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; PAMELA K. BARTELS; JOLINE MILLIN; BECKY MANNING; RENEE WALTZ; SHIRLEY OLSON; EDITH KLEMA; LOIS RUSTAD; KATHERINE McQUILLAN,

Defendants.

OPINION AND ORDER

01-C-140-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.

The case is before the court on defendant Gerald Berge's motion for summary judgment and defendants Prison Health Services, Inc., Dr. Todd Riley, Pamela Bartels, Joline Millin, Becky Manning, Renee Waltz, Shirley Olson, Edith Klema, Lois Rustad and Katherine McQuillan's amended motion for summary judgment.

Defendants' motions for summary judgment will be granted because plaintiff has failed to show that defendants were deliberately indifferent to a serious medical need when they failed to administer his medication on an "as needed" basis. Because plaintiff's federal law claim will be dismissed, I decline to exercise supplemental jurisdiction over his state law claim that his rights as a third-party beneficiary to the contract between the Wisconsin Department of Corrections and defendant Prison Health Services are being violated.

From the findings of fact proposed by the parties and from the record, I find that the following material facts 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 times relevant to this action. 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 great pain. Plaintiff meets regularly with health staff at Supermax and has received extensive and continuous treatment for his stomach cancer and related conditions during his incarceration. Plaintiff has undergone multiple surgical procedures to remove a mass and has received chemotherapy and radiation therapy to treat the cancer. Plaintiff is examined by oncologist Dr. Howard Bailey of the University of Wisconsin Hospitals approximately once a month and is seen by various other specialists as deemed appropriate, including surgeons, urologists and gastroenterology specialists.

As an oncologist, Dr. Bailey is more familiar with cancer treatment and pain control than prison medical staff. 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. Dr. Bailey has also discussed with plaintiff the use of an analgesic patch as an alternative pain medication, but plaintiff has refused it.

Defendant Dr. Riley has prescribed the recommended medication for plaintiff.

Plaintiff is not provided Oxycodone "as needed." Instead, he receives his medication according to a schedule devised by defendants Riley and Bartels. Under this schedule, defendant Riley has prescribed plaintiff Oxycontin to be taken every eight hours. Defendant Riley has also ordered that plaintiff be given the option of taking five to fifteen milligrams of Oxycodone every three hours for more immediate relief of break-through pain. From April 10, 2001 to September 18, 2001, the date that plaintiff filed his proposed findings of fact, 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 Oxycodone late and the next dose on time, plaintiff is over-medicated. 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." 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 [plaintiff]; 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 [plaintiff'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. He filed an inmate complaint about this oversight that was affirmed on or about February 17, 2001. On or

about December 21, 2000, plaintiff's 8:00 p.m. dose of Oxycodone was not delivered until 9:30 p.m. Plaintiff filed an inmate complaint about this delay that was affirmed on or about January 6, 2001. On or about 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. Plaintiff filed an inmate complaint about the medication delivery that was affirmed on January 6, 2001.

Dr. Bailey has discussed plaintiff's pain medication with defendant Riley and agrees that Riley's approach is reasonable. Dr. Bailey does not believe that delivering plaintiff his doses of Oxycodone every three hours rather than on an "as needed" basis is substandard. There is no evidence that the delivery of Oxycodone on a scheduled basis, as opposed to an as needed basis, is harmful to plaintiff's long-term condition.

Plaintiff 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. Plaintiff's physicians, including defendant Riley, have told him that he belongs in a medical facility. 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.

OPINION

A. Standard for Summary Judgment

To prevail on a motion for summary judgment, the moving party must show that even when all inferences are drawn in the light most favorable to the non-moving party, 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); McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Summary judgment may be awarded against the non-moving party only if the court concludes that a reasonable jury could not find for that party on the basis of the facts before it. Hayden v. La-Z-Boy Chair Co., 9 F.3d 617, 618 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994). If the nonmovant 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 moving party is proper. Celotex, 477 U.S. at 322.

B. Eighth Amendment

Plaintiff contends that defendants' refusal to deliver his medication on an "as needed" basis constitutes deliberate indifference to a serious medical need under the Eighth Amendment. 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). In defining "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 v. Brennan, 511 U.S. 825, 837 (1994). 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; Duckworth v. Franzen, 780 F.2d 645, 652-53 (1985). 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 not 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 assert 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 on an "as needed" basis. He does not find the practice unreasonable or harmful to plaintiff's long-term health. 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, I conclude that defendants have not acted with deliberate indifference to plaintiff's serious medical condition. A reasonable jury could not find for plaintiff on the basis of these facts. I will grant summary judgment in favor of defendants.

C. Breach of Contract

Plaintiff alleges that his rights as a third-party beneficiary of the contract between defendant Prison Health Services and the Department of Corrections are being violated. This breach of contract claim is a state law claim. However, because I am granting summary judgment with respect to plaintiff's Eighth Amendment claims, I decline to exercise supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. § 1367.

Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (holding that "a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims").

ORDER

IT IS ORDERED that

1. Defendant Gerald Berge's motion for summary judgment is GRANTED;

2. The amended motion for summary judgment of defendants Prison Health Services, Inc., Dr. Todd Riley, Pamela Bartels, Joline Millin, Becky Manning, Renee Waltz, Shirley Olson, Edith Klema, Lois Rustad and Katherine McQuillan is GRANTED.

The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 18th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge