IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLAYTON HARDY MELLENDER,

Plaintiff, OPINION and ORDER

v. 06-C-298-C

DANE COUNTY and DR. YOUNG S. KIM,

Defendants.

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In an order dated July 13, 2006, I granted plaintiff leave to proceed in forma pauperis on his claims that defendant Kim violated his constitutional rights by refusing to dispense his prescription pain medication and that defendant Dane County violated his rights under the Eighth Amendment by promulgating and enforcing a policy prohibiting jail inmates from receiving prescribed narcotic medication.

Now before the court are the parties' cross-motions for summary judgment. Because the undisputed facts reveal that defendant Kim's decision to terminate plaintiff's methadone prescription was not made with deliberate indifference to his medical needs and because there is no evidence that defendant Dane County enacted or enforced any policy prohibiting inmates from receiving methadone, plaintiff's motion for summary judgment will be denied.

Defendants' cross-motion will be granted.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Clayton Mellender is a prisoner confined presently at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. From March 28, 2006 until March 31, 2006, plaintiff was confined at the Dane County jail.

Defendant Dane County is responsible for the operation of the Dane County jail.

Defendant Young Kim is a doctor. During March 2006, he was Medical Director of the Dane County jail.

B. Methadone

Plaintiff suffers from a number of medical conditions, for which he has been prescribed methadone. In March 2006, plaintiff had a valid methadone prescription.

On March 28, 2006, Mellender was transferred from state prison to the Dane County jail to attend a court appearance the following day. He brought his medications, including methadone, with him to the jail. Because plaintiff was taking methadone, a prescription

narcotic, he was placed in the jail's segregation unit.

On the evening of March 28, 2006 and the morning of March 29, 2006, jail nursing staff gave plaintiff his medication at regularly scheduled intervals. However, at approximately noon on March 29, 2006, without having examined plaintiff, defendant discontinued plaintiff's methadone prescription. When doing so, defendant ordered staff to place plaintiff on a closely monitored withdrawal protocol. Defendant ordered nursing staff to give plaintiff non-narcotic medication for pain, should plaintiff need it. Defendant instructed the nursing staff to watch plaintiff for symptoms of withdrawal. Such symptoms include weakness, restlessness, diaphoresis, shaking, twitching, anxiety, ataxia, drowsiness, vomiting, nausea, diarrhea, nystagmus, confusion, and slurred speech. Had plaintiff demonstrated any of these symptoms, defendant would have assessed him again and considered reinstating the methadone prescription.

On March 29, March 30 and March 31, 2006, medical staff periodically assessed plaintiff's blood pressure, pulse, respiration and temperature. He did not develop any symptoms of withdrawal from noon on March 29, 2006 through 10:30 a.m. on March 31, 2006.

At approximately 3:10 p.m. on March 30, 2006, plaintiff complained to jail staff about chest pains he was experiencing. The medical staff determined that plaintiff was experiencing angina. They phoned defendant, who directed them to give plaintiff a dose of

nitroglycerine. Within ten minutes of receiving the nitroglycerine, plaintiff's chest pain subsided.

The following day, plaintiff left the jail and returned to prison.

The Dane County jail has no official policy prohibiting the use of methadone by jail inmates.

OPINION

The Eighth Amendment's prohibition on "cruel and unusual punishment" establishes the minimum standard for the treatment of prisoners by prison officials. "Cruel and unusual punishment," is demonstrated by the "unnecessary and wanton infliction of pain," including pain that is inflicted "totally without penological justification." Hope v. Pelzer, 536 U.S. 730, 737 (2001). Although this is the general standard that applies to all types of Eighth Amendment claims, it is applied differently depending on the claim involved. For claims involving the adequacy of medical care, the question is whether petitioner suffered from a serious medical need, to which prison officials were deliberately indifferent. Estelle v. Gamble, 429 U.S. 97 (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). The condition does not have

to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

"Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable precautionary measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). To allow a jury to infer deliberate indifference on the basis of a physician's treatment decision, the decision must be so far afield of accepted professional standards as to imply that it was not actually based on a medical judgment. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 262 (7th Cir. 1996). Deliberate indifference is a high standard; inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

It is undisputed that plaintiff arrived at the jail with a valid medical prescription for methadone. From that fact it may be inferred that plaintiff had a medical condition that at least one doctor had found to warrant prescription pain medication. Nevertheless, it is undisputed that when defendant Kim decided to deny plaintiff's methadone, he took steps to insure that plaintiff would not suffer any serious medical problem as a result. Defendant Kim directed nursing staff to monitor plaintiff closely for signs of withdrawal and to provide

him with non-narcotic pain medication if he experienced any discomfort. Plaintiff did not propose as fact that he experienced any pain as a result of the discontinuation of his methadone and medical monitoring revealed no abnormalities that could be attributed to the discontinuation of plaintiff's methadone. (Although plaintiff's angina was a serious problem, neither plaintiff nor defendants have introduced any evidence from which it may be inferred that the episode of angina was related to the discontinuation of plaintiff's methadone.)

It is clear that plaintiff objected to defendant Kim's decision to discontinue his pain medication without examining him. However, plaintiff's disagreement with defendant's medical decisions is not, in itself, a ground for an Eighth Amendment claim. Because plaintiff has failed to show that defendant Kim acted with deliberate indifference to his medical needs, plaintiff's motion for summary judgment will be denied; defendant Kim's cross motion will be granted.

One claim remains: plaintiff's contention that defendant Dane County promulgated and enforced a policy prohibiting jail inmates from receiving prescribed narcotic medication. Plaintiff has adduced no evidence that such a policy exists and defendant Dane County denied that it does. In his brief, plaintiff argues that a jail nurse, Lisa Gregar, told him that such a policy existed; however, plaintiff has not submitted any admissible evidence to support this contention. Although plaintiff insists that he could produce such evidence at

trial, the Court of Appeals for the Seventh Circuit has stated repeatedly that summary judgment is the "put up or shut up" moment in a lawsuit. A party's failure to show what evidence he has to convince a trier of fact to accept his version of the facts will result in summary judgment for the opposing party. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Without admissible evidence of such a blanket jail policy prohibiting the use of narcotic medications, plaintiff lacks even the first piece of an Eighth Amendment claim against defendant Dane County. Because he had failed to meet his burden of coming forward with evidence on this claim, plaintiff's motion for summary judgment will be denied and defendant Dane County's cross-motion will be granted.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for summary judgment is DENIED.

2. Defendants Young Kim's and Dane County's cross-motion for summary judgment is GRANTED.

3. The clerk of court is directed to enter judgment in favor of defendants and close

this case.

Entered this 27th day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge