IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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QUINTIN D. L'MINGGIO,

Plaintiff, OPINION AND ORDER

v. 01-C-0559-C

PAMELA BARTELS, SHIRLEY OLSON, DR. BOSTON, PATTY BOEBEL, JOLENE MILLIN and SUZANE WATTERS,

Defendants.

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Quintin D. L'Minggio, an inmate at Supermax Correctional Institution in Boscobel, Wisconsin, contends that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to provide adequate dental care for a broken wisdom tooth.

Presently before the court is defendants' motion for summary judgment. Because plaintiff has failed to adduce evidence indicating that defendants were deliberately indifferent to his dental needs, the motion will be granted.

From defendants' proposed findings of fact and plaintiff's responses, I find the

following facts material and undisputed.

UNDISPUTED FACTS

Plaintiff is an inmate at the Wisconsin Secure Program Facility located in Boscobel, Wisconsin. At all relevant times, defendants were employees of Prison Health Services, Inc., a private entity providing health care services to the prison pursuant to a contract with the Wisconsin Department of Corrections. Defendant Pamela Bartels was a registered nurse and health services administrator; defendant Dr. Thomas Boston was a dentist; defendants Shirley Olson and Suzane Watters were registered nurses; defendants Patty Boebel and Jolene Millin were licensed practical nurses.

In March 2001, defendant Bartels learned that Dr. Richard Lofthouse, the prison's dentist, was resigning effective May 31, 2001. Upon learning this, defendant Bartels notified Prison Health Services immediately of the vacancy and a recruiting effort commenced. Defendant Bartels's job description required her to "monitor" the hiring of professional staff, including a dentist. Prison Heath Services' recruiting department had the primary responsibility for hiring a dentist. Because of the nature of working in a maximum-security prison and the limited number of dentists in the Boscobel area, Prison Health Services had a difficult time filling Dr. Lofthouse's position. Defendant Bartels was aware of the lack of interest. She contacted defendant Boston and asked that he apply for the

position. He did so on June 6, 2001. On June 18, 2001, after salary negotiations, the regional manager at Prison Health Services hired defendant Boston. Defendant Bartels had no authority to hire defendant Boston at the salary he requested. To defendant Bartels' knowledge, no other applications had been received before defendant Boston's.

As of May 31, 2001, the dental assistant who worked with Dr. Lofthouse also resigned. The department had the same difficulties in filling the dental assistant's position. Without a dental assistant, defendant Boston could not perform dental procedures safely.

Plaintiff suffered severe pain in a wisdom tooth located in his upper left jaw from June 7 to July 4, 2001 (the date on which he was prescribed Vicodin), especially during the overnight hours of approximately 11:00 p.m. to 6:30 a.m.

On June 6, 2001, a nurse assessed plaintiff's tooth pain. That same day, Dr. Gert Hasselhof, a medical doctor, ordered plaintiff to take 650 mg of Tylenol up to three times a day for pain.

On June 12, 2001, Dr. Hasselhof ordered plaintiff to take 800 mg of ibuprofen three times a day. The ibuprofen was in addition to the Tylenol. Plaintiff was given Tylenol three times a day until June 14, 2001. Plaintiff was given ibuprofen three times a day from June 12 to July 5, 2001.

On June 14, 2001, plaintiff reported to a nurse that the Tylenol and ibuprofen were not controlling his pain adequately. That same day, Dr. Hasselhof prescribed plaintiff 100

mg of Darvocet to be taken three times a day until he could be seen by a dentist.

On June 18, 2001, after consulting by telephone with nursing staff at the prison, defendant Boston discontinued plaintiff's Darvocet and re-prescribed 650 mg of Tylenol. In defendant Boston's dental practice, he has not found Darvocet to be consistently effective for controlling pain.

On July 2, 2001, defendant Boston saw plaintiff and determined that his wisdom tooth should be extracted and explained that he could not do the procedure without a dental assistant. Defendant Boston concluded that in any event immediate extraction was not necessary. (Defendant Boston and plaintiff dispute whether plaintiff was in severe pain during this visit.)

On July 5, 2001, after nurse Ken informed defendant Boston of plaintiff's continued pain, Boston discontinued the Tylenol and ibuprofen and prescribed 5 mg of Vicodin to be taken every three hours. The Vicodin relieved plaintiff's pain.

On July 10, 2001, defendant Boston extracted plaintiff's tooth without complication with the help of a dental assistant.

The nurses, defendants Bartels, Boebel, Millin, Olson and Watters, do not have the authority to prescribe new medications or exceed the dose prescribed by the doctor. They provided Tylenol, ibuprofen and, for a brief period, Darvocet, to plaintiff as prescribed.

OPINION

A. Defendant Boston

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 an Eighth Amendment claim of cruel an unusual punishment, a prisoner must show that (1) he had a serious medical need and (2) the defendants were deliberately indifferent to it. Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir.2001); see also Estelle, 429 U.S. at 106 ("a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs"). The Court of Appeals for the Seventh Circuit has defined "serious medical needs" as encompassing 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. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Deliberate indifference entails more than "mere negligence," Farmer v. Brennan, 511 U.S. 825, 836 (1994), but requires the prisoner to show that the prison official was aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed to the prisoner's health or safety. Id. at 837.

According to the Court of Appeals for the Seventh Circuit, "dental care is one of the

most important medical needs of inmates." Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001) (inmate stated claim when deprived of dentures and was unable to chew food and suffered bleeding, headaches, humiliation and disfigurement). Defendants allege that plaintiff is not a medical expert and, thus, is not qualified to ascertain the seriousness of the condition of his tooth. However, plaintiff is capable of describing the pain and suffering that he may have experienced as a result of his tooth, Gutierrez, 111 F.3d at 1371, and the undisputed facts show that defendants recognized that plaintiff was suffering sufficient pain to require treatment. Taking the facts in the light most favorable to plaintiff, as I must on a motion for summary judgment, I find that plaintiff has adduced facts sufficient to show that the pain he suffered relating to his broken wisdom tooth constitutes a serious medical need. (The parties dispute whether plaintiff's tooth was broken or decayed, but this distinction is of no significance. Because plaintiff's prison records indicate that several health services staff members concluded that his tooth was broken, I will refer to it as broken.)

Turning to the second element, I conclude that plaintiff has not provided evidence to show that defendant Boston was deliberately indifferent to his broken wisdom tooth. The undisputed facts are that Prison Health Services hired defendant Boston on June 18, 2001. That same day, after consulting by telephone with nursing staff at the prison, defendant Boston changed plaintiff's pain medication. Although neither plaintiff nor defendants

proposed any facts regarding plaintiff's pain from June 18 to July 2, 2001, plaintiff's affidavit contains averments that his pain continued throughout this period. Even if I were to construe the averments in plaintiff's affidavit as validly proposed (and undisputed) facts, his claim against defendant Boston still fails.

The Supreme Court has held that deliberate indifference requires a showing 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 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 (internal citation omitted), giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104-05 (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"). In this case, defendant Boston's treatment of plaintiff was not so blatantly inappropriate as to evidence intentional mistreatment of his tooth pain. Both Dr. Hasselhof and defendant Boston prescribed 650 mg of Tylenol and 800 mg of ibuprofen to control plaintiff's pain. Defendant Boston reviewed plaintiff's dental records the same day he commenced his employment. He believed that Tylenol and ibuprofen were adequate to control plaintiff's pain and that the condition of plaintiff's tooth on July 2 did not warrant immediate extraction.

In essence, plaintiff contends that he should have been prescribed Vicodin earlier or that his tooth should have been extracted before July 10, 2001. However, a difference of opinion about the type of care provided does not constitute deliberate indifference. See Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996). It is not enough to assert facts that, if true, would constitute poor or negligent medical care. Such assertions might make out a state law tort claim for medical malpractice, but they do rise to the level of an Eighth Amendment violation. See Estelle, 429 U. S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Accordingly, defendants' motion for summary judgment as to defendant Boston will be granted.

B. Defendant Nurses

In his complaint, plaintiff alleges that during the overnight hours from June 7 to July 4, 2001 (the date defendant Boston prescribed Vicodin), the nursing staff did not respond adequately to his pain. However, it is undisputed that the defendant nurses, Olson, Boebel, Millin and Watters, do not have the authority to prescribe medications or exceed the dose of pain medication prescribed by Dr. Hasselhof or defendant Boston. Therefore, plaintiff's claim against the defendant nurses is without merit.

To the extent that plaintiff alleges that the defendant nurses deliberately withheld prescribed medication, plaintiff has failed to provide evidence sufficient to prove this contention. In particular, plaintiff attempts to dispute defendants' proposed finding of fact that he received Tylenol three times a day until June 14, 2001, by asserting generally that "the nurses were not giving him his meds at times and signing their initials as if they were." See Plt.'s Resp. to Dfts.' Proposed Find. of Fact, dkt. #74, at ¶ 22. However, plaintiff's cited evidence fails to support his assertion that the nurses deliberately withheld prescribed medication. Specifically, plaintiff's proof consists of an inmate complaint he filed on June 20, 2001 (SMCI-2001-18189). In that complaint, plaintiff alleged that defendant Olson refused to give him his medication once on June 20 and twice on unspecified dates when he was housed in the prison's Echo unit. In response to this complaint, the inmate complaint examiner stated:

> The inmate was given ibuprofen 3 times during the day on 6-20-01. He was given Tylenol on the bedtime medication pass. This was all the medicine that was ordered for pain. The ICE would note that the inmate's order for Darvocet had been discontinued by Dr. Boston on 6-18-01. Although the ICE would not suggest to be a medical expert, it is found to be curious that someone in such consistent pain would be taken off of pain medication. As such, it is recommended this complaint be dismissed with a copy forwarded to V. Manoni for follow-up with Dr. Boston.

Plt.'s Cpt., dkt. #4, at Exh. 19. When appealing the examiner's determination, plaintiff stated that he was "[i]n full agreement with the ICE + her comments, and especially about being taken off pain medicine with my [s]ituation was urgent [sic], I only request that this ICI be affirmed with modifications, and that it be inquired into why *he* did it." Id. at Exh. 21 (emphasis added). It is clear that the "he" plaintiff is referring to is defendant Boston. In other words, after the examiner's investigation, plaintiff appealed only that portion of his complaint in which he alleged that it was wrong for Dr. Boston to take him off the Darvocet. Thus, the cited evidence shows that plaintiff was in "full agreement" with the inmate complaint examiner's findings that he received all his prescribed medication. Simply put, the defendant nurses cannot be found to be deliberately indifferent to plaintiff's pain by carrying out the treatment prescribed by Dr. Hasselhof and defendant Boston.

Plaintiff argues further that the defendant nurses were supposed to come immediately and render medical aid whenever he requested. However, it is undisputed that Dr. Hasselhof and defendant Boston were each aware of plaintiff's tooth and accompanying pain. Plaintiff has not explained what aid the defendant nurses could have rendered in light of the

undisputed fact that they could not adjust plaintiff's prescribed pain medication. Accordingly, defendants' motion for summary judgment will be granted as to the defendants Olson, Boebel, Millin and Watters.

C. Defendant Bartels

Plaintiff alleges that defendant Bartels turned a "blind eye" to his suffering and that she failed to take plaintiff to an outside dentist or have a dentist come into the prison through a temporary assignment as "she is required to do." First, it is undisputed that, as a nurse, defendant Bartels could not prescribe pain medication to plaintiff or alter the medication that Dr. Hasselhof or defendant Boston prescribed. Second, although plaintiff argues that, as health services administrator, defendant Bartels is required to take plaintiff to an outside dentist or temporarily assign a dentist to the prison, he has not proposed any facts in support of this assertion. Moreover, defendant Bartels' position description does not give her any such authority. See Aff. of Pamela Bartels, dkt. #57, at Attachment. Finally, to the extent that plaintiff alleges that defendant Bartels failed to hire a dentist, it is undisputed that she did not have that authority. Accordingly, defendants' motion for summary judgment as to defendant Bartels will be granted.

ORDER

IT IS ORDERED that motion for summary judgment filed by defendants Pamela Bartels, Shirley Olson, Dr. Boston, Patty Boebel, Jolene Millin and Suzane Watters is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 7th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge