

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

DIEGO GIL,

Plaintiff,

v.

GINGER JONES; JAMES REED, MD.;
MOHAMMED ASLAM, M.D., et al.,

Defendants.

ORDER

99-C-38-C

This is a civil action for monetary relief brought pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and 28 U.S.C. § 1331. Plaintiff Diego Gil, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, contends that defendants violated his Eighth Amendment rights by denying him necessary medical care and treatment. Specifically, plaintiff claims that defendants unreasonably delayed for eight months in arranging for surgery that had been prescribed for him by a physician outside the prison. Presently before this court is defendants' motion for summary judgment. Because I find that plaintiff has not produced evidence from which a trier of fact could conclude reasonably that defendants acted with deliberate indifference towards plaintiff's

medical needs, defendants' motion for summary judgment will be granted.

From the facts proposed by the parties, I find the following to be undisputed.

UNDISPUTED FACTS

Plaintiff Diego Gil has been confined at the Federal Correctional Institution in Oxford, Wisconsin since July 1, 1994. At all times relevant to this complaint, defendants were employees of the prison. Ginger Jones was the Health Services Administrator; Dr. James Reed was Director of Health Services; and Dr. Mohammed Aslam was a Staff Physician.

During his incarceration, plaintiff was stricken with a variety of health problems, including an undiagnosed rectal prolapse. On May 6, 1997, Dr. Aslam examined plaintiff but was unable to diagnose a hernia and noted no complaint regarding rectal pain, bleeding or change of bowel habits. Dr. Aslam indicated in the file that if the reported symptoms persisted, a surgical consultation should be ordered. On June 3, 1997, Dr. Aslam evaluated plaintiff again, noting a number of symptoms, including the plaintiff's report of periodic rectal bleeding, and ordered a surgical consultation. On June 6, 1997, plaintiff was seen by Dr. David D'Angeles, a general surgeon outside the prison. Dr. D'Angeles was unable to diagnose any "fa[s]cial" (connective tissue) defect but recommended that plaintiff undergo a fascial exploration and a hemorrhoidectomy because of his medical history. On July 14, 1997, Dr.

Aslam reviewed Dr. D'Angeles's consultation report and ordered the recommended surgery. Because the diagnoses and recommendations of Dr. D'Angeles were made with regard to a condition that was neither life threatening nor of an emergency nature, the surgery was scheduled in the normal course of business by the administration of health services at the prison. On the basis of the diagnosis, plaintiff's condition was categorized as a Level 3 condition, in accordance with BOP Policy Statement 6000.05, Chap. 11 as "medically acceptable but not necessary."

In consultation with the medical director, the Health Administration Services schedules out-of-institution procedures ordered for inmates. Priority is given to emergency circumstances or life-threatening conditions, within the budgetary constraints of the Bureau of Prisons. From January through September 1997, surgeries were restricted to Level 1 and Level 2 diagnoses because of budgetary constraints. Dr. Aslam ordered plaintiff's Level 3 surgery during this restricted period. On October 23, 1997, the prison requested that plaintiff's surgery be scheduled. On February 9, 1998, the Health Administration Services scheduled the surgery to be performed on March 5, 1998 by Dr. McDonald, at Mercy Medical Center, Oshkosh, Wisconsin. On March 5, 1998, Dr. McDonald diagnosed plaintiff's condition as rectal prolapse and performed a corrective resection of the sigmoid colon instead of the originally scheduled hemorrhoidectomy.

Between June 6, 1997, when the hemorrhoidectomy was first recommended, and March 6, 1998, the date of surgery, plaintiff was seen by medical personnel at the prison on nine occasions.

OPINION

On a motion for summary judgment, if the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). Deliberate indifference requires that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 824, 837 (1994). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment

within the meaning of the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996).

Under this standard, defendants' actions cannot be said to have violated the Eighth Amendment. Plaintiff's condition was misdiagnosed by the consulting surgeon, with the result that surgery was deemed medically acceptable but not necessary. Although plaintiff was later diagnosed correctly as having rectal prolapse, a condition requiring surgery, misdiagnosis "does not represent cruel and unusual punishment At most it is medical malpractice." See Estelle, 429 U.S. 97 at 106. Indeed, defendants, far from remaining deliberately indifferent to plaintiff's serious medical needs, attempted to provide treatment for his condition.

Plaintiff contends that his condition was worsening during the eight months that he was waiting for the hemorrhoidectomy. Plaintiff saw medical officials nine times during this period, but there is no evidence that plaintiff's condition worsened during this time. Furthermore, there is no evidence that defendants were aware of a worsening condition or that they had any reason to draw the inference that a "substantial risk of serious harm exist[ed]" from that worsening condition as required by Farmer. See 511 U.S. 824 at 837.

Plaintiff cites a non-binding case for the proposition that providing some treatment does not shield doctors from a finding that they acting with deliberate indifference. See McElligott v. Foley, 182 F.3d 1248, 1259 (11th Cir. 1999). In that case, the plaintiff was prescribed gas

medication repeatedly while he was complaining of uncontrollable and escalating pain. The court of appeals held that a trier of fact could find the defendants had acted with deliberate indifference to the prisoner's serious medical needs because his condition was clearly worsening over time but the defendants refused to alter his treatment. See id., at 1257-58. In this case, plaintiff has produced no evidence that his condition was worsening while they were treating him. Nor has he produced evidence that defendants had notice of any deterioration in his condition. Moreover, although repeated instances of negligent medical treatment and systemic deficiencies in health care provision may amount to deliberate indifference, see Wellman v. Faulkner 715 F.2d 269, 272 (7th Cir. 1983), there is no evidence of such deficiencies in this case. In Wellman, the systemic deficiencies included the lack of a psychiatrist on staff for two years, language barriers between physicians and patients affecting the ability to make proper diagnoses and denial of medical treatment resulting in death. In this case, by contrast, plaintiff was misdiagnosed despite the apparently diligent effort of both prison medical staff and an outside physician. In short, although it is clear that plaintiff's condition was badly misdiagnosed and that he suffered as a result, defendants did not act with deliberate indifference to his serious medical needs. Accordingly, liability under the Eighth Amendment cannot attach and defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that the motion of defendants Ginger Jones, James Reed, M.D. and Mohammed Aslam, M.D. for summary judgement is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 20th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge