IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JONATHAN P. COLE,

Plaintiff,

v.

JON E. LITSCHER, GERALD A. BERGE
MICHAEL CATALANO, PAM BARTELS,
SHIRLEY OLSON, KERRY MELBY,
BECKY MANNING and
PRISON HEALTH SERVICES, INC.,

Defendants.

OPINION AND ORDER

04-C-116-C

- -

In this civil action under 42 U.S.C. § 1983, plaintiff Jonathan Cole seeks monetary, declaratory and injunctive relief for numerous alleged violations of his constitutional rights. Jurisdiction is present under 28 U.S.C. § 1331. Most of the claims plaintiff alleged have been disposed of under 28 U.S.C. § 1915A for lack of legal merit, under 42 U.S.C. § 1997e for lack of administrative exhaustion or as a result of a motion for summary judgment brought by some of the defendants. Five claims are pending:

(1) Defendant Gerald Berge and Jon Litscher had a policy under which plaintiff

was denied food for days at a time for refusing to turn on the lights in his cell;

(2) Defendant Kerry Melby disclosed the name of plaintiff's prescribed medication to a prison official who was writing plaintiff a conduct report, defendant Pam Bartels consented to the disclosure of plaintiff's medical record and defendant Michael Catalano's failure to provide adequate training and supervision to his employees caused these disclosures, which violated plaintiff's constitutional right to privacy;

(3) Defendants Prison Health Services, Bartels, Becky Manning and Shirley Olson violated plaintiff's rights under the Eighth Amendment by failing to provide him with adequate and appropriate medical care;

(4) Defendant Prison Health Services and Bartels violated the Eighth Amendment by failing to provide plaintiff with adequate mental health care services;

(5) Defendant Prison Health Services and Bartels violated plaintiff's rights under the Eighth Amendment by having policies that deprived plaintiff of higher fat milk and adequate amounts of food;

In an order dated March 15, 2005, I denied defendants Berge and Litscher summary judgment on the first of these listed claims. Defendants have moved for reconsideration in light of the Court of Appeals for the Seventh Circuit's recent decision in Rodriguez v. Briley, ___ F.3d ___, 2005 WL 851499 (7th Cir. Apr. 14, 2005). I will address this motion in a

separate order.

Now before the court is the motion for summary judgment brought by defendants Catalano, Bartels, Olson and Prison Health Services on plaintiff's second third and fourth claims. This motion will be granted. Plaintiff has not adduced evidence suggesting that any of these defendants acted with deliberate indifference to a serious medical or mental condition or violated his First Amendment right to privacy.

In the course of deciding defendants' motion for summary judgment, I have discovered two loose ends. First, neither party has proposed facts concerning plaintiff's claim that Prison Health Services and defendant Bartels had a policy of denying plaintiff non-fat milk and "adequate amounts of food." Plaintiff's failure to make any reference to this claim in his submissions on summary judgment suggests that he has abandoned it. Therefore, I will dismiss it for plaintiff's failure to prosecute.

Second, although plaintiff indicated in January 2005 that he did not have any viable legal claim against defendant Manning, see Plt.'s "Notice of Motion and Motion to Amend and Correct Names of Defendants of Prison Health Services, Inc," dkt. #86, and that defendant Kerry Melby was not the previously named John Doe defendant that plaintiff alleged in his complaint had disclosed information about his prescribed medication in a conduct report, neither of these defendants has been formally dismissed from the case. Because plaintiff concedes that he has no claim against Manning, I will dismiss this

defendant on the court's own motion. The status of defendant Melby is slightly more complicated.

When plaintiff filed his ". . .Motion to Amend and Correct Names of Defendants of Prison Health Services, Inc.," he pointed out that Judge Adelman had made a mistake in dismissing certain John and Jane Does from this case and that, as a result, this court had not correctly described his claim against defendant Melby in its October 25, 2004 order. (This case was filed originally in the Eastern District of Wisconsin.) In particular, plaintiff said that it was not Melby who disclosed the name of plaintiff's prescribed medication to a prison official who wrote plaintiff a conduct report. Rather, according to plaintiff, his claim against Melby was that Melby "intentionally gave plaintiff's medical record to correctional officials for 24 hours who are nonauthorized medical personnel, without [plaintiff's] consent." In denying plaintiff's motion to add Sue Waters as the defendant who disclosed information about his prescribed medication, I ruled in an order dated February 1, 2005, that it was too late for plaintiff to add new defendants to his lawsuit. I reasoned that if plaintiff had disagreed with Judge Adelman's assessment of his claims in late 2003 or the dismissal of certain Doe defendants in early 2004, he should have raised his concerns long before January 2005, when he filed his motion to amend and correct names.

Defendants Melby and Manning joined with defendants Catalano, Bartels, Olson and Prison Health Services in answering plaintiff's complaint on April 23, 2004. Oddly,

however, from that day forward, the Prison Health Services defendants simply dropped defendants Melby and Manning from the caption of their submissions. For example, on June 29, 2004, defendants Catalano, Bartels, Olson and Prison Health Services consented to proceed before the magistrate judge. Inexplicably, it appears that plaintiff has acquiesced in the disappearance of defendant Melby from the case. On July 29, 2004, plaintiff moved to compel discovery from defendants Prison Health Services, Inc., Catalano, Olson and Bartels. He makes no mention of defendants Melby. Subsequently, the Prison Health Services defendants, without Melby, disclosed their expert witnesses. Plaintiff did not object to Melby's failure to disclose. Finally, the Prison Health Services defendants moved for summary judgment, again without Melby. However, both parties have proposed facts concerning the disclosure of plaintiff's medical records. From those facts I have concluded that plaintiff's constitutional right to privacy was not offended. Therefore, I will dismiss defendant Melby from this action.

Also before the court is plaintiff's motion for clarification of the opinion and order dated March 15, 2005, in which I referred to "all four of plaintiff's Eighth Amendment claims." Op. & Order, dkt.#116, at 27. Plaintiff is correct that he was granted leave to proceed on more than four Eighth Amendment claims. For clarification, the four to which I was referring were those that plaintiff brought against the moving defendants that had not been dismissed for lack of administrative exhaustion. At the beginning of the order, these

claims were numbered as claims 11, 12, 13 and 14 and within the Eighth Amendment discussion, each claim was addressed under separate subheadings numbered 1, 2, 3 and 4. In his motion, plaintiff expresses some confusion as to the precise claims on which he was granted leave to proceed. In an opinion and order dated October 25, 2004, I listed the claims that I understood Judge Adelman had allowed. To the extent that plaintiff has substantive objections to Judge Adelman's construction of his complaint or to my interpretation of Judge Adelman's screening order, he should have raised them long ago.

Before setting out the undisputed facts, I will respond to defendants' argument that all but one of the affidavits plaintiff filed in opposition to the motion for summary judgment are inadmissible because they are not notarized. 42 U.S.C. § 1746 creates an exception to the general requirement that affidavits be notarized when the signer makes a declaration at the completion of his affidavit that includes the following statement followed by a signature: "I declare under penalty of perjury that the foregoing is true and correct. Executed on (date)." All of the affidavits plaintiff submitted in response to defendants' motion contain this language and therefore are admissible.

In addition, a word seems warranted regarding plaintiff's numerous proposed findings of fact relating to the contract between defendant Prison Health Services and the Wisconsin Department of Corrections. As a non-party to the contract, plaintiff does not have standing to sue for violation of the contract unless he can demonstrate that he is a third-party

beneficiary to the contract. Goosen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994). A third-party beneficiary contract claim is entirely distinct from a claim based on the violation of a constitutional right. Plaintiff did not raise a third-party beneficiary contract claim in his amended complaint and Judge Adelman did not grant him leave to proceed on such a claim. Plaintiff's claims are limited to alleged violations of his constitutional rights; the mere fact that plaintiff may have been negatively affected in some manner because defendant Prison Health Services violated one of the terms of this contract does not necessarily mean that his constitutional rights have been violated. Thus, I am disregarding as immaterial plaintiff's proposed findings of fact relating to defendant Prison Health Services specific contractual obligations.

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

UNDISPUTED FACTS

Plaintiff Jonathan P. Cole is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. At all relevant times, defendant Prison Health Services, Inc. contracted with the Wisconsin Department of Corrections to provide health services at the Secure Program Facility. Defendant Michael Catalano is the chief executive officer of defendant Prison Health Services. Defendants Pam Bartels and Shirley Olson are registered

nurses employed by defendant Prison Health Services and both were aware that plaintiff suffered from hypertension.

A. Medical Record Disclosure

On April 11, 2001, one of defendant Prison Health Services's employees, Sue Waters, and corrections officer Saunchegrow, came to plaintiff's cell to give him his medication. They gave plaintiff his pills but did not see him swallow them. Plaintiff and Waters got into a verbal exchange during which plaintiff called Waters a liar. The following day, plaintiff received a conduct report for acting disrespectfully and for disobeying orders. The conduct report identified the medication plaintiff was taking and described what it was for. Corrections Officer Saunchegrow told plaintiff that the security office had instructed him to put information about plaintiff's medication in the conduct report and that he had obtained this information from Waters.

Between May 28, 2001 and July 29, 2001, plaintiff submitted multiple requests to review his medical file. Defendant Bartels approved plaintiff's request and on August 3, 2001, another employee of defendant Prison Health Services (presumably defendant Melby) gave plaintiff's medical files, which were in an envelope, to the security officers on plaintiff's unit. When plaintiff received his file the following day, he noticed that the adhesive on the flap sealing the envelope was not very sticky.

B. Medical Care

1. Hypertension

Plaintiff was transferred to the Secure Program Facility on April 21, 2000. Upon arrival he was given a medical screening. The report from this screening indicates that plaintiff had a history of hypertension. On December 22, 2000, plaintiff was prescribed Vasotec and HCTZ for high blood pressure. These medications lowered plaintiff's blood pressure although not down to ideal levels. A physician monitored plaintiff's blood pressure by ordering routine testing, although plaintiff often refused to allow the tests. Plaintiff participated in a chronic care clinic for his hypertension, but he refused to fully comply with some of the program requirements.

On July 25, 2000, plaintiff was not given his morning medication because he was asleep at the time medications were distributed by Prison Health Services staff.

Plaintiff did not take his blood pressure medication between October 12, 2001 and October 24, 2001. (The parties dispute whether plaintiff refused his medication or whether defendant Prison Health Services's employees failed to give him his medication. Because a reasonable jury might believe plaintiff's testimony that he was denied his medication and did not refuse it on these dates, I will assume for the purpose of deciding this motion that he was denied his medication on these dates.) Defendant Olson denied plaintiff his medication on October 20, 2001. Nurse Julene Millin denied plaintiff his evening dosage on October 21

and 23 and nurse Renae Waltz denied plaintiff his morning medication on October 22. On October 22, 2001, one of defendant Prison Health Services's employees checked plaintiff's blood pressure in both of his arms. The check of plaintiff's blood pressure showed 142/102 on his right arm and 148/90 on his left arm.

On November 8, 2001, defendant Olson did not give plaintiff his evening blood pressure medication. At 2 a.m the following morning, plaintiff felt ill and pressed the emergency button in his cell. The responding security guards took him to a medical room where a test revealed that his blood pressure was 184/120. At the direction of one of defendant Prison Health Services's physicians, plaintiff was given sublingual nitro that lowered his blood pressure to 164/116 within an hour.

2. Seborrheic Dermatitis

From May 2000 through December 2002, plaintiff suffered from seborreheic dermatitis (dandruff). As a result, his scalp was dry and would develop sores on occasion. During this time, defendant Prison Health Servcies's employees told plaintiff that they thought he had dandruff. On May 19, 2000, one of defendant Prison Health Services's employees issued plaintiff a one-month supply of medicated shampoo; on March 20, 2001, they gave him a two-month supply. Another employee of defendant Prison Health Services issued plaintiff medicated ointment for his scalp on February 19, 2002 and again on March

27, 2002.

3. Ankle injuries

On September 5, 2001, defendant Olson responded to a complaint plaintiff made regarding injuries he said he sustained as a result of being forced to wear ankle cuffs that were too small for him. Defendant Olson did not notice any visible injury on plaintiff's ankles and determined that no treatment was warranted. Two days later, one of defendant Prison Health Services' nurses noticed superficial abrasions on plaintiff's lower legs. On September 9, she ordered security officers to use large sized leg restraints when transporting plaintiff in the future.

C. Mental Health Care

On February 12, 2002, plaintiff was assessed by defendant Prison Health Services' psychiatrist, who told plaintiff that he did not know what was wrong but recommended that plaintiff take anti-depressant medication. Plaintiff indicated that he did not wish to begin taking this medication. On March 12, 2002, plaintiff met with the same psychiatrist, who asked whether plaintiff was still unwilling to take anti-depressant medication. Plaintiff declined the medication again.

OPINION

A. Medical Record Disclosure

Plaintiff has proposed facts suggesting two incidents of disclosures of his medical information: (1) defendant Prison Health Services's employee, Sue Waters, told Corrections Officer Saunchegrow what type of medication plaintiff was taking and what it was for and (2) defendant Bartels approved plaintiff's request to review his medical file, causing an unidentified person (presumably defendant Melby) to provide plaintiff's medical history to security staff in a sealed envelope that did not appear to be tightly sealed. Both claims fail for multiple reasons.

As Judge Adelman noted in his screening order, whether inmates have a constitutional right to privacy in their medical records is far from settled. Massey v. Helman, 196 F.3d 727, 742 n. 8 (7th Cir. 1999) ("Whether prisoners have any privacy rights in their prison medical records and treatment appears to be an open question.") (citing Anderson v. Romero, 72 F.3d 518, 522-23 (7th Cir.1995)). Although two courts of appeals have recognized such a right, Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001); Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999), the Court of Appeals for the Seventh Circuit has not. Until the court of appeals rules otherwise, I am inclined to view any disclosure of information about plaintiff's high blood pressure as too innocuous to amount to a violation of any constitutional right to privacy plaintiff might have. High blood pressure is an all-too-

common malady that carries no stigma. Delie and Schriver both involved disclosures of far more intensely personal information. Delie, 257 F.3d at 317 (HIV-positive status); Schriver, 175 F.3d at 112 (transexualism). Plaintiff not adduced any evidence to show that other medical information of a more sensitive nature was disclosed in his medical file. Even plaintiff had shown that his file contained sensitive information, he has not submitted evidence showing that the security officers who were given plaintiff's medical history opened the envelope it came in and read through it. This appears to be pure speculation of plaintiff's part.

Moreover, plaintiff's claim about the disclosure of the type of medication he took lacks a proper defendant. Plaintiff has not made Sue White a defendant in this case. He tries to hold defendant Catalano liable for the disclosure by arguing that this defendant failed to train Prison Health Services employees appropriately. Although § 1983's personal involvement may be satisfied under a failure to train theory, Kitzman-Kelley ex rel. Kitzman-Kelley v. Warner, 203 F.3d 454, 459 (7th Cir. 2000), plaintiff has not submitted evidence to support this approach to liability. Plaintiff's affidavit contains numerous averments about defendant Catalano's failure to train Prison Health Services employees but no explanation of how plaintiff acquired the personal knowledge necessary to make such sweeping assertions in a sworn affidavit. "Memorializing mere speculation in the form of an affidavit does not convert the speculation into competent evidence." Gonzalez v.

Litscher, 230 F. Supp. 2d 950, 962 (W.D. Wis. 2002). Because plaintiff has failed to adduce evidence showing that any defendant disclosed medical information of an intensely personal nature, I will grant defendant's motion for summary judgment as to plaintiff's First Amendment claim.

B. Inadequate Medical Care

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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). Deliberate indifference to a prisoner's serious medial needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Estelle, 429 U.S. at 104-05. Plaintiff contends that defendants were deliberately indifferent to his hypertension, dandruff and to the injuries he sustain from being placed in ankle cuffs that were too tight. In order to defeat defendants' motion for summary judgment, plaintiff must adduce evidence from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

1. Serious medical needs

"Serious medical needs," encompass conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated, those that result in needless pain and suffering when treatment is withheld and those that have been diagnosed by a physician as mandating treatment. Gutierrez, 111 F.3d at 1371-73. Plaintiff's high blood pressure undoubtedly reaches this standard. However, his dandruff does not qualify as a serious medical condition. It is not life threatening and it does not present a risk of serious impairment. Although it may have caused plaintiff some mild discomfort, none of his evidence suggests that this discomfort rose to the level of pain and suffering. See Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987) (inmate's seborrheic dermatitis "little more than annoyance").

The superficial abrasion on plaintiff's leg also does not satisfy the requisite objective seriousness. The first nurse to examine plaintiff did not even notice the cut. The facts do not suggests that the cut on plaintiff's ankle warranted professional medical attention. Nothing in the record suggests that plaintiff was unable to rinse it out and keep it clean. Elevating every bump and scratch to a level of constitutional import would result in the kind of micro-management of state prison systems that the court of appeals has disapproved. Oliver v. Deen, 77 F.3d 156, 161 (7th Cir. 1996) (citing Anderson v. Romero, 72 F.3d 518, 524 (7th Cir. 1995)).

2. Deliberate indifference

The subjective element of a claim of cruel and unusual punishment requires that the prison official act with a sufficiently culpable state of mind. Gutierrez, 111 F.3d at 1369. To show deliberate indifference, a plaintiff must establish that the official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). Although "a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired," Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996), inadvertent error, negligence, ordinary malpractice, or even gross negligence is insufficient. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515 (7th Cir. 2002). The Eighth Amendment forbids cruel and unusual punishment; it does not mandate that prisoners be provided with the best treatment available or the treatment of their choosing. Anderson, 72 F.3d at 524.

Plaintiff's claim that defendants were deliberately indifferent to his hypertension has two parts. First, plaintiff contends that the Vasotec and HCTZ was not as effective as other hypertension medication he had received at other institutions. This does not begin to suggest deliberate indifference on the part of the prescribing physician. "A difference of opinion as to how a condition should be treated does not give rise to a constitutional violation." Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir.2001). The facts do not show

that Vasotec and HCTZ are inappropriate as treatment for hypertension. In fact, the undisputed fact is that these medications lowered plaintiff's blood pressure. Although the medication may not have kept plaintiff's blood pressure within an ideal range at all times, the Constitution does not guarantee inmates perfect health.

The second part of plaintiff's hypertension claim is that he was denied his prescribed medication on the morning of July 25, 2000, between October 12, 2001 and October 24, 2001 and again during the evening of November 8, 2001. Plaintiff has not linked any defendant to the denial of his medication on July 25, 2000, October 12, 2001 through October 20, 2001 and October 21, 2001 through October 24, 2001. (Plaintiff has identified nurses Renae Waltz and Julene Millen as having denied him his medication October 21-23, 2001, but Waltz and Millen are not defendants.) He tries to hold defendants Bartels and Catalano liable for failing to train the individuals who were responsible for distributing medication, but the only "evidence" he has submitted is his own unsubstantiated averment. As I have explained already, this averment is not admissible because plaintiff did not explain how he acquired personal knowledge of the training these defendants did or did not provide.

Plaintiff has shown that defendant Olson was aware of his hypertension and that she denied him medication on two isolated occasions, once on October 20, 2001 and once on November 8, 2001. (Plaintiff argued in his brief that defendant Olson also denied him medication on October 12, 15 and 18, but the evidence he submitted does not bear this

out.) However, plaintiff has not submitted evidence to show either that these isolated denials created an excessive risk of harm or that defendant Olson was aware of such a serious risk. Plaintiff proposed as a fact that defendant Olson was aware that "all medical information" "strongly warn[s] against" stopping the medication. Plt.'s PFOF, dkt. #108, ¶ 33. In support of this proposal, plaintiff cited averments in his own affidavit that instructions for his medications indicate that patients are to take the medication at the same time each day, that missed doses should be taken as soon possible and that a patient should not stop taking the medication unless directed to do so by a health care professional and to an unauthenticated copy of these instructions. Plt.'s Aff., dkt. #109, ¶ 97. This "evidence" is insufficient to prove that a missed dose of plaintiff's medication posed an excessive risk of serious harm or that defendant Olson was aware of such a risk.

Because plaintiff has not met his burden to submit evidence showing that defendant were deliberately indifferent to his serious medical needs, defendants are entitled to summary judgment with respect to his Eighth Amendment claim as it relates to the treatment of his high blood pressure.

C. Inadequate Mental Health Care

Under the Eighth Amendment, serious medical needs are not restricted to physical conditions; mental illness may be considered a serious medical need if the failure to treat

could result in significant injury, such as death by suicide or the unnecessary and wanton infliction of pain. Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001); Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (under Eighth Amendment, "mental health needs are no less serious than physical needs"); see also Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (citing Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983)). When factually fleshed out, plaintiff's claim of inadequate mental health care is that he was offered anti-depressant medication without being formally diagnosed as having depression. In essence, plaintiff's claim is that he was offered more treatment than his mental condition warranted.

This theory of liability flunks both prongs of the Eighth Amendment deliberate indifference test. First, it depends on a finding that plaintiff's mental condition was not so serious as to justify medication. Second, it is self-evident that making more treatment available than necessary does not show deliberate indifference. Plaintiff also complains that he was not offered any alternative treatment that he found appropriate. As noted above, plaintiff does not have a constitutional right to the treatment of his choosing. Anderson, 72 F.3d at 524. A difference of opinion whether a specific treatment is appropriate does not show deliberate indifference. Garvin, 236 F.3d at 898. Accordingly, defendants are entitled to summary judgment on plaintiff's claim that he was denied adequate mental health care for a serious mental illness.

ORDER

IT IS ORDERED that

1. The motion for summary judgment brought by defendants Michael Catalano, Pamela Bartels, Shirley Olson and Prison Health Services as to plaintiff Jonathan Cole's Eighth Amendment deliberate indifference claims and his First Amendment right to privacy claim is GRANTED;

2. Plaintiff's claim that defendant Prison Health Services and Bartels violated plaintiff's rights under the Eighth Amendment by having policies that deprived plaintiff of higher fat milk and adequate amounts of food is DISMISSED as abandoned;

3. Defendant's Kerry Melby and Becky Manning are DISMISSED on the court's own motion;

4. Plaintiff's motion for clarification is GRANTED and page 27 of the Opinion and Order dated March 15, 2005 is modified with the addition of "implicated by this motion" after the phrase "all four of plaintiff's Eighth Amendment claims."

Entered this 6th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge