IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAYNE J. HART, JR.,

Plaintiff,

v.

WARDEN MICHAEL S. THURMAN,
SGT KIMBALL, MARY GORSKE,
P. SUMMIT, and JOHN and JANE DOE 1-50,

Defendants.

ORDER

11-cv-604-slc[1]

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In this civil action, plaintiff Wayne Hart, Jr. contends that several defendants employed at the Columbia Correctional Institution violated his constitutional rights by failing to provide adequate medical care for his abdominal hernia. In an order entered on December 2, 2011, I granted plaintiff leave to proceed against defendant Sgt. Kimball and the Jane and John Doe defendants who withheld his pain medication, denied plaintiff leave to proceed against defendants Mary Gorsek and P. Summit and gave plaintiff an opportunity to supplement his complaint to show he was entitled to relief against the Jane and John Doe

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

defendants who required him to carry his own meal tray despite his recent surgery. Dkt. # 6. I then dismissed defendants Gorsek and Summit from the case. Plaintiff has filed an amended complaint, dkt. #12, in he names Gorsek and Summit as defendants again and adds new allegations regarding Gorsek, Summit and the Jane and John Does.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment. Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his proposed amended complaint 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).

The amended complaint includes all of the same allegations about defendant Kimball and the Jane and John Doe defendants who withheld plaintiff's medications. Accordingly, this opinion addresses only the allegations against defendants Gorsek, Summit and the Jane and John Doe defendants who ordered plaintiff to carry his own meal tray. Having reviewed the amended complaint, I conclude that plaintiff may proceed against defendant Summit. However, the factual allegations in the complaint fail to show that plaintiff would be entitled to relief against defendant Gorsek or the Jane and John Does who ordered him to carry his

own meal tray, so these defendants will be dismissed.

Plaintiff has alleged the following facts.

ALLEGATIONS OF FACT

Plaintiff Wayne Hart is an inmate at the Waupun Correctional Institution. Defendant Mary Gorsek has been his health care practitioner since his arrival at the institution. During their initial interview, plaintiff informed Gorsek about his hernia. She confirmed that the hernia was mentioned in the intake screening performed when plaintiff was initially incarcerated. Plaintiff also told Gorsek that he was supposed to have a hernia operation at the Veterans' Affairs Hospital before coming to prison. With his permission, Gorsek obtained his military medical records. After discussing with plaintiff what could be done about his hernia at the Waupun Correctional Institution, Gorsek referred plaintiff to defendant Summit, another provider, in 2008. (The body of plaintiff's complaint refers to this medical provider as "Mr. P. Sumnicht," although his caption identifies the defendant as "P. Summit." I will assume these are the same individual.)

Over the next two and one-half years, plaintiff met with Summit on several occasions about his hernia and the pain in his "lower abdomen/genital area." Summit told plaintiff several times that he should "masturbate to relieve the swelling in [his] genital area" and he should "pray the pain away." Summit also said that the hernia would be "bad enough" for

surgery when plaintiff's belly button was sticking out from his torso, to which plaintiff replied that his belly button had been protruding before he came to seek Summit.

Plaintiff's hernia worsened until it required emergency surgery on August 1, 2010. While plaintiff was recovering at the hospital, his physician prescribed ten days of pain medication and light duty. The physician agreed with plaintiff's suggestion that he should be permitted to eat in his cell rather than with the rest of his tier. Plaintiff does not allege that this suggestion was part of the physician's formal prescription.

Plaintiff returned to prison the afternoon following his surgery. That evening, correctional officers denied him permission to eat in his cell rather than with his tier. At dinner, plaintiff asked correctional officers for help carrying his tray and showed them his bandages. The officers told plaintiff to carry his own tray, but a fellow inmate helped him carry it. A similar incident occurred at breakfast the next morning. A correctional officer refused to help plaintiff carry his tray, but a dining hall worker helped him.

OPINION

A. Defendant's Gorsek and Summit (Sumnicht)

To state an Eighth Amendment medical care claim, a prisoner must allege that (1) he had a "serious medical need" and (2) prison officials knew about his need for medical treatment but disregarded the risk by failing to take reasonable measures. Estelle v. Gamble,

429 U.S. 97, 104 (1976); Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). When an Eighth Amendment complaint rests on treatment decisions by health care providers, it is not enough that the plaintiff disagrees with the defendant's treatment decisions or even that the treatment decisions were negligent. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006). Plaintiff must show that defendant's medical judgments were "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). The law is clear that "[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996); Snipes, 95 F.3d at 591. Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

Defendant Gorsek will be dismissed because the complaint fails to contain allegations of fact that would show Gorsek violated plaintiff's rights under the Eighth Amendment. Under Fed. R. Civ. P. 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." This means that "the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the . . . claim

is and the grounds upon which it rests." EEOC v. Concentra Health Services, Inc., 496 F.3d 773, 776 (7th Cir. 2007). The complaint alleges that Gorsek listened to plaintiff's description of his medical history and conditions, researched plaintiff's treatment history and referred him to a treating physician. The amended complaint contains no factual allegations that suggest defendant Gorsek made any erroneous treatment decisions, much less that her actions departed substantially from accepted practice.

However, plaintiff's allegations against defendant Summit pass muster under the required low standard for screening. Reading plaintiff's allegations liberally, it is possible to infer that his hernia problem was a serious medical need in 2008 and that any medical professional would know that a hernia requires more treatment than masturbating or praying. Plaintiff told Summit that the hernia had extended outside his abdomen previously and that he was suffering abdominal pain. The Veterans' Affairs Hospital had determined previously that his hernia required surgery. Arnett v. Webster, 658 F.3d 742, 752 (7th Cir. 2011) (prisoner stated claim based on medical defendants' failure to treat underlying condition despite prescription from treating physician written prior to incarceration). Even so, plaintiff should be aware that deliberate indifference is a high standard. In particular, it will be his burden to prove that his hernia was a serious medical need between 2008 and 2010 when he was under Summit's care, which may well require expert testimony rebutting medical evidence to the contrary.

B. John and Jane Doe Defendants

Intentional infliction of pain or "deliberate indifference to prolonged, unnecessary pain" can itself violate a person's right to be free from cruel and unusual punishment under the Eighth Amendment. Arnett, 658 F.3d at 751. However, plaintiff's allegations that correctional officers required him to eat meals with his tier and to carry his own tray fail to raise to a constitutional violation. Plaintiff has not alleged that his physician's prescription stated that he should eat in his cell or that the correctional officers knew about the recommendation from his physician. Furthermore, the officers did not order plaintiff to carry his own tray; they simply refused to help. On both occasions, plaintiff received assistance carrying his tray and was not caused any prolonged, unnecessary pain. Although it appears that the correctional officers were unsympathetic to plaintiff's plight, plaintiff's allegations do not state a claim for violation of the Eighth Amendment.

ORDER

IT IS ORDERED that

1. Plaintiff Wayne J. Hart, Jr. is GRANTED leave to proceed on his claims that

a. Defendant P. Summit violated his rights under the Eighth Amendment by failing to provide adequate medical care prior to his surgery;

b. Defendant Sergeant Kimball violated his rights under the Eighth

Amendment by failing to provide adequate medical health care after plaintiff showed her the protruding hernia; and

c. Defendants Jane Doe and John Doe violated his rights under the Eighth Amendment by withholding his pain medication following his surgery.

2. Plaintiff is DENIED leave to proceed on his claims that

a. Defendants Jane Doe and John Doe violated his rights under the Eighth Amendment by causing him unnecessary pain when they forced him to eat lunch with his tier and refused to help carry his meal tray; and

b. Defendant Mary Gorsek violated his rights under the Eighth Amendment by failing to provide him adequate medical care prior to his surgery, and defendant Gorsek is dismissed from the case.

3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on 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 if it accepts service for defendants.

4. For the remainder of this lawsuit, 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 he shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. 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.

6. 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 warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 5th day of April, 2012.

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