IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L. CHERRY,

Plaintiff,

OPINION AND ORDER

v.

02-C-71-C

JON LITSCHER, GERALD BERGE, CHRISTINE APPLE and COLETTE CULLEN,

Defendants.

- -

In an order dated April 1, 2002, plaintiff Eugene L. Cherry was granted leave to proceed on his Eighth Amendment conditions of confinement claim against defendants Jon Litscher and Gerald Berge, his Eighth Amendment inadequate mental health care claim against defendants Christine Apple and Colette Cullen and his Fourth Amendment unreasonable searches claim against defendants Litscher and Berge. He was denied leave to proceed on all other claims.

Now before the court is a motion for summary judgment filed by defendants Apple and Cullen, in which they contend that they were not deliberately indifferent to plaintiff's alleged serious mental health care needs. Because I conclude that no reasonable jury could

find that defendants Apple and Cullen were deliberately indifferent to plaintiff's serious mental health care needs, defendants' motion for summary judgment will be granted.

For the purpose of deciding this motion, I find the following facts proposed by the parties to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Eugene L. Cherry is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin. Defendant Christine Apple is a psychologist-doctorate at Supermax. Defendant Colette Cullen is a psychologist at the institution.

B. Plaintiff's Mental Illness

A mental illness screening tool was completed for plaintiff before he was transferred to Supermax. That document indicates that plaintiff does not have a documented history of chronic or severe mental illness. It also states that plaintiff has no history of medication for any mental illness and no history of suicide attempts.

Plaintiff's inmate evaluation report dated January 26, 2002, notes that according to his records, plaintiff is

regarded as very antisocial and criminally oriented. He has no history of treatment

> for mental illness or prescriptions for psychotropic medications. His clinical services contacts reflect complaints of being unable to tolerate the conditions of segregation units, but there are no descriptions or complaints consistent with mental illness.
> . . .
> Clinicians and correctional staff were consistent in their statement that [plaintiff] is well known for his inappropriate sexual behaviors. Correctional staff stated that he frequently masturbates openly, particularly in the presence of female staff. However, both clinical and correctional staff denied observations of any behaviors indicative of mental illness.
> . . .
> Although [plaintiff] complained of paranoia in regard to clinical and correctional staff, his reaction seems to be due to a general distrust of authorities and not due to the effects of mental illness. Therefore, it is the opinion of the undersigned that [plaintiff] does not currently suffer from a serious mental illness that results in significant impairment of his thinking, judgment, mood or behavior. His mental status is such that he is able to recognize reality, to meet the ordinary demands of life, to appreciate the wrongfulness of his behavior, and to conform his behavior to inmate conduct requirements.

C. Supermax Staff's Treatment of Plaintiff's Mental Health Care Needs

1. Defendant Apple

Defendants Apple and Cullen work under the general supervision of Supermax's psychologist supervisor, Dr. Twila Hagan, to provide mental health services to inmates at the institution. Both defendants have access to, prepare and examine mental health records of inmates at the institution written by mental health care staff. Since defendants have worked at Supermax, plaintiff has been assigned to Dr. Hagan's caseload. Plaintiff never informed either defendant that he had attempted suicide. Neither defendant became aware of any

alleged suicide attempt until they learned of the allegation through this lawsuit. Defendants are not aware of any situation in which plaintiff was in need of emergency care and in which they were required to intervene in Dr. Hagan's absence.

Plaintiff has a history of getting the attention of female staff members and then making inappropriate sexual comments or engaging in inappropriate sexual conduct, such as exposing himself and masturbating. He has made contact with defendant Apple when she has visited Supermax units where plaintiff was housed. At times, plaintiff has made sexually inappropriate remarks to defendant Apple that she ignored. At other times, when plaintiff made requests for her attention in an appropriate manner, defendant Apple talked with plaintiff at his cell front, provided he did not act out in an inappropriate sexual manner. Plaintiff spoke to defendant Apple about programming and placement issues and not about mental health concerns. From her contacts with plaintiff, defendant Apple did not believe that plaintiff had any concerns that could not wait for Dr. Hagan.

2. Defendant Cullen

When defendant Cullen has visited the units where plaintiff was housed, plaintiff has called out Cullen's name and then made sexually inappropriate comments to her. She ignored these comments. Plaintiff had not asked defendant Cullen to speak with him at such times and he has not complained of any clinical symptoms to defendant Cullen. Defendant

Cullen has not spoken to plaintiff face-to-face.

In an interview/information request dated September 9, 2001 and addressed to "psychologist," plaintiff asked for written information about coping with depression. In response, defendant Cullen sent plaintiff a copy of several chapters of "Thoughts & Feelings Taking Control of Your Moods and Your Life."

It is the understanding of both defendants that responding to plaintiff's sexually inappropriate language and conduct is counterproductive, because it encourages this antisocial behavior and interferes with his rehabilitation. At no time have defendants Apple or Cullen wished to harm plaintiff. They do not know of any unmet mental health care needs that plaintiff may has.

In the professional opinion of defendants Apple and Cullen, once a psychologist has established a relationship with a person, another psychologist should not intervene and disrupt that relationship. This standard promotes consistency of care from a psychologist who knows the person. It also minimizes manipulation of the psychologist and prevents the duplication of efforts and misuse of limited staff resources. In conformity with this standard of practice, the Supermax procedure in non-emergency situations is to forward inmate requests for psychological services to the staff member who has that inmate on his or her caseload. In general, defendants followed this procedure when they received requests from plaintiff. Plaintiff's requests include wording such as "personal problems" and "mental

issues." Defendants did not believe that plaintiff's requests addressed to them demanded immediate attention because they did not understand them to indicate emergency situations. In defendants' experience, mental health staff do not have time to duplicate the work of another psychologist in a non-emergency situation.

3. Dr. Hagan

Plaintiff's clinical services file indicates that plaintiff has had numerous documented contacts with Dr. Hagan, including at least ten face-to-face and written contacts over a period of two years. The file also indicates that Dr. Hagan completed a clinical services brief diagnostic summary dated February 19, 2000. The summary indicates that plaintiff has no current or past Axis I diagnosis and that his only current Axis II diagnosis is antisocial personality disorder. The mental health profession does not view this disorder as a serious mental illness but as an underlying disorder of character structure. The summary provides further that plaintiff has no history of suicide attempts, current or past medications or placements indicating mental illness. The summary includes a note that plaintiff was "manipulative - trying to get out of [Assessment and Evaluation] needs by telling half-truths and pushing for support."

Defendants Apple and Cullen believe that Dr. Hagan is a competent professional who is capable of providing psychological services to plaintiff. They are unaware of any reason

that they should have intervened to provide plaintiff with psychological services to plaintiff when Dr. Hagan was available.

4. Other staff

Plaintiff's clinical services file indicates that plaintiff has had face-to-face meetings with Supermax psychiatrist Dr. Maier on seven occasions between May 15, 2001, and January 22, 2002. Defendants Apple and Cullen have no reason to believe that Dr. Maier cannot provide competent mental health care to plaintiff. Dr. Maier's notes indicate that he was successfully treating plaintiff for sleeping difficulties with Benadryl. His notes also state that plaintiff was not harboring thoughts of harming himself or others, that he had a stable mood and that his judgment and insight regarding his clinical circumstances appeared to be good.

Plaintiff has also had numerous contacts with crisis intervention workers Wilmot and Bindl. Crisis intervention workers are trained in identifying symptoms that indicate serious mental illness or otherwise indicate the need for intervention by clinical services staff.

OPINION

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. The Court of Appeals for the Seventh Circuit has held that serious medical needs 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).

In this case, no reasonable jury could find that plaintiff has a serious mental health need and, thus, that defendants Apple and Cullen were deliberately indifferent to that alleged need. The undisputed facts establish that plaintiff has no documented history of chronic or severe mental illness, medication for mental illness and suicide attempts. Plaintiff's inmate evaluation report dated January 26, 2002, notes that despite his inappropriate sexual behavior, neither clinical nor correctional staff has observed behavior indicative of mental illness. In short, the record is devoid of any evidence documenting a serious mental illness.

Plaintiff argues that the inmate evaluation report that was completed pursuant to the class action settlement in Jones 'El v. Berge, case no. 00-C-421-C, is invalid. However, plaintiff misunderstands the proceedings in Jones 'El. In that case, this court determined not

that the inmate evaluations themselves were flawed but that the definition of serious mental illness applied to the evaluations was flawed. In other words, the evaluation's final determination applies a standard for mental illness that has changed since the report was written. However, this change in definition does not diminish the evaluator's review of plaintiff's clinical file or his observations of plaintiff.

Plaintiff asserts that he has endured "emotional distress, anxiety, humiliation, lible [sic], (2) suicide attempts in 2001. . . ." Plt.'s Response Br., dkt. #29, at 2. This assertion does not strengthen plaintiff's claim. First, these assertions do not appear in the undisputed facts and, therefore, I cannot rely on them for the purpose of deciding this motion. Second, when the facts are taken in the light most favorable to plaintiff, they do not suggest that defendants Apple and Cullen were deliberately indifferent to plaintiff's illness, even if it was a serious one.

The undisputed facts establish that plaintiff is assigned to Dr. Hagan's caseload and, therefore, that Dr. Hagan has primary responsibility for plaintiff's mental health care, not defendants Apple and Cullen. Defendants Apple and Cullen have no reason to believe that Dr. Hagan is not capable of providing plaintiff adequate mental health care or that they should have intervened in Dr. Hagan's relationship with plaintiff. Further, the record indicates that defendants Apple and Cullen would speak with plaintiff when they were on his housing unit as long as plaintiff did not engage in inappropriate sexual behavior or make

inappropriate sexual comments. Finally, the evidence shows that defendant Cullen responded to one of plaintiff's written requests about depression by providing him with several chapters from a publication aimed at coping with depression. On the basis of these undisputed facts, no reasonable jury could find that defendants Apple and Cullen were deliberately indifferent to plaintiff's alleged serious mental health needs.

In support of his contention that defendants were deliberately indifferent to his serious needs, plaintiff makes another argument based on assertions that are not a part of the undisputed facts. Plaintiff alleges that Dr. Hagan is employed at Supermax part-time and that defendants Apple and Cullen are employed full-time. From this, plaintiff argues that Dr. Hagan was often unavailable and that defendants Apple and Cullen should have responded to his written requests for interviews rather than determine that his needs were not so urgent that they should interfere with Dr. Hagan's relationship with plaintiff. Further, plaintiff asserts that defendants should have known that he suffers from a serious mental illness because of this court's determination in Jones 'El that the definition of serious mental illness applied to the inmate evaluations completed in early 2002 was insufficient. However, as I have already discussed and will further clarify below, this determination from a different lawsuit does not establish either that plaintiff has a serious mental illness or that defendants Apple and Cullen were deliberately indifferent to that alleged need.

In Jones 'El, the plaintiffs alleged that there are systemic inadequacies in the provision

of mental health care at Supermax. From this, plaintiff argues that defendants Apple and Cullen were deliberately indifferent to his mental health care needs. However, in Jones 'El, the parties reached a settlement agreement without making a determination of the defendants' liability on the merits. That means that individual class members, including plaintiff, cannot rely on Jones 'El for the proposition that Supermax staff are providing inadequate mental health care to its inmates on a systemic level. Instead, plaintiff must prove that he himself received constitutionally inadequate mental health care by showing (1) that he has a serious mental health care need and (2) that defendants Apple and Cullen were deliberately indifferent to that need. The record in this case simply does not support plaintiff's claim on either front. Taking the evidence in the light most favorable to plaintiff, I conclude that no reasonable jury could find that defendants Apple and Cullen were deliberately indifferent to plaintiff's serious mental health need. Accordingly, defendants Apple's and Cullen's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Christine Apple and Colette Cullen is GRANTED. These defendants are dismissed from this

case.

Entered this 10th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge