IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DE'ONDRE J. CONQUEST,

Plaintiff,

v.

GERALD BERGE; PRISON HEALTH SERVICES, INC.; DR. TODD RILEY; SHARON ZUNKER; PAMELA K. BARTELS; GEORGE DALEY; JOLINE MILLIN; BECKY MANNING; RENEE WALTZ; SHIRLEY OLSON; EDITH KLEMA; LOIS RUSTAD; KATHERINE McQUILLAN,

Defendants.

OPINION AND ORDER

01-C-0140-C

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In this civil action for monetary and injunctive relief, plaintiff De'ondre J. Conquest is suing for violations of his Eighth Amendment rights under 42 U.S.C. § 1983 in connection with his incarceration at Supermax Correctional Institution in Boscobel, Wisconsin. On April 9, 2001, I granted plaintiff leave to proceed on his allegations that (1) defendants' failure to give him pain medication for his stomach cancer as prescribed, that is, on an "as needed" basis, constitutes deliberate indifference to a serious medical need in violation of

the Eighth Amendment; and (2) his rights as a third-party beneficiary to a contract between the Wisconsin Department of Corrections and Prison Health Services, Inc. are being violated. I found that plaintiff had alleged facts sufficient to establish that defendants are being deliberately indifferent to his serious medical condition under the Eighth Amendment.

On May 21, 2001, plaintiff filed a motion for injunctive relief pursuant to Fed. R. Civ. P. 65(a), seeking his transfer to another facility. In the alternative, plaintiff seeks an order requiring defendants to provide a specialized treatment program in which plaintiff is provided his doses of Oxycodone "as needed" rather than on a three-hour schedule. A hearing was held on this motion on June 14, 2001. Because plaintiff failed to show that he has a likelihood of success on the merits, I denied his request for a preliminary injuction.

For the purpose of deciding plaintiff's motion for a preliminary injunction, I find from the parties' proposed findings of fact and the evidence presented at the hearing that the following are undisputed.

UNDISPUTED FACTS

Plaintiff De'ondre J. Conquest is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. Defendant Gerald Berge is the warden at Supermax. Defendant Prison Health Services, Inc. of Brentwood, Tennessee, is under contract to the Wisconsin Department of Corrections to provide health care services at Supermax. All of the remaining

defendants were employees of Prison Health Services and worked at Supermax at all relevant times. Defendant Dr. Todd Riley was the head physician; defendant Pamela Bartels was Health Services Administrator; and defendants Joline Millin, Becky Manning, Renee Waltz, Shirley Olson, Edith Klema, Lois Rustad and Katherine McQuillan were nurses.

Plaintiff has stomach cancer that causes him extreme pain. Plaintiff meets regularly with health staff at Supermax. Plaintiff is examined by oncologist Dr. Howard Bailey of the University of Wisconsin Hospitals approximately once a month. For pain control, Dr. Bailey has recommended Oxycontin (a controlled release version of Oxycodone) to be taken three times a day and Oxycodone to be taken as needed for break-through pain. As an oncologist, Dr. Bailey is more familiar with cancer treatment and pain control than prison medical staff. Defendant Dr. Riley prescribed the recommended medication for plaintiff.

Plaintiff is not provided his medication "as needed." Instead, he receives his medication according to a schedule devised by defendants Riley and Bartels. Under this schedule, defendants Riley has prescribed plaintiff Oxycontin to be taken three times a day and Oxycodone to be taken every three hours. From April 10, 2001 to May 21, 2001, the date of the filing of this lawsuit, plaintiff received his Oxycodone late on at least four occasions. When plaintiff does not receive his medication "as needed," he is under-medicated and suffers great pain. When defendants deliver one dose of Oycodone late and the next dose on time, plaintiff is over-medicated and becomes light-headed. On several

occasions plaintiff has tried to discuss the late delivery of his medications with defendants.

On July 3, 2000, plaintiff filed an inmate complaint regarding the late delivery of his medication. In response to the complaint, defendant Bartels stated that petitioner was usually provided his pain medication within 15-30 minutes of his request and that his delivery of medication might be "slightly delayed" when medical emergencies arise. The inmate complaint examiner dismissed plaintiff's complaint. The dismissal was accepted as the decision of the Secretary on August 30, 2000.

On October 4, 2000, defendant Berge wrote in a letter that he had "thoroughly reviewed [plaintiff's] case with health care staff here and [was] convinced that [his] medication needs are being fully addressed." After this statement, defendant nurses continued to deliver petitioner's medication "as needed."

On November 26, 2000, plaintiff did not receive his 8:00 a.m. dose of Oxycodone until approximately 9:40 a.m. Plaintiff filed an inmate complaint about the delay. The complaint was affirmed and the inmate complaint examiner recommended that the Health Service Unit:

> Immediately change its practice of logging medication by discontinuing its practice of logging it out of HSU and immediately commence logging when it is actually issued to the inmate. While this may be more time-consuming and more inconvenient to staff, it is imperative that these changes be made so that medication delivery is correctly documented. Next, Health Service Unit Manager Bartels has reported that nursing staff are having ongoing difficulties adjusting to the 3-hour medication distribution schedule for [petitioner]; it is

> recommended those difficulties be immediately resolved and an action plan documenting how all of the above issues have been dealt with be submitted to Miss Zunker, Miss Manoni, and this office within two weeks of receipt of the Reviewing Authority's decision. Finally, it is recommended copies of the new medication logs (documenting when [petitioner's] medications were delivered to him) be forwarded to Miss Manoni on a daily basis for one month to insure compliance with the prescribed dosing schedule and briefly thereafter for two additional months.

The complaint was affirmed.

On December 11, 2000, plaintiff received his 8:00 a.m. dose of Oxycodone at 9:20 a.m. The inmate complaint that he filed regarding this delay was affirmed on or about January 6, 2001. As a consequence of his stomach tumor, plaintiff needs a catheter to urinate. On December 18, 2000, plaintiff was not catheterized. As a result, he filed an inmate complaint that was affirmed on or about February 17, 2001. On December 21, 2000, plaintiff's 8:00 p.m. dose of Oxycodone was not delivered until 9:30 p.m. As a result, plaintiff filed an inmate complaint that was affirmed on or about January 6, 2001. On January 2, 2001, plaintiff received his 8:00 p.m. dose of Oxycodone at 9:30 p.m. His next dose arrived on time, at 11:00 p.m., only one and a half hours after the previous dose. As a result, plaintiff filed an inmate complaint that was affirmed on January 6, 2001.

Dr. Bailey is aware that medical staff at Supermax have delivered plaintiff his doses of Oxycodone on a three-hour schedule rather than on an "as needed" basis. Dr. Bailey believes that this scheduled delivery is not unreasonable or substandard.

Petitioner wrote a letter to defendant Berge, asking to be transferred to another Department of Corrections facility, such as Dodge Correctional Institution, where he believes his medical condition could be treated properly. Supermax is not a medical facility; it is a prison with a medical unit. Defendant Bartels told plaintiff that his condition could be better treated at the Dodge facility, which has an infirmary. Plaintiff is not in prison for a violent offense (his conviction was drug-related) and he has no history of violence in the Wisconsin prison system.

The contract between respondent Prison Health Services, Inc. and the Wisconsin Department of Corrections provides in part:

> It is the intent of WDOC not to send offenders with the following conditions to the Supermax facility:
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> . . .
>
> • Terminally ill and/or substantially incapacitated.
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> . . .
>
> If an offender is identified by PHS as having such condition, WDOC will pay the cost of treatment of the identified disease including additional incremental staffing required with WDOC prior approval after 10 days notice of the inmate's condition.

The contract provides further:

> PHS shall develop and implement a program for the care of chronically ill offenders. The care provided shall entail the development of an individual treatment plan by the responsible physician specifying instructions on diet, medication, and/or diagnostic testing. Chronic care patients shall be provided a review by a physician minimally every three months and at greater integrals [sic] when medically indicated.

In May 2001, the Wisconsin Legislative Audit Bureau issued an evaluation of prison health care by the Department of Corrections. Among the deficiencies noted, the Legislative Audit Bureau stated:

> Our review of vendor staffing reports for Prairie du Chien and Supermax, which were summarized by the Department, indicates that the vendor did not fulfill the staffing requirements at either institution. However, we were unable to determine precisely how much reimbursement the Department could claim for staff vacancies because of a lack of information regarding staffing coverage for periods exceeding 30 days. We estimate that the vendor failed to provide staffing coverage for as many as 5,845 hours with a value of $124,754 between October 1999 and December 2000. It should be noted that the vendor did make an attempt to cover staff vacancies by re-assigning staff of equal or greater professional training. For example, in FY 1999-2000, the vendor's physician at Supermax worked an additional 208 hours to cover for vacant physician assistant and registered nurse positions.
>
> Because the Department paid a vendor for health care services that were not provided, *we recommend the Department of Corrections seek reimbursement from the vendor operating the health services units at Prairie du Chien and Supermax for the full amount allowable under the contracts.*

The Legislative Audit Bureau also notes that the Wisconsin Department of Corrections did not meet the National Commission on Correctional Health Care standards in certain areas for the minimum requirements for the management of correctional health care. Among the "Essential" Standard listed as "Not Met" are the following:

P-01 Access to Care	Inmates, including those in segregated custody, must have access to health care to meet their serious medical, dental, and mental health needs; interfering with the delivery of inmate request for care must be avoided.

. . .

P-27	Pharmaceuticals	Pharmaceutical services, including procuring, storing, prescribing, dispensing, administering, and disposing of pharmaceuticals, must be "sufficient" and meet legal requirements.

DISCUSSION

A. Standards for Preliminary Injunction

A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing. See Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998). In order to succeed on a motion for a preliminary injunction, the moving party must show that "it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the defendants, adjusting the hardships for the probability of success on the merits." Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998). If it is clear that the moving party lacks even a negligible chance of success on the merits, the court need not evaluate the remaining elements of the test. See In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1301 (7th Cir. 1997). I am persuaded that plaintiff has no chance of success. Therefore, I do not address the other elements of the preliminary

injunction test.

B. Eighth Amendment: Inadequate Medical Care

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, plaintiff must establish facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See Gutierrez, 111 F.3d at 1371.

The Supreme Court has held that 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, 511 U.S. at 837.

Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

The essential question in this case is whether "the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition,'" Snipes, 95 F. 3d at 592 (citations omitted), giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed").

Plaintiff's allegation that he is in severe pain because of his stomach cancer is sufficient to establish that he has a serious medical condition under the Eighth Amendment. Plaintiff's more difficult challenge is to demonstrate that defendants were deliberately indifferent to any of his medical needs because he has been receiving pain medication and medical examinations on a regular basis. In support of his claim, plaintiff points to the

following facts: defendants have delivered his pain medications late on a few occasions; the delays result in plaintiff's being either over- or under-medicated; his inmate complaints have been affirmed; and despite these affirmances, defendants continue to deliver his pain medication late.

Defendants contend that there is no evidence that any prison official or health care provider has been indifferent to plaintiff's needs. To the contrary, defendants allege that all of the professionals involved in plaintiff's care have attended to plaintiff's needs reasonably and within the bounds of ordinary care. Plaintiff meets regularly with medical staff at Supermax and meets with Dr. Bailey approximately once a month. When plaintiff has lodged inmate complaints about late deliveries, Supermax officials have affirmed his complaints and taken steps to address his situation. Defendants argue that providing plaintiff with his Oxycodone on a schedule rather than on an "as needed" basis does not represent substandard care.

Plaintiff's oncologist, Dr. Bailey, is aware that plaintiff receives his doses of Oxycodone on a schedule rather than "as needed" and does not find the practice negligent, unreasonable or harmful to plaintiff's long-term health. In fact, Dr. Bailey would not change the way plaintiff's medication is delivered. Although in an ideal world plaintiff would receive his pain medication as soon as he experiences pain, this method of delivery may not be feasible in the prison setting. Because the scheduled delivery meets Dr. Bailey's concerns for

plaintiff's care, defendants have established that it is highly unlikely that they are violating plaintiff's constitutional rights; the facts do not even suggest that defendants are negligent in caring for plaintiff. Because plaintiff has failed to show that he has even a slight likelihood of success on the merits, I will deny his request for a preliminary injunction to have his pain medication delivered on an "as needed" basis or, in the alternative, to be transferred to a different facility.

ORDER

IT IS ORDERED that the motion of plaintiff De'ondre J. Conquest for a preliminary injunction is DENIED because plaintiff has failed to show that he has any chance of succeeding on the merits of his Eighth Amendment claim of deliberate indifference to a serious medical need.

Entered this 15th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge