

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

DAVID L. SHANKS, JR.,

Plaintiff,

v.

JON LITSCHER and
GERALD BERGE,

Defendants.

ORDER

02-C-0064-C

Plaintiff David L. Shanks, Jr. is an inmate of Supermax Correctional Institution. He brought this civil suit for money damages, pursuant to 42 U.S.C. § 1983, contending that defendants Jon Litscher, Gerald Berge, Kyle Davidson and Does 1-100 violated a number of his constitutional rights. He was granted leave to proceed on two of his claims: that the conditions of confinement at Supermax violate his Eighth Amendment rights and that the systemic inadequacies in the provision of dental care at the institution violate his Eighth Amendment rights. Defendants Kyle Davidson and Does 1-100 were dismissed from the case for plaintiff's failure to state any viable claim against them.

The case is before the court now on defendants' motion to dismiss some of plaintiff's

claims for lack of standing or for failure to exhaust his administrative remedies. Plaintiff concedes that he did not exhaust his administrative remedies as to two of his claims; those claims will be dismissed. Defendants have filed a well-founded motion to dismiss plaintiff's claim of systemic problems in the provision of dental services; however, on reconsideration of the issue, I am convinced that I erred in denying plaintiff leave to proceed on his Eighth Amendment claim of denial of dental services. On the court's own motion, I will vacate my earlier order denying plaintiff leave to proceed on that claim and allow it to go forward.

ALLEGATIONS OF FACT

Plaintiff David L. Shanks, Jr. is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin. Defendant Jon Litscher is Secretary of the Department of Corrections. Defendant Gerald Berge is Warden of Supermax.

At Supermax, plaintiff is subjected to almost total social isolation and sensory deprivation. His cell lacks windows; he must remain in it 24 hours a day, with only four hours a week of recreation in a recreation cell that has no windows and no exercise equipment; and his cell has extremely high and low temperatures and is illuminated at all times.

Plaintiff asked for dental care at Supermax because his teeth hurt. He waited from the day he filed a request slip to see the dentist for almost two months before he was placed

on the waiting list, despite suffering from excruciating pain in his mouth. He saw the dentist three months after filing his initial request. The dentist advised him that he had nine cavities and two wisdom teeth that needed pulling and that he would have to choose between having four cavities filled or the two wisdom teeth pulled because other inmates were waiting for care. Plaintiff asked for pain medication but was not given any. He was told he would have to go back on the waiting list before getting any more dental work done. A week later, he was given 400 mg. of ibuprofen for his pain. He asked for additional pain treatment on September 16, 19 and 20, 2001, because the ibuprofen was not working.

On September 24, 2001, plaintiff saw the dentist again. This time he chose to have the wisdom teeth extracted. Plaintiff filed an inmate complaint about the lack of dental care and his pain. He was in so much pain that he was afraid to eat or drink and he could not sleep. He asked for pain medication on September 28, October 4 and October 5, 2001, but his requests were rejected. He was finally given medication on October 6, 2001. When he complained that the ibuprofen was not working, he received no response.

On December 3, 2001, plaintiff saw the dentist again. The dentist was able to fill only two of his remaining five cavities, despite plaintiff's telling her that he was in considerable pain. He was told to go back on the waiting list for the last three cavities. As of March 19, 2002, he had not seen the dentist again.

FINDINGS ON EXHAUSTION

I take judicial notice of the public records attached to the affidavit of John Ray, Corrections Complaint Examiner that pertain to plaintiff's efforts to exhaust his Eighth Amendment claims administratively. Plaintiff filed inmate complaints SMCI-2001-15768; SMCI-2001-15812; SMCI-2001-16450; SMCI-2001-16792; SMCI-2001-19687; SMCI-2001-26615; SMCI-2001-26634; SMCI-2001-26636; SMCI-2001-28067; SMCI-2001-28358; and SMCI-2002-1889, in which he complained of conditions of his confinement at the institution. None of them referred to excessively warm temperatures or a lack of windows in his cell.

OPINION

Plaintiff concedes that he has not exhausted his administrative remedies with respect to the lack of windows in his cell and to allegedly high temperatures. Therefore, those claims will be dismissed. The three separate claims concerning conditions of confinement that will go forward are the following: (1) plaintiff is subjected to almost total social and physical isolation because he must remain in his cell 24 hours a day, except for the four hours he is allowed to go to the exercise cell; (2) his cell is illuminated constantly; and (3) in winter, his cell is extremely cold.

Defendant argues that it was error to allow plaintiff leave to proceed on his claim of

systemic problems in the provision of dental care at the institution. Defendants are correct that a person who does not have his own constitutional injury is not a proper person to raise the constitutional wrongs of others. However, now that I have reconsidered plaintiff's own claim of denial of dental services, I see no reason why plaintiff cannot challenge the lack of proper dental care at Supermax. He is not attacking anything the dentist did for him or even her inability to give immediate attention to all of his dental problems; he is attacking defendants' failure to provide adequate personnel to meet the serious dental needs of the Supermax population.

Plaintiff's allegations are sufficient to suggest that he was denied constitutionally adequate dental care and pain medication. I will amend the March 15, 2002 order to vacate the order denying plaintiff leave to proceed on his Eighth Amendment claim of inadequate dental treatment. Plaintiff has alleged that he filed a number of inmate complaints about the inadequacy of the dental care and the provision of pain medication. At this stage of the proceedings, these allegations suffice to show that defendants would have been aware of the problems in the provision of dental care and pain medication.

ORDER

IT IS ORDERED that the order entered on March 15, 2002, is AMENDED to vacate that portion of the order denying plaintiff David L. Shanks, Jr. leave to proceed on his claim

that he was denied constitutionally adequate dental care and pain medication. FURTHER, IT IS ORDERED that the motion to dismiss filed by defendant Jon Litscher and Gerald Berge is GRANTED with respect to plaintiff's claims relating to excessively warm temperatures in his cell and a lack of windows in his cell. It is DENIED with respect to defendants' motion to dismiss plaintiff's challenge to systemic problems in the provision of dental services. The case will go forward on the following claims: (1) plaintiff was subjected to total social and sensory deprivation while confined to his cell 24 hours a day; (2) he was subjected to excessively cold temperatures in his cell; (3) he was subjected to constant illumination of his cell; and (4) he was subjected to cruel and unusual punishment when he was denied adequate dental treatment and pain medication.

Entered this 19th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge