IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHILDERIC MAXY,

OPINION AND ORDER

Plaintiff,

03-C-624-C

v.

MICHAEL WEISSENBERGER, STEVE HELGESON, DR. DEAN WHITEWAY, EDIE MacDOUGAL, HOLLY EUCLIDE, SUSAN KRAMER, LEE SCHMITZ, DORIS DAGGETT, STEVE ANDERSON, RANDY HALLER and JIM JACOBSON,

Defendants.

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This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Childeric Maxy, an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin, alleges that defendants Michael Weissenberger, Steve Helgeson (incorrectly identified as "Captain Helgensen" in several prior orders), Dr. Dean Whiteway, Edie MacDougal, Holly Euclide, Susan Kramer, Lee Schmitz, Doris Daggett, Steve Anderson, Randy Haller and Jim Jacobson denied his requests for pain medication in violation of the due process and equal protection clauses of the Fourteenth Amendment. Jurisdiction is

present. 28 U.S.C. § 1331.

Presently before the court are a motion for summary judgment filed collectively by all defendants except defendant Whiteway, dkt. #21, and defendant Whiteway's motion for summary judgment, dkt. #35. For the reasons stated below, the motions will be granted. In brief, plaintiff's failure to insure that all of the essential elements of his claim were presented to the court in factual propositions supported by admissible evidence dooms his effort to survive summary judgment. Specifically, plaintiff has not presented evidence sufficient to support a finding that he had a serious medical condition. Beyond that, plaintiff has not made a showing that defendants were deliberately indifferent to that condition. Finally, with respect to the equal protection claim, plaintiff failed to support his allegations with any evidence of defendants' discriminatory intent.

Before setting out the facts, I note that although plaintiff disagrees with much of the factual record proposed by defendants, his responses to defendants' proposed findings of fact do not follow this court's summary judgment procedure, a copy of which was mailed to plaintiff on at least two occasions. As a result, most of defendants' proposed findings of fact are undisputed. In some cases, plaintiff's response to a proposed fact does not put the fact in dispute. As an example, defendants proposed as a fact that "upon admission to the jail on February 27, 2000, the initial screening process was conducted with respect to Mr. Maxy." Defs'. PFOF, dkt. #23, at ¶ 4. Plaintiff's response was that "the screening process

was barely done because Maxy was not able to stand in front of the booking officer as require[d] by the procedures." Plt's. Resp. to Defs'. PFOF, dkt. #52, at ¶ 4. Plaintiff's response does not contradict defendants' assertion that the initial screening process occurred. In other instances, plaintiff disputed defendants' proposed fact but failed to support his version with a citation to admissible evidence. Many of plaintiff's responses consist solely of conclusory allegations unsupported by any citations to evidence in the record. This court's summary judgment procedure states that the court "will not consider any factual propositions made in response to the movant's proposed findings of fact that are not supported properly and sufficiently by admissible evidence." Procedure II(E)(2). Therefore, ¶¶ 8-17, 19, 23-34, 36-39 and 47-48 of plaintiff's response to defendant's proposed findings of fact have been disregarded. Finally, I note that plaintiff presents several facts in his brief that do not appear as proposed findings of fact; I have disregarded these as well. Procedure I(B)(4) ("The court will not consider facts contained only in a brief.")

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

FACTS

A. Parties

Plaintiff Childeric Maxy, a black man of Haitian origin, is incarcerated at the Green

Bay Correctional Institution. At all times relevant to this case, defendant Weissenberger was employed as the La Crosse County Sheriff. Defendant Helgeson was a captain in the La Crosse County Sheriff's Office and worked at the La Crosse County jail. Defendants Schmitz, Daggett, Anderson, Haller and Jacobson were employed as shift sergeants at the La Crosse County jail. Defendant Whiteway is a doctor licensed to practice medicine in Wisconsin and employed at the Gundersen Clinic. During plaintiff's stay at the La Crosse County jail, the Gundersen Clinic contracted with the jail for the provision of medical services to jail inmates. Pursuant to that arrangement, defendant Whiteway examined and treated inmates at the jail approximately once each week. Defendants MacDougal, Euclide and Kramer were employed as registered nurses by the La Crosse County Health Department and worked at the La Crosse County jail providing medical care to inmates.

B. Plaintiff's Medical Treatment at La Crosse County jail

On February 28, 2000, plaintiff was charged in the Circuit Court for La Crosse County with first degree intentional homicide, burglary, battery and bail jumping in connection with an incident that occurred on February 26, 2000. During the commission of these crimes, plaintiff was struck in the head with a wine bottle, a totem pole and a bar stool, incurring injury to his head. On February 27, 2000 (presumably after his arrest), plaintiff's injuries were treated at the Franciscan Skemp Healthcare Center; his scalp

lacerations required staples to close. After being treated, plaintiff was given a set of "after-care instructions" regarding his wounds and taken to the La Crosse County jail. These instructions stated that scalp lacerations could bleed a lot because of the large amount of blood in that area of the body. In addition, the instructions advised patients to contact a doctor if any one of a list of symptoms arose, including headache pain that worsened or lasted more than a day. Plaintiff was not prescribed any medication in connection with his injuries.

Plaintiff underwent an initial screening process at the jail on February 27. An initial screening form showed that plaintiff had been treated for a head injury and two large cuts on his head and that plaintiff was not taking any prescription medication at the time. Progress notes from jail medical services staff indicate that plaintiff was examined on February 27 and 28 and that his injuries were clean and dry and showed no signs of infection. (Plaintiff contends that he was not examined on February 27 and received no medication for his pain that day; however, he concedes that he heard a nurse speaking to him through his cell door. As for February 28, plaintiff states that a nurse examined him but only because he asked constantly for pain medication. Even if plaintiff had cited to admissible evidence in the record to support these assertions, the inclusion of these facts would not make a difference in the outcome of defendants' motions.) Beginning on March 2, 2000, plaintiff was given Tylenol and Ibuprofen.

On March 8, 2000, plaintiff was taken to Franciscan Skemp Healthcare Center for removal of his staples. A CT scan of plaintiff's head was taken, the results of which were negative. On May 7, 2000, plaintiff submitted a written request for medical treatment in which he complained of migraine headaches and a cold. Plaintiff was given Benadryl and Aleve. (Plaintiff states without evidentiary support that he asked defendants Weissenberger, Helgeson and at least one shift sergeant repeatedly if he could see a doctor prior to his May 7 written request. However, this fact would not change the outcome even if it could be considered, because plaintiff does not say when the requests were made or what he wanted to see the doctor about.) Plaintiff made another written medical request on May 23, this time complaining of migraines, neck pain and vision deterioration. When plaintiff asked to see a doctor, his name was placed on a list for defendant Whiteway's next visit to the jail, which occurred on June 1, 2000. Defendant Whiteway had not examined plaintiff before June 1. Plaintiff refused to let defendant Whiteway perform a vision exam and later refused to sign a consent form allowing defendant Whiteway access to his treatment records from the St. Francis Medical Center.

Plaintiff filed another written request for medical treatment on August 8, 2000, complaining of a stiff neck and continued vision trouble. Defendant Whiteway examined plaintiff on August 10; again plaintiff refused to allow defendant Whiteway to conduct a vision exam. Plaintiff was referred to the Franciscan Skemp Healthcare Center, where a

doctor gave plaintiff a complete eye exam, found no injury other than myopia and issued plaintiff a prescription for glasses.

C. Medical Care and Inmate Complaint Policies

In 2000, La Crosse County jail policies addressed the provision of medical care to inmates and the procedure for inmate complaints. Under the jail's policy regarding medical care, the jail physician had authority to issue orders for treatment and care of inmates and jail nurses were responsible for carrying out medical orders and communicating them to other jail staff. Jail nurses had primary responsibility for distributing both prescribed medication and non-prescribed medications that were pre-approved by the jail physician. Medication was distributed four times each day from the "Med Cart." Inmates could stand in line and request prescription or over-the-counter medications from the Med Cart. (Plaintiff contends without supplying evidentiary support that he was too dizzy at times to stand in line and that the nurse at the Med Cart would not leave her station if an inmate called for her. However, he does not say what prescription medication, if any, he wanted from the cart or what over-the-counter medication he needed or for what condition such medication would be used.) Nurses tracked each inmate's intake of medications on a "Medication Administration Record" form. Each time an inmate received medication, the date and type of medication were recorded. The Medication Administration Record forms

regarding plaintiff show that plaintiff received medications on numerous occasions from March 2 to September 2000; the forms do not indicate what medications if any he received from February 27 to March 1, 2000. In addition, jail policy provided for a daily "sick call" whereby inmates could see a jail nurse regarding medical or health concerns. Finally, defendants Weissenberger, Helgeson, Schmitz, Daggett, Anderson, Haller and Jacobson followed a jail practice of referring any medical requests they received to the appropriate medical personnel. (Plaintiff claims this procedure was not followed with respect to his oral requests to jail guards but admits that when he wrote to defendants Weissenberger and Helgeson about his health concerns he received doctor visits and an eye examination at the Franciscan Skemp Healthcare Center.)

The jail's inmate complaint procedure allowed an inmate to file a written grievance with the jail sergeant regarding any incident occurring while the inmate was confined at the jail. Plaintiff never filed a written grievance regarding the alleged deprivations of pain medication.

DISCUSSION

A. Legal Standard

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., 14 F.3d 1226, 1230 (7th Cir. 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.

When a defendant moves for summary judgment, the plaintiff must do more than respond to the defendants' proposed facts. The plaintiff bears the burden of insuring that all of the essential elements of his claim have been presented to the court in factual propositions supported by admissible evidence. This requires a plaintiff to do more than rely on the allegations in the complaint or conclusory statements in affidavits. Chemsource, Inc. v. Hub Group, Inc., 106 F.3d 1358, 1361 (7th Cir. 1997). In this way summary judgment functions as "'the put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003) (quoting Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999)).

B. Due Process

Plaintiff's claim of denial of medical care is analyzed under the due process clause of the Fourteenth Amendment because plaintiff was not a convicted prisoner at the time of the relevant events in this case. Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760, 764 (7th Cir. 2002). However, the analysis of plaintiff's denial of medical care claim is guided by the standards developed for denial of medical care claims under the Eighth Amendment. Chavez v. Cody, 207 F.3d 901, 904 (7th Cir. 2000). Thus, the question is whether defendants were deliberately indifferent to plaintiff's serious medical needs. Sanders v. Sheahan, 198 F.3d 626, 630 (7th Cir. 1999). In Farmer v. Brennan, 511 U.S. 825 (1995), the Supreme Court added a gloss to "deliberate indifference" and "serious medical needs." The Court explained that a prison official cannot be held liable under the Eighth Amendment unless "the official knows of and disregards an excessive risk to inmate health or safety; 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." Id. at 837.

1. Serious medical need

The first question is whether plaintiff had an objectively serious medical need.

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 but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364 (7th Cir. 1997). Prison officials have an obligation to provide medical treatment to inmates suffering such significant pain that denial of assistance would be "uncivilized." Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996). On the other hand, because the Constitution "is not a charter of protection for hypochondriacs," a prison medical employee's failure to treat minor ailments such as a cold, mild headache or fatigue would not violate the Constitution. Id. More relevant to this case, "to say that the Eighth Amendment requires prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment would be absurd." Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996).

In granting plaintiff leave to proceed on this claim, I assumed that plaintiff's "level of pain was sufficiently severe to constitute a serious medical need." Order, dkt. #3, at 11-12. To avoid summary judgment, plaintiff had to go beyond the allegations of his complaint and set forth specific facts showing that he had an objectively serious medical need. Warsco v. Preferred Technical Group, 258 F.3d 557, 563 (7th Cir. 2001). Plaintiff did not do so. In support of his claim of a serious medical condition, he has offered only repeated statements that he was in pain when he arrived at the jail. It is undisputed that plaintiff's

injuries were treated by a physician at the Franciscan Skemp Healthcare Center on February 27, 2000, and that the treating physician did not prescribe any pain medication for plaintiff. Plaintiff's after-care instructions did not indicate that plaintiff was to be given medication to combat pain stemming from his injury.

In Cooper, 97 F.3d at 916-917, the Court of Appeals for the Seventh Circuit ruled that subjective complaints of pain can be enough by themselves to raise an issue of fact as to the existence of a serious medical need because the existence of pain is a "uniquely subjective experience." In that case, several prison guards beat and maced two inmates and then ignored the inmates' repeated pleas for medical care for two days. The court held that a jury should determine whether the inmates were in enough pain to warrant medication after the beatings. However, in Snipes, 95 F.3d at 591-92, the court upheld summary judgment for a prison doctor who was sued by an inmate for failing to administer a local anesthetic before removing the inmate's toenail. The court ruled that the pain endured by the inmate did not constitute an excessive risk to his health. The court noted further that "those recovering from even the best treatment can experience pain" and stated that pain management "is for doctors to decide free from judicial interference, except in the most extreme situations." Id. at 592. The facts presented here indicate that although plaintiff was in pain, it was not serious enough to trigger due process concerns. Plaintiff did not receive a prescription for pain medication after his injuries were treated at the Franciscan Skemp

Healthcare Center. Moreover, plaintiff's after care instructions did not suggest that he should be given non-prescription medicine for any pain he might experience. In the absence of any evidence establishing that plaintiff's condition from February 27 to March 1, 2000 was serious, I can only conclude that plaintiff's pain was no worse than the discomfort one might expect to have after having wounds stapled shut.

2. Deliberate indifference

Even if I were to find that plaintiff's pain constituted a serious medical need, plaintiff has not shown that defendants were deliberately indifferent to his condition. The deliberate indifference inquiry focuses on a defendant's state of mind. Deliberate indifference requires that a prison official know of and disregard "an excessive risk to inmate health or safety; the official must both be aware of the 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 (1994). Claims of negligence, gross negligence or medical malpractice do not constitute deliberate indifference. Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996); Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985). Likewise, mere disagreements with the course of medical treatment do not violate the Eighth Amendment. Snipes, 95 F.3d at 591. In the present case, plaintiff appears to make two arguments in

support of his claim that defendants were deliberately indifferent to his pain. He argues that in the four days immediately after he was arrived at the La Crosse County jail, February 27 to March 1, 2000, he made numerous oral requests for a doctor or pain medication that were either denied or ignored. Alternatively, he argues that his physical condition was such that it would have been obvious to anyone that he needed medicine for pain in his first days at the jail; thus, even if jail procedure prohibited jail nurses from dispensing pain medication without jail physician approval, they should have done so for him.

The undisputed facts show that policy at the La Crosse County jail provided that jail nurses could distribute prescribed medication and non-prescribed medication only if it had been pre-approved by the jail physician. Plaintiff did not have a prescription for pain medication and defendant Whiteway had not authorized the distribution of any non-prescription pain medication to plaintiff during the relevant time period. If plaintiff had shown that defendants MacDougal, Euclide or Kramer intentionally withheld prescribed medication from plaintiff, he might have survived summary judgment. See Walker v. Benjamin, 293 F.3d 1030, 1039-40 (7th Cir. 2002) (denying summary judgment to nurse and doctor who withheld prescribed medication from inmate); Murphy v. Walker, 51 F.3d 714, 720 (7th Cir. 1995) (ruling that pretrial detainee stated due process claim by alleging that jail officials withheld prescribed pain reliever). As it stands, however, the facts indicate that defendants MacDougal, Euclide and Kramer merely followed the jail's policy regarding

medication distribution. Their failure to disregard jail rules during the four day period highlighted by plaintiff does not constitute deliberate indifference.

As for the shift sergeants, defendants Schmitz, Daggett, Anderson, Haller and Jacobson, and defendants Weissenberger and Helgeson, it is undisputed that they followed a policy of referring medical complaints to appropriate medical personnel at the facility. Plaintiff has introduced no evidence to show that these defendants ignored his requests. More importantly, there is no evidence that shift sergeants, captains or the sheriff had authority to dispense medication, much less that they could do so without the jail physician's prior approval. Finally, with respect to defendant Whiteway, plaintiff has presented no evidence that defendant Whiteway even knew of plaintiff's requests for pain medication, much less that he ignored the requests intentionally. The undisputed facts show that defendant Whiteway did not examine plaintiff until June 1, 2000. Even if plaintiff had presented evidence that defendant Whiteway knew of plaintiff's requests for pain medication and refused to allow the nurses to give plaintiff medicine for his pain, plaintiff would have to show more than a mere disagreement with the doctor's decision to prove deliberate indifference.

C. Equal Protection

In his complaint, plaintiff alleged that he was denied medication because he is a black Haitian and that white detainees with ailments were given the medication that they needed. In granting leave to proceed on this claim, I emphasized that "petitioner will need much more evidence to succeed on his claim. If petitioner chooses to rest on the allegations in his complaint, this claim will not survive a motion for summary judgment." Order, dkt. #3, at 15-16. Plaintiff has presented no evidence beyond the allegations in his complaint tending to show that he was denied medication because of his race or national origin. The equal protection clause of the Fourteenth Amendment prohibits state actors from applying different legal standards to similarly situated individuals. The clause is violated only if defendants acted with discriminatory purpose or intent, but "conclusory allegations of generalized racial bias do not established discriminatory intent." Minority Police Officers Association v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986) (citing Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir. 1983)). Because plaintiff has not gone beyond the allegations of his complaint, defendants are entitled to summary judgment.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Michael Weissenberger, Steve Helgeson, Edie MacDougal, Holly Euclide, Susan Kramer, Lee

Schmitz, Doris Daggett, Steve Anderson, Randy Haller and Jim Jacobson, dkt. #21 and defendant Dean Whiteway's motion for summary judgment, dkt. #35, are GRANTED. The clerk is directed to enter judgment for defendants and close this case.

Entered this 3rd day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge