

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

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ANTHONY TUCKER,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF
CORRECTIONS, OAKHILL
CORRECTIONAL INSTITUTION,
DIAMONDBACK CORRECTIONAL,
JACKSON CORRECTIONAL
INSTITUTION, NORTHFOLK
CORRECTIONAL FACILITY, PRAIRIE
CORRECTIONAL FACILITY, BUREAU
OF HEALTH SERVICES MEDICAL
DIRECTOR,

Defendants.

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OPINION AND
ORDER

06-C-066-C

ANTHONY TUCKER,

Plaintiff,

v.

OAKHILL CORRECTIONAL INSTITUTE,

VIJOYA DASGUPTA, VIRGINIA A
COSTELLO, PATRICIA VOERMANS,

06-C-067-C

DR. G. BRIDGEWATER,

Defendants.

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These are proposed civil actions for declaratory and monetary relief in which plaintiff Anthony Tucker contends that defendants Wisconsin Department of Corrections, Oakhill Correctional Institution, Diamondback Correctional, Jackson Correctional Institution, Northfolk Correctional Facility, Prairie Correctional Facility, Bureau of Health Services Medical Director, Vijoya Dasgupta, Virginia A. Costello, Patricia Voermans and Dr. G. Bridgewater violated his rights under the Eighth Amendment by exhibiting deliberate indifference to his serious medical needs. On January 6, 2006, plaintiff filed both actions in the United States District Court for the Eastern District of Wisconsin.

On January 11, 2006, the Hon. Charles N. Clevert, Jr. found plaintiff financially eligible to proceed in forma pauperis on both cases. Shortly thereafter, plaintiff notified the court that he believed his cases should have been filed in this district; consequently, Judge Clevert transferred both cases to this court on January 26, 2006. Because neither of plaintiff's cases has been screened under 28 U.S.C. § 1915(e)(2), in this order I must consider whether either or both of plaintiff's complaints should be dismissed on the ground that the action is legally meritless, fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. Because

plaintiff's complaints and the documents supporting them do not indicate that defendants were deliberately indifferent to his medical needs, both cases will be dismissed. Moreover, because his cases will be dismissed, I will deny plaintiff's motions for appointment of counsel in each case.

Plaintiff contends that his Eighth Amendment rights were violated when defendants "deprived [him of] medical treatment for over fifteen months." Plaintiff's complaint contains limited facts and does not indicate what actions were taken by each of the defendants named in his complaint. However, plaintiff attached to each of his complaints copies of inmate complaints he wrote to prison officials, clinical notes, letters from physicians and other documents relating to his medical condition. These materials are considered as part of his complaint. Fed. R. Civ. P. 10(c). Therefore, I draw the following allegations of fact from both the complaints and their attached documents.

ALLEGATIONS OF FACT

A. Parties

Plaintiff is an inmate of the Clay County jail in Mississippi. (At all times relevant to this lawsuit, plaintiff was incarcerated. It is unclear whether he was under the supervision of the Wisconsin Department of Corrections during the entire period of his incarceration.)

Defendants Northfolk Correctional Facility, Diamondback Correctional and Prairie Correctional Facility are prisons owned by the Correctional Corporation of America.

Defendants Jackson Correctional Institution and Oakhill Correctional Institution are prisons run by the Wisconsin Department of Corrections.

Defendant Patricia Voermans is the Wisconsin Department of Corrections' Health Services Nursing Coordinator.

Defendants Vijoya Dasgupta and G. Bridgewater are physicians with the Wisconsin Department of Corrections.

Defendant Virginia A. Costello is a nurse practitioner at the Oakhill Correctional Institution.

B. Medical History

Plaintiff suffers from degenerative disc disease, nerve root problems, narrowing of his spinal canal, disc bulging and spinal tumors that plaintiff believes may be cancerous. When plaintiff arrived in prison he had two tumors; he now has more than five tumors.

During his incarceration, plaintiff has seen numerous physicians, nurses and other medical care providers. On February 6, 2004, plaintiff received a magnetic resonance imaging (MRI) exam at the Appleton Municipal Hospital in Appleton, Minnesota. According to the radiology report, plaintiff's back showed signs of degenerative disc disease.

On February 12, 2004, plaintiff met with Dr. Hany Elkaremany at the Prairie Correctional Institution to discuss the MRI results. After examining plaintiff, Dr. Elkaremeny completed an “offsite consultation request form,” in which he requested that plaintiff be referred to a specialist for excision of an “episacral lipoma.¹” (According to The New Oxford American Dictionary 994 (2001), a lipoma is a benign tumor of fatty tissue.) Dr. Elkaremany noted, “I would prefer to have [plaintiff’s] episacral lipoma excised and see if this will relieve his back pain before trying to refer him to surgery.”

On March 30, 2004, Dr. Elkarameny again reviewed the results of plaintiff’s MRI, which showed disk collapse and degeneration. According to clinical notes of that visit, Dr. Elkarameny informed plaintiff that a surgical discectomy would be his “very last option.” Dr. Elkarameny’s notes indicated that he planned to refer plaintiff to a physical therapist.

On June 28, 2004, plaintiff was examined by defendant Yijoya Dasgupta, a physician at the Oakhill Correctional Institution. At that appointment, defendant Dasgupta told plaintiff that if he kept filing complaints with the Health Services Unit, he would find himself in trouble.

On July 14, 2004, plaintiff had an appointment with Dr. Lapsiwala, a neurosurgeon at the University of Wisconsin Hospital. In a letter to plaintiff dated August 11, 2004, Dr. Lapsiwala wrote:

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This letter is in response to your request for clarification on your clinic visit dated July 14, 2004. As a surgeon, we [sic] look at two different things to decide who is a candidate for surgery. We examine the patient and look at the imaging studies (MRI scan). We know exactly what a person's symptoms should be looking at the abnormalities of the MRI scans. If these two things match, surgery is perhaps an answer for them [sic]. Surgery is always the last resort for patients, and we never recommend it unless we are quite certain it will relieve their symptoms. Your radiology report very specifically notes everything that they see. As a surgeon, I am interested in neuro compromise. In my professional opinion, what I saw on the MRI would not directly correlate with the symptoms that you explained to me. Therefore, surgery would not be the answer. You are certainly free to pursue another opinion on this. I recommend a possible workup for other causes such as a rheumatologic workup in an attempt to find an answer for your symptoms.

On August 12, 2004, clinical notes indicate that plaintiff saw a physical therapist, who recommended that plaintiff be referred back to defendant Dasgupta.

On August 25, 2004, defendant Virginia Costello, a nurse practitioner at the Oakhill Correctional Institution, sent an e-mail message to several Department of Corrections officials stating that plaintiff had "significant medical issues" and that, although he did "not need a medical restriction," he should not be required to participate in any activity that caused him to be uncomfortable.

On September 8, 2004, plaintiff was seen again at the prison's health services unit. Clinical notes indicate that plaintiff's physical therapy had been "put on hold" and that the focus of plaintiff's treatment was pain management.

At some time, plaintiff requested a biopsy of the tumors on his back. On October 12,

2004, the Department of Corrections denied the request.

On November 12, 2004, defendant Patricia Voermans, Health Services Nursing Coordinator for the Wisconsin Department of Corrections, wrote to plaintiff, stating:

Your letter of November 5, 2004, to the Department of Corrections has been forwarded to me. In it, you again express concern about your medical care at Oakhill Correctional Institution (OCI) regarding your back pain, problems with the health staff, and your request to be released so that you may go home for treatment. I reviewed your medical records and discussed your concerns with Ms. Costello, the nurse practitioner at OCI previously. I answered these concerns in a letter to you dated November 3, 2004, and also in two recent complaints through the inmate complaint system.

As I previously indicated, you are receiving care according to a neurosurgery specialist recommendations form [sic] the University Hospital and the nurse practitioner at Oakhill. Although you are dissatisfied, the care you are receiving is appropriate and comprehensive.

On November 17, 2004, plaintiff was examined by defendant Bridgewater, a prison physician. According to defendant Bridgewater's notes, plaintiff was concerned that the lumps on his back were cancerous. Defendant Bridgewater noted, "No further treatment needed for lumps; they are benign." In an addendum to his clinical notes, defendant Bridgewater added:

Back pain "not explained by MRI" according to neurosurgeon. Rheumatologic work-up blood-wise negative. PT reports "pain increases and decreases." Lipoma or panniculitis is not inflamed. No other joint symptoms. This chart is full of repetitive complaints from this man. Seems like nothing will satisfy him. I recommend some indirect evaluation . . . I suspect he wants either narcotics or legal monetary settlement and main diagnosis is antisocial personality disorder.

Additional notes contained in plaintiff's clinical chart indicate that he was seen again by an unidentified treatment provider on December 8, 2004. The notes from that visit indicate that plaintiff "insist[ed] he ha[d] cancer."

On March 16, 2005, plaintiff was seen by Dr. Michael Bentz, a surgeon at the University of Wisconsin Hospital in Madison, Wisconsin. According to Dr. Bentz's clinical notes, the pain plaintiff was experiencing was not a result of the lipomas on his back. Dr. Bentz recommended that plaintiff have an MRI exam before proceeding with any pre-operative planning. In a letter to plaintiff dated March 23, 2005, Dr. Bentz stated his belief that the lipomas should be excised and again recommended that plaintiff obtain an MRI exam. In a letter to plaintiff dated April 11, 2005, Dr. Bentz repeated that plaintiff should have an MRI exam and told plaintiff that although it was theoretically possible to perform a "needle biopsy" of plaintiff's lipomas, Bentz had never ordered such an exam.

In an inmate complaint dated March 31, 2005, plaintiff alleged that defendant Costello had referred him to a dermatologist and had consulted with him on numerous occasions to discuss his medical problems. Plaintiff asserted that he had met with defendants Costello and Voermans and that they refused to authorize the MRI exam recommended by Dr. Bentz.

On November 15, 2005, a second MRI exam was performed on plaintiff. The following week, plaintiff was treated in the Clay County Medical Center emergency room,

where he was given pain medication and discharged.

OPINION

A. Proper Defendants Under 42 U.S.C. § 1983

In his complaints, plaintiff has named the Wisconsin Department of Corrections, Oakhill Correctional Institution, Diamondback Correctional, Jackson Correctional Institution, Norfolk Correctional Facility and Prairie Correctional Facility as defendants. Neither a state nor a state agency is a “person” within the meaning of 42 U.S.C. § 1983 and therefore may not be sued under that statute. Will v. Michigan Department of State Police, 491 U.S. 58 (1989); Ryan v. Illinois Department of Children and Family Services, 185 F.3d 751, 758 (7th Cir. 1999). Because the Wisconsin Department of Corrections is a state agency, it is not subject to liability under § 1983. Furthermore, prisons are not suable entities because they are not persons capable of accepting service of plaintiff's complaints or responding to them. Therefore, plaintiff has failed to state a claim under § 1983 against the Wisconsin Department of Corrections, Oakhill Correctional Institution, Diamondback Correctional, Jackson Correctional Institution, Norfolk Correctional Facility or Prairie Correctional Facility.

B. Deliberate Indifference

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners “humane conditions of confinement.” Farmer v. Brennan, 511 U.S. 825, 832 (1994). As long as conditions do not fall below contemporary standards of decency, they are not unconstitutional. Id. With respect to medical care, the Eighth Amendment is violated only when prison officials are deliberately indifferent to inmate health or safety. Farmer, 511 U.S. at 834. The Supreme Court has said that in the context of prisoner litigation, “deliberate indifference” means that an official (1) was aware of facts that could lead to the conclusion that a prisoner was at substantial risk of serious harm and (2) actually came to the conclusion that the prisoner was at substantial risk of serious harm. Id. at 837. Under this legal standard, it is not enough that an official “should have known” of a risk to plaintiff. Rather, the official must actually know of a risk and consciously choose to disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999).

The Court of Appeals for the Seventh Circuit has defined “serious medical needs” as conditions that carry risks of permanent impairment or death if left untreated and those in which the withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Plaintiff has alleged that he suffers from a degenerative disc disease, nerve root problems, narrowing of his spinal canal, disc bulging and spinal tumors that cause him pain and for which he requires medical attention. In other

words, he has alleged a serious medical need. The question, then, is whether defendants have been deliberately indifferent to his needs.

Plaintiff contends that defendants Bureau of Health Services Medical Director, Vijoya Dasgupta, Virginia A. Costello, Patricia Voermans and Dr. G. Bridgewater exhibited deliberate indifference to his medical needs when they refused to authorize a biopsy of the lumps on his back, denied him timely access to an MRI exam and failed to fully alleviate his back pain. However, the documents plaintiff has attached to his complaint show that he has received consistent, frequent medical care from prison physicians and outside specialists, that he has had access to physical therapy, pain medication and appropriate medical testing and that prison officials have responded conscientiously to his repeated medical complaints.

It is clear from plaintiff's complaints in these actions and from the complaints he has filed with the Department of Corrections that he is afraid the tumors on his back are cancerous and believes that he is in need of a biopsy. However, despite his concerns, the letters sent to him by numerous physicians and the copious notations contained in his clinical charts indicate that plaintiff's worries about cancer are unfounded; the lumps on his back are benign.

Despite the mixed recommendations of the doctors with whom he has consulted, plaintiff appears to believe that surgery would alleviate his pain. It is understandable that plaintiff wants his chronic pain to end. However, the Constitution does not require prison

officials to provide prisoners such as plaintiff with the medical care they believe to be appropriate; it requires officials to rely upon medical judgment to provide prisoners with care that is reasonable in light of their knowledge of each prisoner's problems. See, e.g., Estelle v. Gamble, 429 U.S. 97, 107 (1976) (plaintiff's objection to prison physician's failure to order back X-ray failed to state claim under Eighth Amendment when prison physicians provided minimal treatment). Because plaintiff has not alleged facts from which it can be inferred that defendants have treated his medical needs with indifference, he has failed to state a claim under the Eighth Amendment. Therefore, both cases will be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff's complaints in Case Nos. 06-C-066-C and 06-C-067-C are dismissed with prejudice for failure to state a claim upon which relief may be granted;
2. The unpaid balance of plaintiff's filing fee in each case is \$250, for a total fee of \$500; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. Two strikes will be recorded against plaintiff, one for each of his cases, pursuant

to § 1915(g); and

4. The clerk of court is directed to close the file.

FURTHER, IT IS ORDERED that plaintiff's motions for appointment of counsel in each of his cases are denied as moot.

Entered this 15th day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge