

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

SERGEY V. ANDREYEV

Plaintiff,

v.

OPINION AND ORDER

09-cv-651-slc

BRIAN KJORLIE, ROBERT KIEFER, MATTHEW EARLL,
CHRISTOPHER KUHL, KIMBERLY STILWELL,
CURTIS DEBOER, ROBERT ZANON,
HOLLEY DORNFIELD, JOSH BRANDSMA,
MICHAEL SCHLIESMAN, DAVID WEGNER,
SUSAN ROBERTS, ALEX AGNEW, SUSAN BARTON,
JUDY WEISS(n/k/a Judy Beilke), and JACOB PARKER,

Defendants.

Plaintiff Sergey V. Andreyev is proceeding on a claim that while he was detained at the Columbia County Jail, the defendants were deliberately indifferent to his serious dental needs. Jurisdiction is present pursuant to 28 U.S.C. §§ 1331. All of the defendants have moved for summary judgment. *See* dkt. 99. For the reasons stated below, I am granting defendants' motion.

FACTS

I. The Parties

At all times material to this action, plaintiff Sergey V. Andreyev was a pre-trial detainee at the Columbia County Jail, and all of the defendants—Brian Kjorlie, Robert Kiefer, Matthew Earll, Christopher Kuhl, Kimberly Stilwell, Curtis DeBoer, Robert Zanon, Holley Dornfield, Josh Brandsma, Michael Schliesman, David Wegner, Susan Roberts, Alex Agnew, Susan Barton, Judy Weiss (n/k/a Judy Beilke) and Jacob Parker—were employed there as jailers.

II. Plaintiff's Dental Health and Care

A. Before Plaintiff Was Jailed

About fourteen years ago, on November 24, 1996, plaintiff was diagnosed with severe periodontal disease, and this diagnosis was confirmed during subsequent dental appointments. Plaintiff's symptoms included persistent bleeding gums, constant oral pain, tooth decay and bone loss. Plaintiff described his pain as moderate-to-severe and always present.

On January 14, 2005, plaintiff's dentist Robert Savage, D.D.S., recommended the immediate extraction of plaintiff's molars, and the preparation of a full upper denture for plaintiff. At that time, plaintiff was suffering multiple infections; plaintiff had alveolar abscesses, which often result in toothaches and decay. Dr. Savage warned plaintiff that his infections would not go away unless plaintiff had his teeth extracted. Plaintiff's dental records indicate that he chose to postpone treatment. This delay necessitated the removal of plaintiff's remaining teeth. Late in 2005, plaintiff submitted a pre-treatment insurance claim for full upper and lower dentures, which would require extraction of all his teeth; plaintiff, however, did not have his teeth extracted at that time. As of December 31, 2005, plaintiff had not had his teeth extracted.

B. While Plaintiff Was Jailed

On December 31, 2005, plaintiff was taken into custody and housed at the Columbia County (Wisconsin) Jail as a pretrial detainee. During his intake interview, plaintiff reported having "bad teeth." Defendant Parker recorded this information on plaintiff's health screening form. At this time, plaintiff did not request a toothbrush or toothpaste, and neither item was offered to him.

While detained at the jail, plaintiff was placed on suicide watch with a “no sharps” restriction because of his suicidal gestures. Plaintiff remained on suicide watch during his entire detention in the jail. Because of the “no sharps” restriction plaintiff could not keep a toothbrush or toothpaste in his cell, but he could request these items and would be allowed to use them while being watched by an officer.

Between December 31, 2005 and April 2006, defendants did not receive any written communication from plaintiff regarding his request for a toothbrush or toothpaste or any other dental issue. Plaintiff did not ask to see a dentist, to have his teeth extracted, or to get dentures.

On one occasion, defendant Brandsma observed plaintiff holding his cheek, so she asked him if something was wrong. Plaintiff responded that he was in pain. Brandsma encouraged plaintiff to submit a request to see a nurse or doctor if he wanted medical attention. Brandsma provided plaintiff with a toothbrush and toothpaste on six occasions and observed plaintiff brushing his teeth.

Defendant Wegner recalls that plaintiff complained to him of rotting teeth resulting from a denial by jail staff of a toothbrush and toothpaste. Wegner spoke with Sergeant Robert Kiefer immediately. Wegner provided plaintiff a toothbrush and toothpaste, observed him brush his teeth, then retrieved the items when plaintiff was done. Defendant Barton recalls providing plaintiff a toothbrush and toothpaste on one occasion.

Between December 31, 2005 and April 4, 2006, defendants Dornfield, Kuhl, Stilwell and Zanon each denied one request from plaintiff for a toothbrush and toothpaste. Defendants DeBoer, Earll, Kiefer, Kjorlie, Parker and Weiss each denied two requests from plaintiff for a toothbrush and toothpaste. Defendants Agnew, Brandsma and Wegner each denied three

requests from plaintiff for a toothbrush and toothpaste. Defendant Schliesman denied four requests from plaintiff for a toothbrush and toothpaste.¹

Although plaintiff used inmate request forms for other purposes, he never used them to request a toothbrush or toothpaste. During his incarceration at the jail, plaintiff submitted eight requests to see a nurse or doctor, but he never submitted a request for dental care. Plaintiff's teeth were extracted in November 2007.

The loss of plaintiff's teeth was caused by his pre-existing severe periodontal disease which plaintiff had failed to treat before being jailed. Even if plaintiff had failed to brush his teeth for 3½ months, this would not have exacerbated his pre-existing periodontal disease and such a failure to brush would not have caused a condition that did not already exist.²

ANALYSIS

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the admissible evidence presented by the nonmoving party must be believed and all reasonable inferences must be drawn in the nonmovant's favor. However, a party that bears the burden of proof on a particular issue may not rest on his pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material

¹ Although these defendants all state in their affidavits that they do not recall denying plaintiff's requests for a toothbrush and toothpaste, I am accepting plaintiff's version of events solely for the purpose of deciding defendants' motion for summary judgment.

² This is the uncontradicted opinion of defendants' expert, Gary Conger, D.D.S. *See* Dkt.118, Exh. 1.

fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The applicable substantive law will dictate which facts are material. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). Further, a factual dispute is “genuine” only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Roger Whitmore’s Auto. Servs., Inc. v. Lake County, Ill.*, 424 F.3d 659, 667 (7th Cir. 2005). The court’s function in a summary judgment motion is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007).

II. Deliberate Indifference to a Serious Medical Need

The Eighth Amendment prohibits prison officials from showing deliberate indifference to a prisoner’s serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and courts have incorporated this same deliberate indifference standard to protect pretrial detainees like plaintiff pursuant to the Fourteenth Amendment. *Board v. Farnham*, 394 F.3d 469, 477-78 (7th Cir. 2005). Further, the constitution protects detainees not only from deliberate indifference to his current serious health problems, but also from deliberate indifference to conditions posing an unreasonable risk of serious damage to future health. *Id.* at 479. In other words, while jailed, plaintiff had a right “to receive necessary and proper personal hygiene items as preventative of future medical and physical harm.” *Id.* at 482. Indeed, “requiring that officials supply needed dental and medical care in the form of oral hygiene products, *i.e.*, toothpaste, also prevents future potentially serious dental problems such as tooth decay and gum infections.” *Id.* Dental care

is one of the most important medical needs of inmates.” *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001) (citation omitted).

In this case, defendants’ expert opines that plaintiff had a serious medical need, namely periodontal disease, when he was admitted to the jail, and it is undisputed that plaintiff had not followed through on recommended treatment for his condition prior to being jailed. In short, there is no dispute that plaintiff had a serious dental need.

Next, the court must determine whether the evidence suggests that any of the defendants were deliberately indifferent to this need. A prison official acts with deliberate indifference when the official “knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk.” *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)). A prison official who lacks knowledge of a risk cannot be said to have inflicted punishment. *Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994).

It is undisputed that plaintiff did *not* advise the defendants that he had a serious dental need and it is undisputed that plaintiff did not request dental care beyond cleaning supplies during his detention at the Columbia County Jail. The court cannot infer deliberate indifference from the fact that plaintiff repeatedly asked for a toothbrush and toothpaste, sometimes receiving them, sometimes not (again, accepting s true plaintiff’s assertions on this point). Because plaintiff was on a “no sharps” suicide watch, he was not allowed to keep a toothbrush or toothpaste, which meant that he would have to ask for them every time he wished to brush his teeth. In this circumstance, none of the jailers would have inferred from plaintiff’s regular and repeated requests for these items that plaintiff had any sort of serious dental need rather than an understandable wish to clean his teeth.

Next, even accepting as true plaintiff's assertions that some of the jailers denied his requests for a toothbrush and toothpaste, there is no evidence of a consistent, ongoing denial by any defendant or group of defendants that would have/should have flagged the concerns raised by the court in *Board*, 394 F.3d at 481 (denying a detainee toothpaste for 3½ straight weeks violated the plaintiff's "established constitutional right to toothpaste under the circumstances.")

Moreover, even accepting as true plaintiff's claims that the defendants consistently denied his requests for toothpaste and a toothbrush, this case is distinguishable from *Board* because plaintiff's serious medical need already had vested: long before he ever was jailed, plaintiff's teeth and gums already were so rotten and diseased that providing him a toothbrush and toothpaste on a daily basis would not have prevented any medical or physical harm. *Id.* at 482.

This segues to the related question whether defendants were deliberately indifferent to plaintiff's dental hygiene in a manner that posed an unreasonable risk of serious damage to plaintiff's *future* dental health. As the court stated in *Board*, "requiring that officials supply needed dental and medical care in the form of oral hygiene products, *i.e.*, toothpaste, also prevents future potentially serious dental problems such as tooth decay and gum infections." *Board*, 429 at 482. One cannot quarrel with this as a general proposition, and it would be equally true to observe generally that the possibility of future dental harm would be difficult to quantify accurately at the summary judgment phase. But in the instant case plaintiff's mouth already was a septic wasteland so profoundly diseased that the plaintiff's own dentist had urged the immediate extraction of all remaining teeth. Here, there was simply no possibility of even incremental future harm to plaintiff because the worst case dental health scenario already has occurred prior to any acts or omissions by the defendants: plaintiff's gums already were painfully

infected and his teeth already were dead. Even accepting as fact for summary judgment purposes plaintiff's averments that the defendants did not provide him with a toothbrush and toothpaste on a consistent and ongoing basis, the undisputed expert testimony is that even if plaintiff had failed to brush his teeth for up to three and a half months (the time period material in this case), his dental condition would not have been exacerbated, and this failure to brush would not have cause a condition that did not already exist. Thus, dental needs, and their motion for summary judgment will be granted.

But what about *scienter*? Could a jailer escape liability for being deliberately indifferent to a detainee's need to brush his teeth just because no additional harm resulted from this indifference? It's an interesting question, but one that need not be answered here. Plaintiff has made precise accusations against each defendant, tallied above in the fact section (*supra* at 3-4). During the operative 3½ month period, only one defendant denied plaintiff's request for a toothbrush even four times, the rest are accused of fewer denials, and there is no proof of concerted action or collective knowledge here. Some of the officers specifically remember providing dental materials to plaintiff, recollections that do not conflict with plaintiff's precise accusations against each defendant. Circling back to the analysis provided above (*supra* at 6-7), the uncontested facts do not establish that any defendant was deliberately indifferent to plaintiff's requests for a toothbrush and toothpaste. The defendants all are entitled to summary judgment.

ORDER

IT IS ORDERED that:

1. Defendants Brian Kjorlie, Robert Kiefer, Matthew Earll, Christopher Kuhl, Kimberly Stilwell, Curtis DeBoer, Robert Zanon, Holley Dornfield, Josh Brandsma, Michael Schliesman, David Wegner, Susan Roberts, Alex Agnew, Susan Barton, Judy Weiss (n/k/a Judy Beilke) and Jacob Parker's motion for summary judgment on plaintiff Sergey V. Andreyev's Eighth Amendment deliberate indifference claim is GRANTED.
2. The clerk of court is directed to enter judgment in favor of defendants and close the case.

Entered this 27th day of December, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge