IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEON TYRONE HARDY,

Plaintiff,

v.

ANDY GFRORER,

Defendant.

OPINION AND ORDER

99-C-364-C

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This is a civil action for declaratory and monetary relief brought pursuant to 42 U.S.C § 1983. Plaintiff Leon Tyrone Hardy, contends that while he was confined at the Rock County jail in the summer of 1998, defendant Andy Gfrorer, a Huber officer at the jail, denied him necessary dental care in violation of the Eighth Amendment. Presently before the court is defendant's motion for summary judgment. I conclude that defendant is entitled to summary judgment because the undisputed facts show that defendant's actions did not violate plaintiff's Eighth Amendment rights.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If a party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the opposing party is proper. Celotex, 477 U.S. at 322.

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

UNDISPUTED FACTS

Plaintiff Leon Tyrone Hardy is currently incarcerated at the Rock County jail and has been an inmate there on fifteen separate occasions between 1992 and 1999. Between July 1, 1998 and September 21, 1998, plaintiff was incarcerated at the jail and had Huber release privileges. During this same time, defendant Andy Gfrorer was a Huber officer who worked the late shift from 1:00 p.m. to 9:00 p.m.

The Rock County jail has a series of policies and procedures approved by the Department of Corrections, including a policy addressing Huber requests or what is referred

to as a "special." A "special" relates to requests to leave the jail for job searches, medical appointments, court appearances, probation appointments or similar types of appointments that are permitted when an inmate has Huber privileges. The special request form states in bold print that an inmate must submit the form 48 hours in advance of any scheduled special appointment. The inmate rule book, which is provided to inmates once they have been granted Huber privileges, has been in place during plaintiff's several admissions to the jail. It states that "Specials are set up 48 hours in advance." The reason for the 48-hour advance notice is to permit Huber officers sufficient time to verify the special appointments. However, exceptions to the 48-hour advance notice rule have been made, including exceptions for plaintiff on at least two occasions.

In order to request a "special," inmates place a note or request in a request box within their respective housing units. Huber officers are responsible for addressing any requests made by Huber inmates. However, unit officers respond occasionally to requests by Huber inmates if the request relates to a routine matter. The requests are generally picked up by the Huber officers two to three times a day, depending on the officers' workload. If the Huber officers are busy, the requests may be picked up by a unit officer.

Huber officers do not address specific inmate medical or dental needs. Instead, those matters are referred to the Rock County jail nurse by the unit officer, or the inmate may

choose to complain to the nurse directly through a note.

Huber officers are responsible for verifying and checking on all inmates on work release and for verifying all "specials." Huber officers are not assigned to, or responsible for, a particular group of Huber inmates. Thus, notes from inmates can be answered by any Huber officer.

On June 30, 1998, plaintiff complained to the Rock County jail nurse about a painful toothache. The nurse told plaintiff that she could not arrange an immediate appointment for him and recommended that plaintiff make his own appointment because he had Huber privileges. On July 21, 1998, plaintiff wrote a note addressed to "Huber Officer," stating that he had a toothache, was "in extreme pain" and would be calling a dentist from work to arrange an appointment. Also in the note, plaintiff mentioned his June 30 meeting with the jail nurse and that she would be unable to arrange for him to see a dentist until September of 1998. He requested that the Huber officers "[p]lease consider this a notice of an emergency situation." Plaintiff put the note in the request box between 1:00 and 3:00 P.M. on that same day. Defendant Gfrorer was on duty during this time. The response to plaintiff's July 21 note was undated and unsigned; it indicated that plaintiff was free to make his own arrangements with a dentist at his own expense.

Defendant has no recollection of seeing plaintiff's July 21 note. It is defendant's habit

to date and either sign his name, initial, or write "Huber Office" on all inmate requests. Because the note advised that plaintiff would be making his own dental appointment, it would have been viewed as a routine matter that could have been handled by a unit officer. Around 1:00 A.M. on July 22, 1998, plaintiff submitted a "special" request form for a July 23, 1999 dental appointment. Defendant received plaintiff's request. The special request made no reference to an emergency situation, plaintiff's July 21, 1998 note or any problem with petitioner's tooth. Defendant believed the request was for a routine dental appointment. He denied it on the ground that it had not been submitted 48 hours in advance of the appointment. If defendant had been aware of plaintiff's July 21 note, he would have responded to plaintiff's July 22 special request by consulting with the duty sergeant. Plaintiff never complained to defendant or any other Huber officer about his dental problem prior to submitting his request for special permission to go to his July l23 dental appointment.

In July 1998, plaintiff was working at Fazoli's. At Fazoli's, there was only a business phone and plaintiff's supervisor discouraged employee use of this phone for personal calls. Nevertheless, plaintiff used the phone to make personal calls to a Shirley Miller, as well as approximately ten calls to dentists in his attempt to make his July 23 dental appointment. After defendant denied plaintiff's "special," plaintiff continued on Huber privileges for another two months, working at Fazoli's. During this time, plaintiff did not reschedule his dental

appointment.

OPINION

Before addressing the merits of plaintiff's claim, there is an initial issue to be considered. The parties submitted several proposed findings of fact relating to an alleged injury to plaintiff's back as a result of a fall on October 26, 1998 and the failure of unnamed persons to medicate plaintiff for pain, a matter that has not been alleged anywhere in plaintiff's complaint. As noted earlier, this case concerns a single claim: that defendant was deliberately indifferent to plaintiff's serious dental needs when he denied plaintiff's request for a special pass to see a dentist on July 23, 1998. Therefore, I have not considered any of the parties' proposed facts relating to plaintiff's fall.

With respect to the claim at issue in this lawsuit, the Supreme Court consistently has held that:

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and Due Process Clause.

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 200 (1989) (citing Estelle v. Gamble, 429 U.S. 97, 103-104 (1976). A county jail "has an affirmative duty to provide persons in its custody with a medical care system that meets

minimal standards of adequacy." Holmes v. Shehan, 930 F.2d 1196, 1199 (7th Cir. 1991) (citations and internal quotation marks omitted).

Ordinarily, when a prisoner sues prison officials for denying him medical or dental care, the prisoner is confined 24 hours a day and is wholly dependent on his jailors to provide for his basic human needs. This case presents a different, unique situation. Plaintiff's status as a Huber inmate renders him able to attend to his own medical and dental needs. As the facts of this case reveal, Huber inmates are able to go to work and earn wages, and they may receive special passes to conduct job searches or go to medical or dental appointments. Therefore, in order for plaintiff to avoid summary judgment in defendant's favor on his claim that defendant deprived him of his Eighth Amendment rights, it is necessary for him to prove or put into dispute facts regarding the following basic elements of his claim:

1) that he had a serious and painful dental emergency;

2) that defendant knew of this emergency; and

3) that defendant deliberately prevented plaintiff from obtaining the emergency care he needed.

See Estelle v. Gamble, 429 U.S. at 104. The idea is that if plaintiff is not prepared to prove on a motion for summary judgment what he is required to prove at trial, then the defendant is entitled to judgment in his favor.

As to the first element, courts recognize that inmates have serious medical needs if they are suffering from medical conditions generally considered to be life-threatening or to carry risks of permanent, serious impairment if left untreated. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Even if inmates are not facing death or permanent harm, a serious medical need may arise where an inmate is suffering such significant pain that denial of assistance would be "uncivilized." Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); but see Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996) (Eighth Amendment does not require prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment).

The parties in this case dispute whether plaintiff's pain was "excruciating," as plaintiff contends it was. Defendant argues that if plaintiff's pain was so serious that defendant's lack of a response to it could be considered "uncivilized," plaintiff would have arranged to see a dentist sometime in the three weeks between June 30 when he saw a nurse about his tooth and July 21 when he advised jail officials that he intended to make a dental appointment, or at the least, in the two month period he remained on Huber release privileges after July 21.

It is unnecessary to resolve the question whether plaintiff's pain rose to a level sufficient to trigger the protections of the Eighth Amendment, because plaintiff has failed to prove that defendant Gfrorer knew anything about his painful dental condition or that he was deliberately indifferent to it. Prison officials are deliberately indifferent when they know of and disregard

an excessive risk to an inmate's health or safety. See Farmer v. Brennan, 511 U.S. 825 (1994). Officials must have actual knowledge of a substantial risk before they can be found deliberately indifferent, but such knowledge may be inferred from the fact that the risk was obvious. See id. at 1981. Inadvertent error, negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d at 992; see also Snipes v. Detella, 95 F.3d at 590-91.

The facts reflect that the only information defendant possessed about plaintiff's circumstance was that on July 22, 1998, plaintiff requested a "special" pass to go to a dentist appointment that had been submitted less than 48 hours in advance of the appointment contrary to jail policy. There are no facts suggesting that at any time prior to plaintiff's submission of the July 22 special request, or at any time following the submission, plaintiff complained directly to defendant about his toothache or requested permission to go to another appointment. There is no evidence to suggest that plaintiff's pain was so obvious that defendant would have to have been aware of it. Moreover, plaintiff's special request did not mention a dental "emergency," refer to his July 21 note or describe the level of his pain. Consequently, plaintiff has failed to offer evidence from which a reasonable trier of fact could conclude that defendant knew of an excessive risk to plaintiff's health or safety and that he recklessly and indifferently disregarded the risk.

ORDER

IT IS ORDERED that defendant Andy Gfrorer's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in defendant's favor and to close this case.

Entered this _____ day of April, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge