IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRISON FRANKLIN,

Plaintiff,

OPINION AND ORDER

v.

02-C-618-C

GARY R. McCAUGHTRY, GERALD BERGE,
PAULINE BELGADO, SARGENT SIEDOSCHLAG,
PETER HUIBREGTSE, LINDA HODDY-TRIPP,
JIM WEGNER, SARGENT LIND, CAPTAIN JOHN P
GRAHL, SARGENT DAN MEEHAN, CO II MIKE
GLAMAN, NURSE HOLLY MEIER, PAM BARTELS,
TODD BAST and STEVEN SCHOELER

Defendants.

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In an opinion and order dated February 3, 2004, I granted defendants' motion for summary judgment and dismissed this case. The clerk of court entered judgment in favor of defendants on the same day. Plaintiff has filed a "motion for reconsideration and correction of undisputed facts," which I construe as a timely-filed motion to alter or amend the judgment under Fed. R. Civ. P. 59.

In his motion, plaintiff makes several arguments. First, he asks the court to consider

his previous motion under Fed. R. Civ. P. 6(b) to grant him an enlargement of time to substitute defendant Belgado's estate in the place of defendant Belgado, who died last year. I addressed this issue both in the February 3 opinion and order and in a later order dated February 9, 2004. I will not consider the issue again. Second, plaintiff renews his request to recover sanctions for affidavits that Cindy Sawinski and defendant Linda Hoddy-Tripp allegedly filed in bad faith. Because plaintiff offers nothing new that persuades me that sanctions are appropriate, plaintiff's request will be denied.

Third, plaintiff identifies several facts that he believes the court erroneously overlooked or concluded were undisputed when they were not. I will discuss each of plaintiff's arguments below.

Retaliation

One of plaintiff's claims was that several defendants falsely accused him of drug possession because of an earlier lawsuit he had filed. Plaintiff argues that there is a dispute whether a confidential informant told defendants that plaintiff had received drugs from a visitor. However, as I explained in the February 3 opinion and order, even if these facts were genuinely disputed, the disputes would not be material:

> [E]ven if plaintiff were correct that Grahl, Meehan and Glamann had no factual basis for concluding that he was in possession of an illegal substance and that the whole investigation was a sham, his retaliation claim would fail nevertheless. It is not

> enough for plaintiff to show that defendants took adverse action against him without checking their facts or even that they *knew* that plaintiff was not harboring contraband. . . . [T]o prevail on a retaliation claim, plaintiff must show that defendants took action against him because he exercised his constitutional rights.

February 3 Op. and Order, dkt. # 114, at 17-18. Plaintiff has still failed to point to any evidence that defendants' actions were motivated by his previous lawsuit. Accordingly, plaintiff's motion for reconsideration will be denied with respect to this claim.

Adequate Medical Care

Plaintiff asserted a number of a claims in his complaint regarding medical care. Among them were claims that defendant Holly Meier refused to treat his finger because he would not pay a $2.50 co-payment, that defendant Belgado failed to properly diagnose and treat his squamous cell carcinoma, that defendant Schueler failed to provide him with adequate exercise and that defendant Hoddy-Tripp prevented him from obtaining eyeglasses.

In his motion, plaintiff says that the court failed to consider the undisputed fact that he was not required to make a co-payment because he was on non-wage paying status. First, I note that plaintiff did not propose any facts showing that prisoners not receiving wages are exempt from making co-payments or that defendant Meier knew that plaintiff was exempt from paying. In any event, whether or not plaintiff was exempt is irrelevant. Plaintiff failed to adduce any evidence that his finger required immediate treatment at the time Meier

examined it or that Meier believed that failing to treat plaintiff would pose a substantial risk of serious harm.

Plaintiff also says that the court failed to consider evidence that the amputation of his finger could have been prevented if defendant Belgado had diagnosed his condition sooner. Plaintiff is correct that I did not discuss this proposed fact in the February 3 opinion and order. There are two reasons for this. First, plaintiff's only evidence was his own affidavit in which he averred that a doctor from UW Hospital had told him that earlier detection could have prevented amputation. Thus, plaintiff's affidavit was based on second-hand information; he did not have *personal knowledge* that Belgado's failure to diagnose his condition caused his amputation. Under Rule 56(e), a court may not consider affidavits unless they are "made on personal knowledge." Second, even if plaintiff's affidavit were admissible, it would not have precluded summary judgment. To prevail on a claim under the Eighth Amendment, a plaintiff must show both that he had a serious medical need *and* that the defendant was deliberately indifferent to that need. As I discussed in the February 3 opinion and order, it is undisputed that defendant Belgado attempted to treat plaintiff's condition through 1997 and 1998. Although his failure to realize the serious nature of plaintiff's condition may have been negligence, negligence is insufficient to prove an Eighth Amendment violation.

With respect to plaintiff's claim of inadequate exercise, he argues that I erred in

dismissing this claim for his failure to adduce any evidence either that he was denied exercise or that, if he were, defendant Schueler was responsible for this denial. Plaintiff points to a letter that he filed with his summary judgment materials in which he complained that the Wisconsin Secure Program Facility has "no exercise facilities or machines." As I explained to plaintiff in the February 3 opinion and order, complaints are not evidence of the facts alleged in that complaint; they show only that plaintiff did in fact complain. In any event, evidence that a prison has no exercise facilities would be insufficient to show that defendant Schueler was violating plaintiff's Eighth Amendment rights.

Finally, with respect to his claim of a denial of eyeglasses, plaintiff writes that his doctor appointment in December 2000 was not related to his eyes. Rather, plaintiff says that the doctor only looked at his eyes because plaintiff asked him to. Plaintiff did not propose this allegation as a fact in his summary judgment materials. Even if he had, it does not show that defendant Hoddy-Tripp was deliberately indifferent to a serious medical need. Regardless why plaintiff went to the doctor, it is undisputed that defendant Hoddy-Tripp was making efforts in December 2000 to determine what needed to be done to protect plaintiff's health.

In short, plaintiff has not shown that the February 3 opinion and order contains any

legal errors. Accordingly, his motion to alter or amend the judgment will be denied.

ORDER

IT IS ORDERED that plaintiff Harrison Franklin's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 is DENIED.

Entered this 17th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge