UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GAVEN PICCIANO,

Plaintiff,

vs.

CLARK COUNTY, CLARK COUNTY JAIL, WELLPATH, LLC, and NAPHCARE, INC.,

Defendants.

Civil Action No. 3:20-cv-06106-DGE

DEFENDANT WELLPATH, LLC'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Noted Date for Motion: March 11, 2022

I. RELIEF REQUESTED

Defendant Wellpath, LLC requests that the District Court dismiss the Second Amended Complaint with prejudice. Three causes of action must be dismissed as a matter of law. The Washington state civil rights statutes do not apply because jails do not fall within the definition of a public accommodation. Plaintiff's claim for negligent infliction of emotional distress fails because Plaintiff was not a bystander to a tort committed on a third party. Plaintiff's claim of outrage against Wellpath also fails as a matter of law.

Plaintiff's remaining allegations against Wellpath still fail to satisfy necessary pleading requirements under Rule 8. Plaintiff's allegations are formulaic and are conclusory. The claims for violations of the Rehabilitation Act of 1973, 42 U.S.C. § 1983, and negligence should be dismissed with prejudice.

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II. STATEMENT OF FACTS

In May 2021, Wellpath filed a motion to dismiss the First Amended Complaint. (Dkt. 31) That motion pointed out the following: (a) Plaintiff had received discovery; (b) there were no allegations that Plaintiff saw a Wellpath provider on January 30 or 31, 2020. Wellpath's original motion to dismiss was primarily predicated on Plaintiff's shotgun approach in which all "Defendants" were lumped together and there was no factual specificity as to what Wellpath's alleged misconduct was on January 30 and 31, 2020, the only two days that it was involved with Plaintiff.

The court dismissed the First Amended Complaint on January 4, 2022 and gave Plaintiff until January 25 to file an amended complaint. (Dkt. 42) The Court's ruling was based on pleading requirements, but reserved ruling on whether some or all remained allegations after an amended complaint was filed. (Dkt. 42 at 4)

Plaintiff's Second Amended Complaint is an improvement, but legally it fares no better than the First Amended Complaint. The Second Amended Complaint contains numerous conclusory allegations that are not based on facts. The following are but two examples:

Wellpath was responsible for Plaintiff's dietary requirements. (Dkt. 43 at 4 ¶ 6) However, the Second Amended Complaint states that the jail prepared meals and served them to the detainees. (*Id*. at 5 ¶ 18)

"Upon information and belief, it was the policy of . . . Wellpath . . . that individuals with food allergies not receive medically necessary diets" until medical records are requested, approved and the jail kitchen is notified. (Dkt. 43 at 6 ¶ 22)

State and federal law, as well as Federal Rule of Civil Procedure 8 require that the Second Amended Complaint against Wellpath be dismissed with prejudice.

III. LEGAL AUTHORITY AND ARGUMENT

Pursuant to Fed. R. Civ. P. 12(b)(6), three counts (Four, Six and Seven) must be dismissed as a matter of law because the Second Amended Complaint fails to state a valid cause of action against Wellpath. The remaining counts against Wellpath should be dismissed because

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they still fail to contain the necessary factual allegations to support the various elements of those causes of action.

A. The Washington State Civil Rights Claim Fails as a Matter of Law and Must be Dismissed with Prejudice.

Count Four of the Second Amended Complaint is for an alleged violation of the Washington Law Against Discrimination. (Dkt. 43 at 20-22) Plaintiff admits that this state law applies to public accommodations.

The federal district courts for both the Western and Eastern Districts have held on a number of occasions that the Washington anti-discrimination law ***does not apply to county jails*** because a jail does not provide public accommodations. *See, e.g., Skylstad v. Washington,* 2019 U.S. Dist. LEXIS 29591, at *16-*17 (W.D. Wa. 2019); *Foley v. Klickitat County*, 2009 U.S. Dist. LEXIS 120943, at *6 (E.D. Wa. 2009). The Washington statute applies to places that are "generally open to the public," which a county jail is not. *Skylstad*, 2019 U.S. Dist. LEXIS at 29591, at*16. Wellpath does not provide health care to the public. It provided care in a jail. Wellpath does not fall within the definition of a public accommodation.

Therefore, the district court must dismiss with prejudice Count Four of the Second Amended Complaint.

B. The Negligent Infliction of Emotional Distress Claim (Count Six) fails as a Matter of Law Because Plaintiff was not a Bystander to a Tort

Plaintiff's allegations in Count Six are based on alleged "negligent" infliction of emotional distress by Wellpath. (Dkt. 43, at 24, ¶ 138) This cause of action was asserted in the First Amended Complaint and was also part of Wellpath's initial motion to dismiss. (Dkt. 31) The legal merits of this claim were deferred by the Court. (Dkt. 42 at 4)

Negligent infliction of emotional distress applies to ***bystanders*** who suffer an emotional injury after the plaintiff witnesses an injury ***to a loved one*** and the plaintiff was in the zone of danger when the family member was physically injured. *Colbert v. Moomba Sports, Inc.*, 163 Wn.43, 49, 176 P.3d 497 (2008) (bystander). The emotional distress must be susceptible to

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medical diagnosis and proved through medical evidence. The symptoms of emotional distress must also constitute a diagnosable emotional disorder. *Kloepfel*, 149 Wn.2d at 196-97. This is a limited, judicially created tort. *Colbert*, 163 Wn. at 49.

Plaintiff was not a bystander to a tort committed on a loved one. Plaintiff was not ***diagnosed*** with emotional distress that is documented in a medical record. (Dkt. 43 at 23-24 (absence of allegations of diagnosis or medical evidence of emotional distress)) Accordingly, Wellpath is entitled to the dismissal of Count Six with prejudice.

C. Count Seven (Outrage) Must be Dismissed as a Matter of Law

Outrage was another claim that was the subject of Wellpath's initial motion to dismiss and a ruling was deferred by the court. Wellpath again renews its motion to dismiss this claim.

The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1 (2003). The elements of a claim for the tort of outrage or the intentional infliction of emotional distress are "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). The conduct must be "'so outrageous and so extreme as to go beyond all possible bounds of decency, and be regarded as atrocious, and intolerable in a civilized community. *Reyes v. Yakima Health Dist*., 191 Wash. 2d 79, 91, 419 P.3d 819, 825 (2018); *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (plurality opinion). The tort of outrage does not apply to mere insults, threats, indignities, annoyances, petty oppressions; the plaintiff must "`necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.'" *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003).

This court "must make" an initial legal determination whether the conduct may be reasonably regarded as so extreme and outrageous to warrant a factual decision by a jury. *Repin v. State*, 198 Wn. App. 243, 266-67, 392 P.3d 1174 (Ct. App. 2017). The level of outrageous conduct is extremely high and is not an easy standard to meet. *Id*. at 266-67. Gross negligence by a healthcare provider does not satisfy the tort of outrage. *Christian v. Tohmeh*, 191 Wn. App.

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709 (2015).

While Plaintiff alleges that he disclosed that he had Celiac Disease on January 30, 2020, Plaintiff did not allege his response when asked who his doctor was and whether he would sign a release to obtain his medical records. Plaintiff also does not allege what time of day the disclosure was made and whether that disclosure was made at a time that the Clark County kitchen staff had time to change his evening meal.

Plaintiff claims in the Second Amended Complaint that there was a policy or requirement that there be medical verification of a detainee's claim of a medical condition warranting a special diet. (Dkt. 43 at 6 ¶ 22) Even if this conclusory allegation were true and legally sufficient, which it is not, that allegation still does not rise to the level of being beyond all bounds of decency in society for a healthcare provider in a jail. ***Plaintiff agrees that a "medical evaluation" needed to occur*** and that evaluation would assess whether Plaintiff was "required" to have a medically necessary diet. (Dkt. 43 at 6 ¶ 20)

The district court should dismiss Count Seven (Outrage) with prejudice.

D. Plaintiff's Claim Regarding a Violation of the Rehabilitation Act of 1973 (Count Two) Should be Dismissed

Plaintiff is suing for money damages from Wellpath for an alleged violation of the Rehabilitation Act of 1973. (Dkt. 43 at 18, ¶ 101; 32, ¶ (b)) Plaintiff must provide evidence that Wellpath ***intended to discriminate*** against him regarding an alleged disability. *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998); *Lantis v. Marion County*, 2014 U.S. Dist. LEXIS 65394, at *11 (D. Or. 2014). The deliberate indifference standard applicable to § 1983 cases has been applied to cases under the Rehabilitation Act. *Lantis*, 2014 U.S. Dist. LEXIS 65394, at 11. Mere negligence is not sufficient to state a claim. For the first element of deliberate indifference, there has to be notice that an accommodation was required. *Id.* at 12. The second element requires an element of "deliberateness," not mere negligence. *Id*. Wellpath was entitled to an investigation into whether accommodations were necessary. *Id*.

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1. Plaintiff Claims a "Medical Evaluation" Should have Been Done

Plaintiff has never alleged who acted on behalf of Wellpath and allegedly whose conduct caused a violation of the Rehabilitation Act. Plaintiff does not even allege the job category of the person who spoke to him on January 30 or 31 (e.g., registered nurse, LPN, physician assistant, doctor). The absence of an allegation of the name and/or license of that person is fatal given the concurrent allegation that a "medical evaluation" had to take place.

Wellpath employed nurses in the Clark County Jail. Nurses conduct ***nursing evaluations*** and make a nursing diagnoses with the scope of practice for that particular licensee. WAC 246-840-700(2) (Washington nursing process defined). Numerous courts have noted that nurses perform a nursing assessment. *See Lyons v. Multnomah Cty.*, 2017 U.S. Dist. LEXIS 157813, at *8-*9 (D. Or. 2017) (nursing assessment and orthopedic consultation); *Sampson v. Ukiah Valley Med. Ctr.*, 2017 U.S. Dist. LEXIS 102452, at *17 (N.D. Cal. 2017) (allegation that nurse failed to conduct "nursing assessment"); *Turner v. Cal. Forensic Med. Group*, 2013 U.S. Dist. LEXIS 38321, at *16 (E.D. Cal. 2013) (Yolo County psychiatric nurse conducted a "nursing assessment" on intake to the jail). Thus, a nursing assessment or nursing evaluation is, *a fortiori,* not the same thing as a "medical evaluation."

2. Assessing Whether a Gluten-Free Diet was "Required"

Plaintiff also alleged that part of that medical evaluation was an assessment of whether a special diet was "required." (Dkt. 43 at 6 ¶ 20) The words "assess," "whether," and "required," are three different elements of the "medical evaluation" process. Use of the words "whether" and "required" is an admission that a process has to take place and then a conclusion reached by a person as part of the evaluation process.

3. Plaintiff's Allegations Fall Short

The Supreme Court noted in *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009) that allegations that a defendant knew, condoned and agreed to subject a person to harsh conditions of confinement were merely bare assertions that were improper formulaic recitation of the elements of a claim. Such formulaic allegations need not be taken as true. *Id*. at 681. Whether a

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complaint contains sufficient factual allegations is a "context-specific" analysis. *Id*. at 679. The context-specific analysis here is the who did Plaintiff speak to upon arrival in the jail on January 30 and if the "medical evaluation" process would have resulted in receipt of gluten free meals.

The following factual allegations are fatal omissions to Plaintiff's Rehabilitation Act claim: (1) who saw or spoke to Plaintiff on January 30 or 31; (2) the license held by that person; (3) whether the person was licensed to make a diagnosis that Celiac Disease existed; (4) what steps should have been taken to conduct the "medical evaluation;" (5) when would a "medical evaluation" have taken place in a jail given the license of the person or persons who saw Plaintiff on January 30 or 31? (6) whether the "medical evaluation" would have resulted in a recommendation to receive a gluten free diet; and (7) what meals would Plaintiff have received on January 30 or 31 that would have been gluten free based on the timing of the "medical evaluation."

Plaintiff's Second Amended Complaint fails to include the necessary factual allegations against Wellpath to support a Rehabilitation Act claim. *Iqbal*, 556 U.S. at 678. The district court should dismiss Plaintiff's Rehabilitation Act claim (Count Two) against Wellpath.

E. The § 1983 Claim is Based on Conclusory Allegations and Must be Dismissed

Plaintiff is suing Wellpath as an entity. Plaintiff's burden is to prove that Wellpath had an unconstitutional policy or practice, and this unconstitutional policy caused an injury. *Martinez v. Richard A. Cummo & Assoc*., 2015 U.S. Dist. LEXIS 145688 *4 (E.D. Cal. 2015); *Cornish v. Corr. Corp. of Am.*, 2011 U.S. Dist. LEXIS 33205 at *6 (D. Ariz. 2011).

1. Claims Based on the Conduct of Individuals Must Be Dismissed

Plaintiff's Second Amended Complaint, however, contains allegations regarding specific conduct by people. Paragraph 111 alleges that Wellpath "failed to take steps necessary to ensure that Mr. Picciano had timely access to . . . gluten-free meals." Plaintiff's allegations regarding Wellpath's actions or inactions are claims of improper conduct by employees. The § 1983 allegations against Wellpath in paragraph 111 must be dismissed as a matter of law.

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2. The Policy Claims Are Conclusory

Plaintiff asserted the conclusory allegation that Wellpath had an unconstitutional policy based "[u]pon information and belief." (Dkt. 43 at 6 ¶ 22) Making an allegation based on "information and belief" is not a valid factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 551, 557 (2007) (not accepting as true conclusory allegations based on information and belief); *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013); *Ryan v. Salisbury*, 2019 U.S. Dist. LEXIS 180158, at * 38 (D. Hawaii 2019) (citing cases).

The specific section regarding the alleged § 1983 violations is also couched in conclusions. For example, paragraph 109 merely contains the legal conclusion that there was a custom or practice by Wellpath to not provide medically necessary meals to people. There is no factual support for the claim of such a policy. Similarly, Plaintiff's allegation regarding acting with "reckless or callous indifference" (Dkt. 43, at 20 ¶ 111) is another conclusory allegation that is a legal conclusion. Legal conclusions are not accepted as being true. *Iqbal*, 556 U.S. at 678.

Wellpath requests that the district court dismiss Count Three (alleged violation of § 1983).

F. The District Court Should Dismiss the Negligence Claim (Count Five)

The only remaining allegation against Wellpath is for negligence. In considering the allegations in Count Five, the district court is entitled to draw upon judicial experience and common sense. *Iqbal*, 556 U.S. at 679. The analysis of the negligence claim is also context specific. *Id*.

Plaintiff cannot simply allege that there was a duty, breach of a duty, and a cause of an injury. Such formulaic incantations do not contain sufficient factual allegations. *Iqbal,* 556 U.S. at 681. The court knows from its own common sense and judicial experience that health care is provided ***by people*** and those people have specific job titles. *See Lyons*, 2017 U.S. Dist. LEXIS 157813, at *8-*9; *Sampson*, 2017 U.S. Dist. LEXIS 102452, at *17; *Turner*, 2013 U.S. Dist. LEXIS 38321, at *16. Consequently, ***who*** allegedly provided negligent care is a key fact.

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Negligence claims against a healthcare provider are malpractice claims. Medical malpractice is defined as what a reasonable and prudent health care provider ***in the same profession*** would do under the same or similar circumstances, and that failure was a proximate cause of injuries. RCW 7.70.040(1); *Frausto v.Yakima HMA, LLC*, 188 Wn.2d 227, 231-32, 393 P.3d 776, 779 (2017). The district court's January 4, 2022 ruling advised the parties that clear and precise pleadings are necessary to control discovery, which impacts the court's docket, that imprecise allegations makes cases unmanageable, and causes harm to the litigants and society. (Dkt. 42 at 4, *quoting Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir. 1996)). Plaintiff did not heed the court's warning.

Plaintiff failed to allege who he saw on January 30 or 31 and that person's job title or profession. The name and job title of that person should be in a pleading because the allegation regarding what that person did wrong controls the discovery process (e.g., standard of care of a nurse, standard of care of a doctor). Plaintiff has been in the possession of medical records for at least a year. Plaintiff refuses to allege the identity of person who acted negligently, the profession of that person, what a reasonable person in that profession would do under the same or circumstances, and whether compliance with the standard of care would have prevented harm.

The district court should dismiss the negligence claim (Count Five) with prejudice.

IV. CONCLUSION

Plaintiff's allegations against Wellpath fail to state a claim upon which relief can be granted. The Washington civil rights law does not apply in a jail setting, and the elements of negligent infliction of emotional distress and outrage cannot be satisfied. These three claims fail as a matter of law. The remaining allegations (Rehabilitation Act of 1973, § 1983, and negligence/malpractice) are based on conclusory allegations and all should be dismissed.

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Accordingly, Defendant Wellpath, LLC requests that the district court dismiss Plaintiff's Second Amended Complaint with prejudice.

DATED this 8th day of February, 2022.

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CERTIFICATE OF SERVICE

I certify that on February 8, 2022, I electronically filed the foregoing **DEFENDANT WELLPATH, LLC'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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