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

CHARLES SHEPPARD,

Plaintiff,

v.

PATTERSON,WATERMAN,
BHS NURSING COORDINATOR,
NP MCARDLE, JOHN AND/OR JANE DOE,

Defendants.

OPINION AND ORDER

18-cv-896-wmc

*Pro se* plaintiff Charles Sheppard, a prisoner at the Wisconsin Secure Program Facility ("WSPF"), filed this lawsuit pursuant to 42 U.S.C. § 1983. Sheppard claims that defendants, all WSPF employees, violated his rights under the Eighth and Fourteenth Amendments and state law by terminating his prescription medication. Sheppard's complaint is ready for screening as required by 28 U.S.C. § 1915A. For the following reasons, the court will allow him to proceed against some, but not all, of the defendants.

## ALLEGATIONS OF FACT[1]

Sheppard is seeking to proceed against Dr. Patterson, Health Services Unit ("HSU") Manager Waterman, an unnamed Bureau of Health Services ("BHS") Coordinator at WSPF, Nurse Practitioner McCardle, and John or Jane Doe HSU staff.

Sheppard suffers from diabetic neuropathy, a type of nerve damage caused by diabetes, and for a long time had been prescribed Lyrica, a brand of pregabalin, to treat his

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously, drawing all reasonable inferences and resolving ambiguities in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint, unless otherwise noted.

nerve pain.

On August 7, 2018, Dr. Patterson and McCardle discontinued Sheppard's pregabalin prescription based on Waterman's allegedly unsubstantiated report that he was misusing the medication. Sheppard started suffering from withdrawal symptoms, and on August 10, 2018, he submitted a Health Services Request ("HSR") to the HSU, in which he reported that the cessation of his pregabalin caused him to suffer headaches, muscle aches, pain, dizziness, nausea, stomach cramps and sweating. However, no one from HSU called him in for examination.

On August 13 and 14, Sheppard was called to the HSU for other unspecified reasons. However, even though he complained to the nurses about his withdrawal from pregabalin, none of the nurses responded to his complaint or noted his complaints in his medical files. Since that time, Sheppard has repeatedly reported pain due to his neuropathy to health care providers, one of whom was McCardle, who responded that she did not care. While McCardle did prescribe him Topamax (a medication that has also been used to treat diabetic neuropathy), she did not change the prescription when Sheppard told her that medication did not work.

## OPINION

Plaintiff seeks leave to proceed against all of the defendants on Eighth Amendment deliberate indifference, Fourteenth Amendment due process and Wisconsin negligence claims.

As an initial matter, the court is dismissing the "BHS Nursing Coordinator." This unnamed individual was not involved directly in the treatment that gave rise to the

allegations comprising plaintiff's claims, so he or she cannot be held liable under § 1983. *See Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996) ("a supervising prison official cannot incur § 1983 liability unless that officer is shown to be personally responsible for a deprivation of a constitutional right"); *see also Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir.1988) (noting that "supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable"). To be sure, a supervisor might be liable for flawed policies or deficient training, over which the supervisor had control, if the policies or training amount to deliberate indifference to the rights of the persons affected by the policies or inadequate training. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). However, since plaintiff has not challenged any official or unofficial policies that the nursing coordinator knew about or condoned, plaintiff may not proceed against this individual on any claim.

## I. Deliberate Indifference

A prison official who violates the Eighth Amendment in the context of a prisoner's medical treatment demonstrates "deliberate indifference" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). "Serious medical needs" include (1) life-threatening conditions or those carrying a risk of permanent serious impairment if left untreated, (2) withholding of medical care that results in needless pain and suffering, or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997).

"Deliberate indifference" encompasses two elements: (1) awareness on the part of officials that the prisoner needs medical treatment and (2) disregard of this risk by conscious failure to take reasonable measures. Allegations of delayed care, even a delay of a just a few days, may violate the Eighth Amendment if the alleged delayed caused the inmate's condition to worsen or unnecessarily prolonged his pain. *See Estelle*, 429 U.S. at 104–05; *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *Petties v. Carter* 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that inexplicable delay in medical treatment for a prisoner, which serves no penological interest, can support an inference of deliberate indifference, as element for a prisoner's Eighth Amendment claim); *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable under the Eighth Amendment for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference). Thus, a plaintiff's claim has three elements under this standard:

1. Did plaintiff objectively need medical treatment?
2. Did defendants know that plaintiff needed treatment?
3. Despite their awareness of the need, did defendants consciously fail to take reasonable measures to provide the necessary treatment?

As an initial matter, the court will accept for purposes of screening that plaintiff's prescription for pregabalin and subsequent reports of withdrawal symptoms both constitute serious medical needs. The next inquiry, then, is whether each defendant's alleged response to his need for his prescription, or reports of withdrawal symptoms, gives

rise to an inference of deliberate indifference.

Waterman, McCardle and Patterson's group decision to abruptly, and allegedly without justification or examination of plaintiff, terminate plaintiff's pregabalin prescription supports a reasonable inference of deliberate indifference. Indeed, plaintiff's allegations that he had been on that medication for a long time to treat his condition, coupled with his subsequent reports of suffering severe withdrawal symptoms, suggest that their decision completely abandoned professional judgment. Moreover, McCardle's alleged decision to persist in treating him with an ineffective medication (Topamax) also permits an inference of deliberate indifference. *Petties*, 836 F.3d at 729-31 (decision to persist in a course of treatment known to be ineffective supports a finding of deliberate indifference). Accordingly, the court will grant plaintiff leave to proceed against these defendants on deliberate indifference claims.

However, as currently pled, the court cannot grant plaintiff leave to proceed against the John/Jane Doe HSU employee. To be fair, it is reasonable to infer that the failure by HSU staff to call plaintiff to the HSU to evaluate the severity of the symptoms he reported in his August 10 HSR, as well as the failure of HSU staff that examined him for other issues on August 13 and 14 to address his reported withdrawal symptoms, constituted deliberate indifference. The problem is that plaintiff does not specifically attribute these failures to any one nurse or staff member that the court could reasonably infer to be the "Doe HSU employee" he names as a defendant. As such, the court cannot reasonably infer that the Doe defendant was personally involved in his care, much less that this defendant responded with deliberate indifference to plaintiff's serious medical needs. To the extent

plaintiff believes he may proceed against the HSU staff more generally, that belief is mistaken because "HSU staff" is not a "person" that may be sued under § 1983. *Smith v. Knox County Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) ("A prison or department in a prison cannot be sued because it cannot accept service of the complaint."). Therefore, if plaintiff would like to proceed against any *individual* within the HSU, he should seek leave to file an amended complaint that alleges with precision which proposed Doe defendant (or defendants, if there were different HSU staff members handling his requests to be seen) did what. Should plaintiff file such a proposed amended complaint, the court would promptly screen it as required by § 1915A.

## II. Fourteenth Amendment Due Process Clause

Plaintiff also seeks leave to proceed on a Fourteenth Amendment due process clause claim because he was not afforded notice prior to the termination of his prescription. Yet plaintiff's allegations comprising this claim are the exact allegations comprising his deliberate indifference claim: his medical providers terminated his prescription without giving him an opportunity to object and he suffered withdrawal symptoms as a result. The circumstances may have been different if, for example, plaintiff had been issued a conduct report and punished for misusing his medications. However, since plaintiff has not suggested as much, his Fourteenth Amendment claim appears wholly duplicative of his Eighth Amendment claim, and thus he does not allege facts sufficient to support a separate Fourteenth Amendment claim. *See Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (dismissing equal protection and Eighth Amendment claims based on same circumstances as free exercise claim because free exercise claim "gains nothing by attracting additional

constitutional labels"); *Williams v. Snyder*, 150 F. App'x 549, 552-52 (7th Cir. 2005) (dismissing equal protection, access to courts, due process and Eighth Amendment claims as duplicative of retaliation and freedom of religion claims). Accordingly, plaintiff may not proceed on a Fourteenth Amendment due process claim.

## III. Wisconsin Negligence

Finally, plaintiff seeks to proceed on Wisconsin negligence claims against the same defendants. Jurisdiction is proper over these claims under 28 U.S.C. § 1367(a) ("[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). As an initial matter, since the Eighth Amendment claims against the BHS nursing coordinator and Doe have been dismissed, the court will decline to exercise jurisdiction over the state law tort claims against them as well. *See, e.g.*, *Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) (affirming trail court's dismissal of plaintiff's state law claims for lack of jurisdiction after parallel federal claims had been dismissed).

Under Wisconsin law, the elements of a cause of action in negligence are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty, which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 307 (1987).

Plaintiff may proceed on a negligence claim against Dr. Patterson, Waterman and

McCardle. Each defendant owed plaintiff a duty of care. It is plausible that they breached their duty by terminating his prescription without titrating down the dosage, or prescribing him another medication to address his neuropathy. And, it follows that the plaintiff's pain and suffering was proximately caused by their breach.

ORDER

IT IS ORDERED that:

1. Plaintiff Charles Sheppard is GRANTED leave to proceed on Eighth Amendment deliberate indifference and Wisconsin negligence claims against defendants Patterson, Waterman and McCardle.

2. Plaintiff is DENIED leave to proceed on any other claims, and defendant BHS Nursing Coordinator and John/Jane Doe are DISMISSED from this lawsuit.

3. Pursuant to 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 the plaintiff's complaint if it accepts service for the defendants.

4. 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 defendant. 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 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. 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 defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.

Entered this 21st day of March, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge