

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

ONTARIO A. DAVIS,

Plaintiff,

v.

ORDER

10-cv-674-slc¹

BARBARA DELAP, MARY MILLER,
SGT. NOVINSKA, NURSE JANE DOE,
PETER HUIBREGTSE and RICK HABLE,

Defendants.

In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Ontario Davis raises constitutional claims regarding his medical and dental treatment, the medical co-pay policy and the policy prohibiting inmates from wearing thermal underwear and coats at the Wisconsin Secure Program Facility. On December 21, 2010, dkt. #5, I told plaintiff that his initial complaint violated Fed. R. Civ. P. 20 because it contained two separate lawsuits against different sets of defendants:

¹ For the purpose of issuing this order, I am assuming jurisdiction over this case.

1. Lawsuit #1: Plaintiff's claims against defendants Peter Huibregtse, Barbara Delap, Sgt. Novinska and nurse Jane Doe regarding adequacy of dental care, nurse training, the medical co-pay and treatment of plaintiff's headaches on July 27, 2010.
2. Lawsuit #2: Plaintiff's claims against defendants Huibregtse and Rick Hable regarding the thermal underwear and coat policy.

I directed plaintiff to identify which lawsuit he wished to pursue under this case number.

Plaintiff has responded, dkt. #6, stating that he wishes to proceed under this case number with lawsuit #1, and would like to dismiss lawsuit #2 and defendant Hable at this time. Therefore, I will screen the allegations of lawsuit #1 and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After reviewing plaintiff's complaint, I conclude that plaintiff may proceed on his claim that defendants Huibregtse and Delap violated his rights under the Eighth Amendment by failing to provide adequate dental care. Also, plaintiff may proceed on his claim that defendants Novinska and Jane Doe failed to provide medical care for his headaches and mouth pain. Plaintiff may not proceed on his claims that defendants Huibregtse and Miller failed to provide adequately trained nurses and encouraged prison staff to invoke the medical co-pay unlawfully.

ALLEGATIONS OF FACT

Plaintiff Ontario Davis is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Peter Huibregtse is the warden of the Wisconsin Secure Program Facility, where defendant Mary Miller is the nursing supervisor, defendant Jane Doe is a nurse and defendant Novinska is a sergeant. Defendant Barbara Delap is the dental director for the Department of Corrections.

As the dental director, defendant Dr. Delap controls the number of dentists who come to the prison and is responsible for insuring that the dentists have the equipment necessary to perform their duties. Generally, dentists are contracted on a monthly basis to visit prisons, but they are at the prison for limited times during that month. There is one dentist assigned to the Wisconsin Secure Program Facility. The dentist is available one day each week for the dental care of 500 prisoners. The facility has no on-site dentist available who can prescribe “controlled medication.”

Since at least May 2005, one of plaintiff’s wisdom teeth has caused chronic inflammation. On January 4, 2008, plaintiff broke the fillings in his tooth while eating meatloaf at the Wisconsin Secure Program Facility. In April 2008, plaintiff paid a \$7.50 co-pay and dental personnel fixed the broken fillings. During the April visit to the dentist, the dental personnel determined that other teeth required restoration and scheduled a follow-up visit. At the April 15, 2008 follow-up visit, dental personnel restored other fillings. Plaintiff

paid another \$7.50 medical co-pay.

Plaintiff filed a complaint with the inmate complaint review system regarding the medical co-pay, arguing that he was charged the co-pay wrongfully because he was excluded from having to pay under the rules of the Department of Corrections. The complaint was rejected and affirmed by defendant Huibregtse. Huibregtse has permitted and encouraged his subordinates to invoke the medical co-pay policy any time an inmate seeks medical attention.

On March 31, 2009, plaintiff was seen by a dentist who said plaintiff's wisdom tooth needed to be pulled or it could cause problems for plaintiff. The dentist told plaintiff to submit a dental request to have the tooth pulled. On April 5, 2009, plaintiff submitted a dental service request, stating that his wisdom tooth needed to be pulled. On April 7, 2009, dental personnel responded to plaintiff's request, telling him that his name had been placed on a waiting list and that the prison had to call a particular dentist to perform difficult extractions. They asked plaintiff to be patient.

Sometime later, plaintiff noticed that other prisoners who had arrived at the Wisconsin Secure Program Facility after he did had received tooth extractions. Plaintiff filed another dental request asking that his tooth be pulled.

On March 12, 2010, dental personnel placed plaintiff on the "essential wait list" and stated "we will call you in to have this situation re-evaluated." Plaintiff was seen by Dr.

Weber, who said he could perform the surgery but needed a “pan x-ray” machine in order to get a complete view of the entire root before he could extract the tooth. Dr. Weber said it would take no longer than a month for the x-ray to arrive.

On July 27, 2010, plaintiff experienced a severe headache and extreme pain on the right side of his face near his wisdom tooth. He pressed the emergency button in his cell. Several minutes later, defendant Sergeant Novinska answered the call. After plaintiff described his pain, Novinska told him that he would have to pay the \$7.50 medical co-pay to see a nurse or, in the alternative, he could take Tylenol. Plaintiff told Novinska that he would pay the co-pay and asked to see a nurse. Several minutes later, defendant Novinska called plaintiff on the intercom, offered him Tylenol again and reminded him about the co-pay for seeing a nurse. Plaintiff told Novinska that she was not qualified to diagnose his medical conditions or to prescribe Tylenol. Novinska responded that the nurse, defendant Jane Doe, was present and was checking his medical records to determine whether he was eligible for Tylenol. A few minutes later, Novinska told plaintiff that Tylenol was “on the way.” Plaintiff asked again to see the nurse, but Novinska turned off the intercom. A correctional officer brought the Tylenol, which plaintiff took, but his pain continued. Later, when plaintiff questioned Novinska about the incident, Novinska told plaintiff that the nurse had not wanted to see him. Plaintiff asked defendant Miller, the nursing supervisor, for the name of defendant Jane Doe, but Miller refused to reveal the name of the nurse and

told plaintiff to direct any questions regarding the incident to her.

Plaintiff filed a complaint about being denied medical attention by defendants Novinska and Jane Doe. When the complaint examiner contacted Novinska regarding the incident, Novinska told the examiner that the nurse did not come to the unit because plaintiff had refused to pay the co-pay.

On July 29, 2010, plaintiff submitted a dental service request for pain pills for the recurring severe headaches and extreme pain that he was experiencing. Dental personnel responded to his request, stating that they could not give the plaintiff “controlled medication,” but that one of the nurses had recommended 800mg of ibuprofen. Plaintiff did not receive any ibuprofen.

Since July 27, 2010, plaintiff has experienced severe headaches. He cannot function when he has these headaches.

DISCUSSION

A. Dental Care

Plaintiff contends that defendants Huibregtse and Delap violated his rights under the Eighth Amendment by failing to provide an adequate number of dentists and dental equipment, resulting in delay and unnecessary pain to plaintiff. Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by

incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a “serious medical need” and that prison officials were “deliberately indifferent” to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, “significantly affects an individual’s daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996) or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

“Deliberate indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Plaintiff alleges that his wisdom tooth causes severe pain, chronic inflammation and is a serious risk to his future health until it is extracted. At this stage, I can infer that plaintiff’s dental needs are serious medical needs. Board v. Farnham, 394 F.3d 469, 480 (7th Cir. 2005) (dental needs may present serious medical needs); Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001) (inability to chew food, bleeding, headaches, cracked teeth and extreme

pain are examples of harms that present serious dental needs). At summary judgment or at trial, plaintiff will have to prove with admissible evidence that having his wisdom tooth pulled is more than just a convenience and that he suffers serious health consequences until the tooth is pulled.

Plaintiff alleges that defendants Huibregtse and Delap are responsible for the policy regarding the number of dentists and dental equipment for use at the Wisconsin Secure Program Facility. At this stage, I can infer that Huibregtse and Delap were aware of the insufficient number of dentists and inadequate dental equipment, knew that these deficiencies could cause serious harm to plaintiff and other prisoners with dental needs and failed to take reasonable measures to address the risk of serious harm. However, more will be required at summary judgment and trial. Plaintiff will have to submit evidence showing that defendants Huibregtse and Delap have a role in enacting and implementing the policy regarding dental care, that they actually knew the dental staff and equipment was insufficient and posed a substantial risk of serious harm to inmates and that defendants have the authority and capability to provide more dentists and equipment for use at the prison.

B. July 27, 2010 Incident

Plaintiff contends that defendants Novinska and nurse Jane Doe violated his rights under the Eighth Amendment by offering him Tylenol when he had a medical emergency,

threatening him with the co-pay and refusing to evaluate his medical needs. Plaintiff alleges that on July 27, 2010, he experienced a severe headache and pain from his wisdom tooth that has continued intermittently since that date. At this stage, I can infer that plaintiff's headache and pain on July 27 constituted a serious medical need that required medical care. It is not clear from plaintiff's allegations whether defendant Novinska or defendant nurse Jane Doe was responsible for the failure to provide plaintiff adequate medical care for his pain. Plaintiff's allegations suggest that Novinska may have called nurse Jane Doe, who refused to see plaintiff. These allegations are sufficient to state a claim against Jane Doe for failing to take reasonable measures to address plaintiff's medical needs. On the other hand, if the allegations are construed liberally, I can infer that Novinska declined to address plaintiff's medical needs and later lied to justify her actions by telling the complaint examiner that plaintiff had refused to pay the medical co-pay. These allegations are sufficient to state a claim against Novinska under the Eighth Amendment. At summary judgment or trial, plaintiff will have to prove that both defendants Novinska and Jane Doe were deliberately indifferent to his medical needs.

C. Nurses and Medical Co-pay

Plaintiff contends that defendants Huibregtse and Miller violated his rights under the Eighth Amendment by failing to provide adequately trained nurses and that Huibregtse

encouraged prison staff to threaten inmates with the medical co-pay unlawfully. Plaintiff's allegations do not permit an inference that defendants Huibregtse and Miller failed to provide adequately trained nurses. The only nurse with whom plaintiff alleges to have a problem is defendant Jane Doe, and it is not clear whether the problem arose from a training problem or something else. In addition, an incident with one nurse does not imply that the majority of nurses at the Wisconsin Secure Program Facility are poorly trained.

Plaintiff has also failed to state a claim that defendant Huibregtse violated his constitutional rights by encouraging prison staff to enforce a medical co-pay policy. Plaintiff does not allege that he was denied care because he could not afford to pay for it; rather, he contends that as a matter of principle, policy or state law, he should not have been charged. This does not state a constitutional claim. Although the Constitution guarantees that inmates receive necessary medical care, it does not guarantee free medical care. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 245 n.7 (1983); see also Reynolds v. Wagner, 128 F.3d 166, 174 (3d Cir. 1 997) (prisoner co-payment plan does not violate the Eighth Amendment); Johnson v. Smith, 2010 WL 55699, *2 (S.D. Ill. Jan. 4, 2010) (same); Martin v. DeBruyn, 880 F. Supp. 610, 615 (N.D. Ind. 1995), aff'd, 116 F.3d 1482 (7 th Cir.1997) (Eighth Amendment guarantees only that inmates receive necessary medical care; it does not guarantee free medical care).

ORDER

IT IS ORDERED that

1. Plaintiff Ontario Davis is GRANTED leave to proceed on the following claims:

(a) Defendants Peter Huibregtse and Barbara Delap violated plaintiff's rights under the Eighth Amendment by failing to provide an adequate number of dentists and dental equipment, resulting in delay and unnecessary pain to plaintiff; and

(b) Defendants Novinska and nurse Jane Doe violated his rights under the Eighth Amendment by failing to provide adequate medical care for his headaches and mouth pain.

2. Plaintiff is DENIED leave to proceed on his claim that defendants Peter Huibregtse and Mary Miller violated plaintiff's rights under the Eighth Amendment by failing to provide adequately trained nurses and encouraging prison staff to invoke the medical co-pay policy when prisoner's ask for medical treatment.

3. The complaint is DISMISSED as to plaintiff's claims against defendant Mary Miller and Rick Hable.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, the December 21, 2010 order, dkt. #5, and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date

of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

5. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 13th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge