene, Health Services Unit manager Jane Doe, and Jon E. Litscher.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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 defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff 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.

8. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and the defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered September 20, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge