IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

ORDER

Plaintiff,

02-C-544-C

v.

GERALD BERGE, CINDY SAWINSKI,
JOLENE MILLER, JOLINDA WATERMAN,

Defendants.

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EUGENE L. CHERRY,

Plaintiff,

02-C-394-C

v.

JON LITSCHER, GERALD BERGE,
JIM PARISI, TIMOTHY MASON,
PAM BARTELS, KATHRYN McQUILLAN,
JOHN SHARPE, and YASMIN YUSUF-SAFAVI,

Defendants.

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Plaintiff Eugene Cherry is an inmate at the Wisconsin Secure Program Facility. He filed these two lawsuits under 42 U.S.C. § 1983, alleging that various defendants violated

his constitutional rights by retaliating against him for filing lawsuits, failing to adequately treat his medical conditions and denying him food and medication when he failed to comply with prison rules. Because of the similarity of many of the facts in both cases, I granted defendants' motion to consolidate them in an order dated February 13, 2002. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court are three motions for summary judgment: one filed by plaintiff, one filed by defendants Gerald Berge, Jon Litscher, James Parisi, Timothy Mason and John Sharpe and one filed by defendants Cindy Sawinski, Jolene Millen, Jolinda Waterman, Pam Bartels, Katherine McQuillan, and Yasmin Yusuf-Safavi. Defendants' motions will be granted and plaintiff's motion will be denied. First, I conclude that plaintiff has failed to exhaust his administrative remedies with respect to his claim that he was denied food when defendants Mason, Parisi, Berge and Litscher placed a sign outside his cell. Second, defendants are entitled to summary judgment of plaintiff's retaliation claim because plaintiff has adduced no evidence that defendant Sharpe placed him on a behavior management plan because he filed a lawsuit against Sharpe's wife. Third, I conclude that defendants are entitled to summary judgment on plaintiff's claim that his Eighth Amendment right to adequate medical care was denied because plaintiff has failed to create a genuine issue of material fact with respect to the issue whether defendants Safavi and Bartels acted with deliberate indifference to plaintiff's health or safety and because plaintiff

failed to adduce any evidence that he was harmed by not receiving medication from defendants McQuillan, Sawinski, Millen and Waterman.

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

UNDISPUTED FACTS

A. Parties

Plaintiff Eugene Cherry has been incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, since December 2, 1999. During the time period relevant to this action, defendant Jon Litscher was Secretary of the Department of Corrections. Defendant Gerald Berge is the warden of the Secure Program Facility. Defendant James Parisi was the prison's security director. Defendant Sharpe was a unit manager at the prison. Defendant Mason is a correctional officer. Defendants Cindy Sawinski, Jolene Millen, Jolinda Waterman, Pam Bartels, Katherine McQuillan and Yasmin Yasuf-Safavi were employees of Prison Health Services, Inc., which contracted with the Department of Corrections to provide health care to inmates.

B. Treatment for H-pylori Bacteria

During a medical exam in the health services unit on April 3, 2001, plaintiff told Dr.

Todd Riley that he was experiencing reflux, which was worse at night and occasionally left a bad taste in his mouth. Riley prescribed Zantac for plaintiff and ordered blood work to test for the presence of H-pylori bacteria. Although "normal" populations of H-pylori provide a "protective effect" for the body, an overgrowth weakens the protective mucous lining of the stomach and duodenum. The bacteria's effects range from no symptoms to mild stomach discomfort to peptic ulcers. Generally, an overgrowth of h-pylori can be eliminated with a ten to fourteen day regimen of antibiotics and acid reducing medication. However, in defendant Safavi's view, repeated use of antibiotics is not recommended because it may lead to the development of serious conditions such as esophageal cancer and may deprive the body of the bacteria's protective benefits.

Plaintiff tested positive for H-pylori bacteria. On April 19, 2001, Riley placed him on a two-week regimen of antibiotic and antibacterial treatment, in addition to Zantac. On May 1, 2001, defendant's request for an extension of his Zantac prescription was granted. At a follow-up appointment with Riley on May 8, 2001, defendant reported that his symptoms were improved though he occasionally still experienced reflux. Riley ordered a continuing prescription for Zantac and lactaid. On September 24, 2001, plaintiff submitted a request to health services for a renewal of his Zantac prescription, writing that it had been effective in the past. His prescription was renewed the following day.

Plaintiff requested on January 26, 2002, that health services extend his Zantac

prescription because it was "really working." The prescription was renewed the following day. On January 30, 2002, plaintiff complained to Ron Reimer, a physician's assistant, regarding continuing abdominal discomfort and he requested another test for H-pylori. Reimer granted the request and on February 16, 2002, Reimer told plaintiff that he had tested positive. Reimer ordered a two-week regimen of antibiotic and antibacterial treatment. On March 27, 2002, defendant Safavi treated plaintiff for a dry skin condition. Plaintiff did not complain of stomach discomfort at this time.

On April 10, 2002, plaintiff complained to Reimer that he was experiencing a burning sensation in his stomach, explaining that although the medication was effective while it lasted, the symptoms returned once the prescription expired. In response, Reimer prescribed a 20-day regimen of antibiotic and antibacterial medications.

On August 3, 2002, plaintiff asked to see defendant Safavi to treat his pain for his stomach condition. Safavi declined to treat plaintiff at the time because she had other patients to examine. Prison staff gave plaintiff Pepto Bismol instead. Defendant Safavi examined plaintiff on August 13, 2002. Plaintiff told Safavi that his stomach condition had not been treated adequately. Safavi concluded that plaintiff's symptoms were consistent with gastroesphageal reflux disease, or GERD, and she placed him on a ten-day regimen of antibiotic and antibacterial treatment in addition to a prescription for Zantac.

Between January 20, 2002, and June 17, 2002, plaintiff made seven requests to speak

with defendant Bartels. Three of the requests address improper treatment for plaintiff's "serious medical issues." Two of the requests address plaintiff's stomach condition specifically. One of the requests is a complaint that defendant Millen refused to give him his medication and one is a complaint that Reimer would not examine him in a private setting. Defendant Bartels did not respond to any of these requests.

C. Treatment for Herpes

On November 7, 2001, plaintiff told Elizabeth Hinkley, a nurse practitioner, that he believed he had herpes. Hinkley observed some ingrown hairs in plaintiff's pubic area and a few small papules on his penis. She ordered blood work to test for the presence of the herpes simplex virus and prescribed antibiotics and warm packs. On December 13, 2001, lab results indicated that plaintiff tested positive for the herpes simplex virus group IgG-EIA.

As with h-pylori bacteria, the symptoms for a genital herpes infection can vary, from several outbreaks each year to only a few outbreaks over the course of a lifetime. Outbreaks may involve mild symptoms such as itching and redness or more severe ones such as painful burning and sores. Although there is no cure for herpes, it may be treated with antiviral medications that relieve the pain and discomfort of the disease's symptoms, shorten the duration of the infection and reduce new lesion formation and viral shedding.

On January 24, 2002, plaintiff complained to physician's assistant Ron Reimer about

lesions on his penis and requested additional information about his lab results. Reimer discussed plaintiff's results with him on January 30, 2002, and prescribed acyclovir, an antiviral medication. Plaintiff did not complain of any herpes-related symptoms during his appointment with defendant Safavi on March 27, 2002. Reimer examined plaintiff again on April 10, 2002, after plaintiff informed him that his lesions had returned. Reimer gave plaintiff another prescription for acyclovir.

On July 3, 2002, plaintiff complained of a flare-up of lesions. At least by July 9, 2002, plaintiff was given a renewed prescription of acyclovir. On July 7, 2002, plaintiff requested to see a physician and was scheduled for an appointment on July 10, 2002. However, plaintiff refused to keep the appointment because the doctor would not agree to see plaintiff alone.

D. Denial of Medication and Food

In accordance with prison rules, inmates at the Secure Program Facility must follow certain procedures when receiving food or medication. They must stand at their door, keep their light on and be wearing trousers or gym shorts. Failure to do any of these things is construed by prison staff as a "refusal" to accept medication.

In May 2000, defendant Mason placed a sign outside plaintiff's door that stated:

DUE TO INMATE CHERRY'S ONGOING

BEHAVIOR,

IF HE EXPOSES HIMSELF TO **ANY**
STAFF, SUCH BEHAVIOR IS TO BE REGARDED AS

NON-COMPLIANCE
AND

WILL RESULT IN DENIAL OF ANY ITEMS BEING OFFERED AT THE TIME

(MEALS, MEDICATION, SHOWER
ROLL, LINEN, PHONE, SUPPLIES, ETC.)

The sign remained outside plaintiff's door until September 2001.

Plaintiff wrote letters to defendants Berge and Parisi, asking that the sign be taken down. In a letter to plaintiff dated July 13, 2000, defendant Berge noted, "The sexual activity you describe in your correspondence is only noted as inappropriate when you specifically perform for staff at your cell front." Berge recommended, "Please conduct yourself appropriately and succeed through the Level System, and afford yourself many more options than now present." Defendant Parisi wrote that staff members "are not expected to be subject to unnecessary displays by yourself."

On June 14, 2000, plaintiff filed inmate complaint SMCI-2000-17413, in which he alleged that defendant Mason had placed the sign outside his door in order to "humiliate and slander" him. Plaintiff withdrew the complaint the following day, writing that "the matter

has been taken care of." Plaintiff filed complaint SMCI-2001-17413 on March 26, 2001. He wrote that he was being subjected to "constant monitoring." In addition, plaintiff alleged that he was being denied medication and meals because of a sign outside his door. The inmate complaint examiner rejected plaintiff's complaint because it contained more than one issue. Plaintiff appealed to the corrections complaint examiner, arguing that he was "complaining (only) about the 'constant monitoring' issue and not the 'constant monitoring issue' & the sign being placed outside my cell." The corrections complaint examiner and the office of the secretary affirmed the examiner's rejection of the complaint.

According to plaintiff's behavior and multi-purpose logs, he "refused" medications on nine occasions in 2000, 2001 and 2002: July 22, 2000, November 16, 2001, November 21, 2001, November 30, 2001, December 11, 2001, February 18, 2002, February 23, 2002, March 9, 2002 and June 4, 2002. According to these same sources, he "refused" meals on the following dates: May 4, 2000, May 19, 2000, August 7, 2000, April 19, 2001, May 18, 2001, November 26, 2001, July 12, 2002, July 15, 2002, and January 29, 2003. In addition, he "refused" meals every day from November 16, 2001, to November 24, 2001. Plaintiff was not deprived of more than one meal each day, with the exception of November 16, 2001, and July 15, 2002, on which plaintiff "refused" breakfast, lunch and dinner.

On April 20, 2002, defendant McQuillan chose not to give plaintiff his medication because he was yelling profanities and making sexual comments. On several occasions in

July, August and September 2002, defendants Sawinski, Waterman and Millen denied plaintiff medication because he was engaging in inappropriate sexual behavior at the time that medication was being administered. Plaintiff filed several complaints about these refusals, most of which were affirmed because the policy at the prison was to refrain from using food or medicine as punishment.

E. Behavior Management Program

From December 1999 to June 2002, plaintiff received 14 conduct reports related to inappropriate sexual conduct, such as exposing himself to staff. In addition, between May 2000 and June 2002, he received 131 entries in his behavior log for similar sexual misconduct. In June 2002, defendant Sharpe placed plaintiff on a "special management program." Under the program, which defendant Berge approved, plaintiff's property would be removed from his cell if he engaged in inappropriate sexual conduct. Further, before his medications were administered, plaintiff was removed from his cell wearing a "segregation smock/gown."

OPINION

A. Denial of Food – Exhaustion of Administrative Remedies

Plaintiff filed two inmate complaints regarding the sign placed outside his cell.

However, he withdrew the first complaint voluntarily and the examiner rejected the second complaint under Wis. Admin. Code § DOC 310.09(1) because it included more than one issue. An inmate that fails to follow the procedural rules of the inmate complaint review system has not exhausted his administrative remedies under 42 U.S.C. § 1997e(a). Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). "Failure to do what the state requires bars, and does not just postpone, suit under § 1983." Id. at 1024. Accordingly, I must dismiss plaintiff's claim that defendants Mason, Parisi, Berge and Litscher violated his Eighth Amendment rights by consenting to the placement of a sign that instructed prison staff to deny plaintiff food and medicine for inappropriate behavior.

B. Retaliation

In his complaint, plaintiff alleged that defendant Sharpe placed him on a behavior management program because plaintiff was suing defendant Sharpe's spouse. In a claim for retaliation, the ultimate question is whether events would have transpired differently absent the retaliatory motive." Babcock v. White, 102 F.3d at 267, 275 (7th Cir. 1996). Plaintiff has presented no evidence to support his retaliation claim. Rather, the facts show that defendant Sharpe instituted the program in response to plaintiff''s extended history of sexually inappropriate behavior. Because plaintiff bears the burden to prove retaliation, his failure to adduce supporting evidence is fatal to his claim. See Anderson v. Liberty Lobby,

Inc., 477 U.S. 242 (1986) (to defeat motion for summary judgment, plaintiff may not rest on allegations in complaint but must come forward with probative evidence supporting his claim). Defendant's motion for summay judgment will be granted with respect to this claim.

C. Failure to Treat Medical Conditions

Plaintiff alleged in his complaint that defendant Bartels refused to treat his herpes and stomach condition, even though he made repeated requests for her to do so. In addition, he alleged that defendant Safavi refused to see him for ten days even though he was in excruciating stomach pain. I allowed plaintiff to proceed against both of these defendants on claims that they violated his Eighth Amendment rights by acting with deliberate indifference to his serious medical needs. See Farmer v. Brennan, 511 U.S. 825 (1994).

In support of his claim against Bartels, plaintiff has submitted several "interview/information" forms dated between January and June 2002 in which he requested to speak with defendant Bartels about his "serious medical issues." Defendant Bartels did not respond to any of these requests and defendants do not explain the reason for this inaction. However, although defendant Bartels's failure to respond may have been insensitive, it falls short of demonstrating deliberate indifference to plaintiff's health or safety.

It is undisputed that plaintiff was provided medical treatment for both his herpes and

his stomach condition on numerous occasions in 2001 and 2002. The complaints that plaintiff was making to defendant Bartels were not that he needed immediate medical treatment but rather that he was unhappy with the treatment that he was getting. Plaintiff's frustration is understandable; it is clear that he continued to experience symptoms despite the treatment that he received. Perhaps those providing medical care for plaintiff should have tried longer regimens of medication or alternative treatments, but if this is true, it would support a claim for negligence at most; it does not suggest that plaintiff was subjected to cruel and unusual punishment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Williams v. O'Leary, 55 F.3d 320 (7th Cir. 1995). Many people outside prison become frustrated with their medical care or believe that their care providers could do more to alleviate their illnesses. However, such a belief does not support a claim under the Eighth Amendment just because the patient is a prisoner. Regardless whether plaintiff's treatment completely resolved his medical problems, the facts show that medical staff did address his concerns, even if defendant Bartels did not do so personally, and they generally did so within a short time of plaintiff's requests for treatment, often within a day. The Constitution does not guarantee plaintiff that his medical problems will be resolved to his satisfaction; it only prohibits prison officials from recklessly disregarding substantial risks of harm to an inmate's health or safety. Snipes v. Detella, 95 F.3d 581 (7th Cir. 1996). Although plaintiff's conditions may have caused him discomfort at times, they did not place him in any

immediate danger so that a failure to provide him with immediate treatment on demand caused an excessive risk to his health.

With respect to plaintiff's claim against defendant Safavi, I noted in the order granting plaintiff leave to proceed that "[i]t will not be enough for petitioner to show that [defendant Safavi] was unable to see [plaintiff] because of more pressing scheduling demands or he had a different view than [plaintiff] of the necessary treatment. Rather, he must show that [defendant Safavi] acted intentionally or with reckless disregard in refusing to treat him." Plaintiff has adduced no evidence showing that Safavi acted with intent to harm him or with reckless disregard to his health or safety. Although it is certainly regrettable that Safavi could not treat plaintiff right away, plaintiff does not dispute the fact that Safavi could not see him immediately because of demands from other patients. Further, plaintiff communicated no information to Safavi suggesting that immediate treatment was needed and plaintiff's medical history supports a conclusion that his needs were not urgent. Accordingly, plaintiff's claims against defendants Bartels and Safavi must be dismissed.

D. Denial of Medication

I granted plaintiff leave to proceed on a claim that defendants McQuillan, Sawinski, Millen and Waterman denied plaintiff medication in violation of the Eighth Amendment. As an initial matter I note that defendants proposed a number of facts with respect to their

lack of authority in deciding when they may or may not withhold medication. For instance, they state that "HSU staff is obligated to defer to WSPF officers on matters of security" and that they "acted consistent with WSPF policy and upon the instruction of WSPF officers." Dfts.' Prop. Find. of Fact ¶¶ 38-39, dkt. #83, at 9. To the extent that these defendants suggest that they cannot be held liable for constitutional violations if their acts are consistent with prison policy, I disagree. As other courts have noted, there is no "just following orders" defense under § 1983. See, e.g., Gonzales v. Cecil County, Maryland, 221 F. Supp. 2d. 611, 617 (D. Md. 2002). The only difference that a policy makes is to impose liability on supervisory officials liable as well. See Perkins v. Lawson, 312 F.3d 872, 875 (7th Cir. 2002).

The denial of medication can violate the Eighth Amendment in some circumstances. Walker v. Benjamin, 293 F.3d 1030, 1039 (7th Cir. 2002) (summary judgment inappropriate on Eighth Amendment claim when plaintiff submitted evidence that defendant refused to provide prescribed pain medication). However, in Walker, there was evidence that the defendant refused plaintiff his medication simply because she did not want him to have it. The court stated that if the jury believed the plaintiff, such a refusal would be an "unnecessary and wanton infliction of pain." Id. at 1040. The facts are different in this case because defendants withheld medication in response to plaintiff's inappropriate behavior. Plaintiff could have received his medication if he had complied with prison policies. Using

medication as a disciplinary tool has questionable penological value, as many of the prison officials themselves recognized during the inmate complaint review process. Even so, one could argue that a prison official does not act "wantonly" when he denies an inmate medication because of his misconduct and not out of desire to cause harm.

I need not resolve this difficult question in this case, however, because even assuming that defendant's actions were "unnecessary and wanton" or at least "deliberately indifferent," plaintiff has pointed to no evidence showing that he was harmed by the denial of medication. In Walker, the defendant had denied the plaintiff all medication, even though a doctor had prescribed him "a powerful narcotic-based pain killer" after his surgery. As a result, the plaintiff was in great pain. In this case, however, plaintiff has proposed no facts suggesting that missing an occasional dose of medication caused him pain or otherwise threatened his health. Plaintiff was required to show not only that defendants acted with deliberate indifference but also that they subjected him to an excessive risk of harm. By itself, evidence that plaintiff did not receive every dose of his medication is insufficient to show such a risk. Therefore, defendants' motion for summary judgment will be granted with respect to this claim.

ORDER

IT IS ORDERED that plaintiff Eugene Cherry's motion for summary judgment is

DENIED and defendants' motions for summary judgment are GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close these cases.

Entered this 26th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge