IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEON IRBY,

Plaintiff,

v.

OPINION AND ORDER

03-C-346-C

JON E. LITSCHER, Secretary, Department of Corrections;
CINDY O'DONNELL, Deputy Secretary, Department of Corrections;
JOHN RAY, Corrections Complaint Examiner, Department of Corrections;
SHARON K. ZUNKER, Director, Bureau of Health Services, Department of Corrections;
GERALD BERGE, Warden, Wisconsin Secure Program Facility;
TOM GOZINSKE, Institution Complaint Examiner, Wisconsin Secure Program Facility;
KELLY COON, Institution Complaint Examiner, Program Assistant, Wisconsin Secure Program Facility;
PAMELA BARTELS, Health Services Unit Manager, Wisconsin Secure Program Facility,

Defendants.

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Plaintiff Leon Irby is proceeding pro se and in forma pauperis in this civil action for declaratory, monetary and injunctive relief on his claim that (1) defendants Gerald Berge and Kelly Coon violated his free speech rights when they rejected an inmate complaint containing the word "hell"; (2) defendants Berge and Jon Litscher violated his Eighth Amendment rights by depriving him of sleep as the result of constant illumination and

excessive noise; (3) defendant Pamela Bartels violated his Eighth Amendment right to adequate medical care by ignoring his complaints of severe pain; and (4) defendants Thomas Gozinske, John Ray, Sharon Zunker and Cindy O'Donnell violated the Eighth Amendment by being deliberately indifferent to plaintiff's complaints regarding the denial of treatment for his osteoarthritis.

Presently before the court is a motion for summary judgment filed by defendants Coon, Berge, Litscher, Ray, Zunker, Gozinske and O'Donnell and a separate motion for summary judgment filed by defendant Bartels. Both motions will be granted. Defendants have demonstrated that there is no genuine issue of material fact and the facts demonstrate that defendants are deserving of judgment in their favor as a matter of law. Plaintiff has not filed a response to defendants' motions although he was warned of the consequences of failing to do so. PPTC Order, dkt. #17, at 8.

With respect to plaintiff's First Amendment claim against defendants Coon and Berge, I conclude that plaintiff has not suffered a deprivation of his free speech rights. Plaintiff cannot succeed on his Eighth Amendment claim regarding constant illumination and excessive noise because he has not shown that the conditions of his confinement amounted to cruel and unusual punishment. He cannot succeed on his Eighth Amendment claim against defendant Bartels because the facts show that defendant provided adequate medical care to plaintiff. Finally, plaintiff has failed to put into dispute the facts underlying

his claim that defendants Gozinske, Ray, Zunker and O'Donnell were deliberately indifferent to plaintiff's serious medical needs in their response to his complaints about inadequate medical treatment.

From the proposed findings of fact submitted by defendants and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Free Speech Claim

Plaintiff Leon Irby has been an inmate at Wisconsin Secure Program Facility since April 18, 2000. In July 2000, plaintiff filed an inmate complaint with the Institution Complaint Examiner's office. That complaint contained the word "hell" in its description of conditions at the prison. Defendant Coon, then a Program Assistant 2 Confidential at the prison, reviewed and rejected plaintiff's complaint as "inappropriate" under Wis. Admin. Code § DOC 310.09(1). (Coon's name has been changed to Kelly Trumm and she is referred to by that name in defendants' proposed findings of fact. For continuity's sake, however, I will continue to refer to this defendant as Coon.) On July 20, 2000, plaintiff filed another inmate complaint alleging that Coon's rejection of his prior complaint amounted to discrimination on the basis of religion.

On July 21, 2000, plaintiff wrote to defendant Gerald Berge, Warden, Wisconsin

Secure Program Facility, urging Berge to allow the submission of his rejected complaint. Berge reviewed plaintiff's complaint and rejected it in reliance on Wis. Admin. Code § DOC 310.09(1)(c), which prohibits obscene, profane, abusive or threatening language unless germane to the substance of the complaint. Berge then wrote to plaintiff stating that he agreed with Coon's dismissal of the complaint.

Plaintiff's complaint was reviewed by both Institution Complaint Examiner John Bell and Peter Huibregtse, Deputy Warden, Wisconsin Secure Program Facility. Both agreed with the dismissal of the complaint. Plaintiff appealed those decisions. His complaint was reviewed by defendant Ray, a Corrections Complaint Examiner, who agreed with the dismissal recommendation. The complaint was then reviewed by defendant Cindy O'Donnell, Deputy Secretary for the Department of Corrections. In her Office of the Secretary Decision Comments, O'Donnell allowed the complaint's dismissal "with modification," stating that "the use of the word 'hell' to describe [Wisconsin Secure Program Facility] hardly qualifies as language that is obscene, profane, abusive or threatening." Plaintiff did not resubmit his complaint after this decision.

B. Constant Illumination and Excessive Noise

Lighting within the cells at Wisconsin Secure Program Facility comes from two sources. The primary light source is powerful enough for reading and can be controlled both

by the inmate within the cell and by prison staff outside of the cell. The other light source comes on automatically when the primary light source has been turned off. This "nightlight" cannot be turned off by an inmate. In 2000, the majority of these nightlights were 7-watt, twin tube florescent bulbs. Starting in late 2001, however, when the 7-watt bulbs burned out, they were replaced by 5-watt bulbs. The light fixture is mounted in the center of the ceiling and is covered by two lenses: a 3/8 inch thick tempered glass lens and a 1/4 inch thick acrylic prismatic lens. Inmates are allowed to cover their eyes with a washcloth, towel or T-shirt to shield them from the light as long as part of their face is still showing for inspection.

Prison staff check on inmates at irregular intervals throughout the course of the night. Generally, staff monitor inmate behavior through a window in the cell door. These checks are performed for the safety of the staff and the inmates themselves. Natural or incidental light is not sufficient for staff to monitor inmates in their cells. Alternative light sources for performing these checks include the use of flashlights by staff or the use of the primary light source controlled by staff.

Wisconsin Secure Program Facility has several policies designed to remedy excessive noise. Inmates may request ear plugs from the Health Services Unit to deal with noise within the prison. When an inmate is continuously excessively loud he is guilty of a prison "offense" pursuant to Wis. Admin. Code § DOC 303.28, and is subject to a conduct report. Wis. Admin. Code § DOC 303.66. The cells at the facility are constructed with one-quarter

inch, twelve-gauge steel doors, and eight-inch concrete panels for walls.

C. Inadequate Medical Treatment

1. Medical care

Plaintiff was seen for various reasons by the Health Services Unit at the Wisconsin Secure Program Facility thirty times between September 25, 2000 and April 25, 2001. Plaintiff asked for and received Tylenol for pain at least thirteen times between December 2000 and January 2003. On April 25, 2001, plaintiff was seen by Dr. Hasselhoff for neck pain caused by arthritis. Dr. Hasselhoff prescribed Indocin for plaintiff's pain. On May 17, 2001,the Indocin prescription was discontinued because of plaintiff's complaints of abdominal pain. On June 1, 2001, plaintiff was seen at University of Wisconsin Hospital for an endoscopy and colonoscopy. On January 22, 2002, plaintiff was given medical advice after complaining of leg pain and constipation. He was advised to take Tylenol and milk of magnesia and to exercise. Also, he was told to contact the Health Services Unit if he wanted an exam. Plaintiff was seen on February 24, 2003 for complaints of stiffness, grinding and aching in his neck. At that visit he was diagnosed with degenerative joint disease of the cervical spine, and was given ibuprofen and told to perform neck exercises.

2. Plaintiff's complaint

On June 2, 2001, plaintiff filed an inmate complaint, alleging that the Health Services

Unit staff had denied him medical treatment for osteoarthritis. During his review of plaintiff's complaint, defendant Gozinske received an email from defendant Bartels, then the manager of the Health Services Unit, stating that plaintiff was receiving Tylenol for osteoarthritis pain. That email also stated that Tylenol is a "highly recommended and acceptable treatment" for that type of pain. Gozinske then made a recommendation that plaintiff's complaint be dismissed.

Defendant Zunker, then the Director of the Bureau of Health Services, reviewed Gozinske's recommendation along with plaintiff's complaint and the report prepared by Gozinske containing the information regarding Bartels's email correspondence. Through a review of Gozinske's report, Zunker was also made aware that plaintiff was taking Indocin for pain and had instructions for neck and back exercises. Zunker agreed with Gozinske's recommendation that plaintiff's complaint be dismissed.

Plaintiff filed an appeal of the Institution Complaint Examiner's dismissal of his complaint, which was reviewed by defendant Ray. Ray reviewed the evidence and the decisions of Gozinske and Zunker, agreed that plaintiff was receiving adequate medical treatment and recommended dismissal of the complaint. That decision was reviewed by Deputy Secretary of the Department of Corrections, Cindy O'Donnell. O'Donnell reviewed Ray's report and accompanying documents and accepted Ray's recommendation to dismiss the complaint.

OPINION

The standard for summary judgment is well known. Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-movant 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party . Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

A. The Free Speech Claim

Although prisoners maintain some of their rights once incarcerated, their constitutional rights are often curtailed. Shaw v. Murphy, 532 U.S. 223, 229 (2001). "In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system[.]'" Id. (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). When a prison regulation impinges on an inmate's constitutional right, the regulation must be reasonably related to a legitimate penological interest . O'Lone v. Estate of Shabazz, 482 U.S. 342, 349

(1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and (4) whether there are obvious, easy alternatives, which may be evidence that the regulation is not reasonable, although the regulation need not satisfy a least restrictive alternative test. Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted).

Although the rule prohibiting obscene, profane, abusive or threatening language would likely pass the Turner test in light of its relationship with the penological interest of maintaining order and discipline, it is questionable whether it would have been proper to apply the rule to plaintiff's use of the word "hell." It is unnecessary to decide this question, however, because plaintiff's complaint was not ultimately rejected on this basis. Defendant O'Donnell was the last to review the dismissal of plaintiff's claim. Although it is unclear from the record why O'Donnell approved the dismissal of plaintiff's complaint, it is clear that her decision was not based on plaintiff's use of the word "hell." O'Donnell explicitly

overturned Coon's, Berge's, Bell's, Huibregtse's and Ray's finding that the use of that word violated Wis. Admin. Code § DOC 310.09(1). In other words, plaintiff was not prohibited from using that word if he so chose. Therefore, his free speech rights were not threatened or restricted.

B. Constant Illumination and Excessive Noise

Plaintiff alleged in his complaint that prison officials subjected him to cruel and inhumane conditions by exposing him to constant cell illumination and excessive noise, which deprived him of sleep. Because plaintiff has failed to oppose defendant's motions with any evidence of his own, I cannot find that he suffered any adverse consequence as a result of the prison's lighting or noise level. In any event, "[t]he Constitution does not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones. "Inhumane conditions" are those that exceed the "contemporary bounds of decency of a mature, civilized society ." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994). Deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes 452 U.S. at 347.

To hold prison officials liable for inhuman conditions, an inmate plaintiff must show not only that the conditions are objectively unconstitutional but that the defendant prison officials "acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d

at 1579. That state of mind is one of "'deliberate indifference' to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994). To prove deliberate indifference, a plaintiff must show that the defendant official knew of an excessive risk to inmate health or safety and disregarded that risk. Id. at 837. He "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." Id.

As noted above, plaintiff did not provide any evidence to prove that his conditions are objectively inhumane or to demonstrate defendants' requisite mental state. To determine whether a condition of confinement is inflicted wantonly or unnecessarily, it is necessary to make some examination into the legitimacy of the penological interest being furthered and the reasonableness of alternatives. Defendants have put in evidence to show that the 24-hour illumination furthers legitimate penological interests. Prison security officials must observe inmates at all times at unpredictable intervals in order to protect themselves and other inmates. Artificial light at night is necessary to ensure that inmates are alive and not engaging in behavior dangerous to themselves or others. Any incidental light such as moonlight, hallway light or illumination from outside security lights is insufficient for this purpose.

If the cells did not have nightlights, staff making cell checks could use a flashlight to see into the cell through the cell door window. Such a light might be more disruptive of

sleep than the constant low level illumination provided by the nightlight and would not provide the same degree of visibility within the cell. Alternatively, staff could perform their nighttime monitoring by turning on a light source inside the cell each time they did a cell check. Like the use of flashlights, this practice might be more disruptive than the nightlight. Because the nightlights are outside the control of staff as well as inmates, they are less likely to become a focus of tension between inmates and staff.

Additionally, inmates in general confinement cells are allowed to cover their eyes while sleeping, so as to block out the light from the nightlight. Also, inmates may contact the Health Services Unit if they have trouble sleeping.

Plaintiff alleged in his complaint that prison officials allow mentally ill inmates who create an excessively loud environment to remain in the general population. Plaintiff has provided no evidence to prove this fact or to prove that he suffered any ill effects from noise. Therefore, it is unnecessary to decide whether defendants have been deliberately indifferent with regard to excessive noise from mentally ill inmates or the general inmate population. Defendants are entitled to judgment as a matter of law on the merits of this claim. Because plaintiff has not succeeded in proving a violation of his constitutional rights, it is unnecessary to discuss defendants' claims that they are entitled to qualified immunity or that this dispute must be remedied through use of the enforcement mechanisms chosen in the settlement agreement in Jones 'El v. Litscher, 00-C-421-C.

C. Inadequate Medical Treatment

1. The standard

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 prevail on a claim of cruel and unusual punishment, a plaintiff must prove "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. On a motion for summary judgment plaintiff has the obligation to prove that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). 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. Gutierrez, 111 F.3d at 1371. The Supreme Court has held that deliberate indifference requires 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 v. Brennan, 511 U.S. 825, 837 (1993). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth

Amendment. Vance, 97 F.3d at 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91. 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. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

2. Defendant Bartels

In his complaint, plaintiff made the bald assertion that various members of the Health Services Unit at the prison were deliberately indifferent to his medical needs. He has not provided any evidence to prove that he requested medical assistance for a serious medical need and that defendant Bartels recklessly disregarded his requests. However, defendant Bartels has provided ample support for her contention that plaintiff was treated adequately by the Health Services Unit. A difference of opinion about the proper course of treatment for his pains does not amount to cruel and unusual punishment. I conclude that it is not disputed that plaintiff's medical needs were met adequately.

3. Defendants Gozinske, Zunker, Ray and O'Donnell

Plaintiff alleged in his complaint that defendants Gozinske, Zunker, Ray and O'Donnell were deliberately indifferent to his medical needs when they dismissed his complaint regarding the level of medical treatment he was receiving. Again, plaintiff has

provided no evidence to show intent or reckless disregard. The evidence points to the conclusion that all of these defendants properly reviewed the necessary facts accompanying plaintiff's complaint and determined that he was receiving adequate medical care. That does not evince deliberate indifference.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Litscher, O'Donnell, Ray, Zunker, Berge, Gozinske and Coon with respect to all claims against them is GRANTED.

FURTHER, IT IS ORDERED that the motion for summary judgment filed by defendant Bartels is GRANTED.

The clerk of court is directed to enter judgment in favor of all defendants and close this case.

Entered this 23rd day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge