IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MONTELL M. HORTON,

OPINION AND ORDER

Plaintiff,

02-C-0470-C

v.

PAMELA BARTELS,

Defendant.

- -

This is a civil action for monetary relief brought by plaintiff Montell M. Horton, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Plaintiff contends that defendant Pamela Bartels violated his constitutional rights under the Eighth Amendment. Specifically, he alleges that she was deliberately indifferent to his serious medical needs when she refused to let him see an optometrist for over 21 days for his eye condition.

Presently before the court is defendant's motion for summary judgment. Because the plaintiff has failed to make a showing sufficient to establish the existence of an essential element on which he will bear the burden of proof at trial, summary judgment for the moving party is proper.

From the facts proposed by the parties, I find that the following material facts are not in dispute.

UNDISPUTED FACTS

Plaintiff Montell M. Horton is an inmate incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Pamela Bartels was an employee of Prison Health Services, Inc., a private company that provided health care services at the facility pursuant to a contract with the Wisconsin Department of Corrections. At all times relevant to this action, Bartels was employed at the Wisconsin Secure Program Facility as the Health Services Administrator.

On April 7, 2001, Horton sought medical care for "blurred vision and excruciating eye pain." Dr. Tai Chan, an optometrist in the Health Services Unit, examined him. Plaintiff's optomology records from that day indicate, "eyes dry, no other problms [sic]." The progress notes further explain, "complained of dry eyes, biomicroscopy of the cornea is neg (no stai...[illegible]), adequate tear flow, eversions of upper lids GPC 3f, eversion of lower lids showed f...[illegible] 2f, dry eyes are due to allergies, possibly contact ...x[illegible] allergic conjunctivitis of unknown nature Rx 1% pred for 14 days, f/u if not better." Horton was allowed to keep his eye drop prescription in his cell and self-administer it as necessary.

On May 1, 2001, plaintiff went to the Health Services Unit for an unrelated medical complaint. There is no indication in the progress notes that he complained about dryness

or difficulty with his eyes.

On May 21, 2001, Horton returned to the Health Services Unit for a follow-up eye examination. Dr. Nicolai, another optometrist, concluded that plaintiff had a possible bacterial infection and prescribed additional eye drops.

Between the dates of May 1 and 21, 2001, defendant Bartels personally observed the plaintiff on three separate occasions: May 2, 3, and 10. On each of those days, she noted on segregation rounds records that plaintiff was awake and that there was no change in his mental status. The records indicate also that although her interaction with plaintiff was limited, Bartels did not observe any significant physical findings.

OPINION

A. Standard of Review

The Court of Appeals for the Seventh Circuit has held that summary judgment is appropriate if the court concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party." Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995). A party moving for summary judgment will prevail if it demonstrates that there is no genuine issue of material fact and that it 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); Anetsberger v. Metropolitan Life Ins. Co., No. 93-1852, slip op. at 6-7 (7th Cir. Jan. 28, 1994). 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); Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1988). 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 Horton was allowed to proceed on a claim that defendant Bartels violated his Eighth Amendment rights by being deliberately indifferent to his serious medical needs when she refused to let him see an optometrist for over 21 days for his eye condition. 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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). This does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately

indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

In 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 v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997) ("'serious' medical need is one that has been diagnosed by a physician as mandating treatment").

To show deliberate indifference, the plaintiff must establish that the official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Inadvertent error, negligence, ordinary malpractice or even gross negligence does not constitute deliberate indifference. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002); see also Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care can be shown by a defendant's actual intent or reckless disregard. Reckless disregard is 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).

In the present case, plaintiff's objective medical needs are questionable at best.

Although Dr. Nicolai concluded that plaintiff had a possible bacterial infection on May 21, 2001, there is no way of knowing how serious the eye condition was on the days preceding it or even that the "possible bacterial infection" was a serious medical condition. The progress notes from his May 1 visit to the Health Services Unit are silent on the matter. Moreover, defendant's segregation round records from May 2, 3, and 10 reveal no significant physical findings. Even if one were to assume, however, that Horton's eyes mandated treatment as early as May 1st, he has failed to set forth any facts that support the subjective component of the Eighth Amendment test: defendant's deliberate indifference.

Plaintiff has not demonstrated that there is a genuine issue for trial regarding defendant's deliberate indifference. To do so, he needed to show not only that Bartels knew of his condition but also that it posed a substantial risk of serious harm when left untreated and, despite that known risk, chose to do nothing about it. In opposition to defendant's motion for summary judgment, Horton proposed as fact that he "repeatedly submitted request[s] to defendant Bartels, requesting to be seen by the optometrist immediately and that his eyes were in extreme pain and blurred vision." He then cited "(Comp. at 200), Ex. #101, Ex. #108; (aff. of Horton at 3); Ex. #110 - Ex. #117; (aff. of Horton at 5)" for support. Unfortunately for Horton, his affidavits do not support this proposition. His exhibits are similarly deficient. Of the ten he cited, only one falls within the relevant time period: his formal prison complaint dated May 17, 2001. That document, however, is not

addressed to defendant Bartels and there is no indication that she ever saw or read it it. With neither the affidavit nor exhibits to rely upon, plaintiff is left with the inadmissible allegations of his complaint.

This court cannot consider Horton's complaint as evidence when looking for a genuine issue for trial. As explained in II.E.1 of this court's Procedures to Be Followed On Motions For Summary Judgment, "Each fact proposed in disputing a movant's proposed factual statement and all additional facts proposed by the non-moving party must be supported by *admissible* evidence. The court will not search the record for evidence. To support a proposed fact, you may use evidence as described in Procedure I.C.1.a. through f." (emphasis added). Procedure I.C.1.a. through f. includes depositions, answers to interrogatories, admissions made pursuant to Fed. R. Civ. P. 36, other admissions, affidavits, and documentary evidence. It does not include complaints. Plaintiff should have been aware of this from a copy of the rules that was attached to this court's April 4, 2003, amended preliminary pretrial conference order.

In sum, the undisputed facts are that Bartels saw plaintiff briefly on May 2, 3, and 10 and indicated in her notes nothing remarkable about his eye condition. Because nothing in these facts support Horton's claim that Bartels knew that he had a serious eye condition requiring treatment and posing a substantial risk of serious harm and chose to do nothing about it, summary judgment for the defendant is proper.

ORDER

IT IS ORDERED that the motion of defendant Pamela Bartels for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this18th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge