IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN 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

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In an opinion and order dated March 15, 2005, I granted the motion for summary judgment of defendants Jon Litscher, Gerald Berge, Dane Esser, Josh Fuerstenburg, Tim Haines, John Kussmaul and Keith Jantzen with respect to all but one claim that plaintiff Jonathan P. Cole had made against them. The single exception was plaintiff's claim that defendants Berge and Litscher were violating his Eighth Amendment rights by enforcing a policy under which plaintiff was denied food for days at a time for refusing to comply with prison rules that he turn on the bright lights in his cell during meal delivery. With respect to this claim, I decided that a jury could find that an extensive period of food deprivation

"is a [constitutionally] impermissible response to a rule violation as innocuous as failing to turn on a brighter light," particularly in view of the fact that the prison officials delivering meals could control the lighting with a switch outside plaintiff's cell. Defendants Litscher and Berge have moved for relief from the order pursuant to Fed. R. Civ. P. 60(B) in light of the April 14, 2005 holding of the Court of Appeals for the Seventh Circuit in Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005). For the reasons stated below, I will grant defendants' motion.

Also before the court is plaintiff's motion for reconsideration of the May 6, 2005 opinion and order in which I granted summary judgment to defendants Michael Catalano, Pamela Bartels, Shirley Olson and Prison Health Services. For the most part, the arguments plaintiff raises in this motion rest on a misreading of that opinion or a misunderstanding of the scope of protection provided by the Eighth Amendment. Because none of plaintiff's arguments show that I was in error to grant these defendants' motion for summary judgment, I will deny plaintiff's motion for reconsideration.

Before turning to the merits of these motions, I note that Rule 60(b) is not the proper vehicle for defendants' motion. Legal error, even a post-judgment change of law, is not a proper ground for relief under Rule 60(b). Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002) (citing Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074 (7th Cir. 1997)). Defendants may have thought that framing their motion as a simple motion for

reconsideration would have meant that the ten-day limitation period of Rule 59(e) would apply, but the ten-day period begins to run only after entry of judgment. Because judgment has not yet been entered in this case, Rule 59(e)'s time limit does not apply. Accordingly, I will construe defendants' Rule 60(b) motion for relief from the order as a motion for reconsideration.

OPINION

A. Defendants' Motion

In support of his food deprivation claim, plaintiff submitted evidence showing that in May 2001, he was denied meals for 6 consecutive days and in May 2002, he was denied two meals one day, all three meals the following day and all meals for five consecutive days at the end of the month because he had not turned on the high wattage lights in his cell, as required by the prison's policy. In denying defendants summary judgment as to this claim, I cited a number of cases in which courts had held the denial of food for four consecutive meals or more could amount to cruel and unusual punishment. Reed v. McBride, 178 F.3d 849, 853 (7th Cir. 1999) (three to five days' deprivation to already of food to infirm inmate stated a claim); Simmons v. Cook, 154 F. 3d 805 (8th Cir. 1998) (four consecutive meals); Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991) (several days); Beckford v. Portuondo, 151 F. Supp. 2d 204 (N.D.N.Y. 2001) (denial of two out of three

meals each day for eight days); Williams v. Coughlin, 875 F. Supp. 1004 (W.D.N.Y. 1995) (two days). I reasoned that if a particular deprivation could not be inflicted in response to an inmate's underlying crime, it could not be inflicted in response to a rule violation such as failing to turn on a light, see Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) ("forms of punishment that are permitted for serious crimes may violate the [Eighth Amendment] if imposed for trivial ones"), and that prison officials may not disregard a substantial risk to an inmate's health just because the inmate failed to comply with prison rules. (The undisputed facts showed that prison officials were able to control the lighting in an inmate's cell.)

Approximately one month after that decision was entered, the Court of Appeals for the Seventh Circuit held that the denial of meals to a prisoner is not punishment within the meaning of the Eighth Amendment if the denials are a response to the prisoner's refusal to obey a valid institutional regulation. Rodriguez v. Briley, 403 F.3d 952, 952-53 (7th Cir. 2005). Rodriguez involved an inmate who had been denied between 300 and 350 meals over the course of 18 months because he refused to comply with a rule requiring him to store his belongings in a storage box before leaving his cell. The court rejected the inmate's Eighth Amendment claim, stating that "deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment . . . [B]y failing to comply with a reasonable condition on being allowed to leave his cell, and as

a result missing out on meals, Rodriguez punished himself." Id. at 952-53.

Of course, Rodriguez, 403 F.3d 952, does not undermine the view that at some point, the denial of food to an inmate may violate the Eighth Amendment even if the denial is the result of the inmate's own choice not to follow the rules. Id. at 953 ("At some point, refusal to eat might turn suicidal and then the prison would have to intervene. Likewise if noncompliance with the rule were a product of insanity.") (internal citations omitted). However, the evidence in this case does not reflect the degree of severity necessary to make out a claim of cruel and unusual punishment; only extreme deprivations violate the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 8-9 (1992); Rhodes v. Chapman, 452 U.S. 337, 349 (1981) (only those deprivations of "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment claim); see also Pearson, 237 F.3d at 886 ("Every disciplinary sanction, like every sentence, must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.").

In his brief opposing defendants' motion for reconsideration, plaintiff does not contest that Rodriguez forecloses his claim under the Eighth Amendment but instead attempts to reform his claim into one arising under the due process clause. As applied to prison regulations, due process requires "fair notice of prohibited conduct before a sanction can be imposed." Williams v. Nix, 1 F.3d 712, 716 (8th Cir. 1993); see also Rios v. Lane, 812 F.2d 1032, 1038 (7th Cir. 1987). Plaintiff contends that the prison's rule does not

make it clear that inmates must have their "high beam" lights on in order to receive their meals. Inmate cells are constantly illuminated by a five to eight-watt bulb; normal lighting, or "high beam" lights, can be turned on and off either by the inmates or by the guards. This is not simply a different argument but an entirely distinct claim and it is not a claim that plaintiff raised in his complaint or for which he was granted leave to proceed. Thus, it is not part of this action.

Even if this due process claim were before the court, plaintiff's argument is unavailing. It is undisputed that inmates had control only over the high beam lights and thus, it should have been obvious to him that these are the lights to which the rule refers. Had prison officials thought that the low beam lights were sufficient, they would not have needed to institute a rule. A regulation is not impermissibly vague simply because a small degree of common sense is required to understand it. Rios, 812 F.2d at 1038 (rule unconstitutionally vague only if "'men of common intelligence must necessarily guess at its meaning'") (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

B. Plaintiff's Motion

In his motion for reconsideration, plaintiff raises a myriad of objections to the opinion and order dated May 6, 2005, granting the motion for summary judgment filed by defendants Machael Catalano, Pamela Bartels, Shirley Olson and Prison Health Services.

First, he requests reinstatement of a claim premised on a theory of breach of contract. As I explained to plaintiff in the May 6 order, because he is not a party to the relevant contract, he does not have standing to sue for violation of its terms unless he can demonstrate that he is a third-party beneficiary of the contract. Goosen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994). In addition, I noted that 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 does not contend that he established that he was a third-party beneficiary under the contract, that he raised this claim in his complaint or that Judge Adelman granted him leave to proceed on it. Reinstatement is not an option; this claim is not and never has been part of this case.

Second, plaintiff contends that I erred in failing to consider that defendant Bartels was not only a nurse but also responsible for managing and supervising other employees of defendant Prison Health Services. Plaintiff suggests that she should be held liable for failing to implement policies to insure that none of his medical records would ever be given to correctional officers. Defendant Bartel's managerial duties are irrelevant to this case. The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Furthermore, plaintiff does not challenge my conclusions that his evidence did not show that the relevant disclosures of certain medical information amounted to a

violation of his constitutional rights. Thus, establishing that defendant Bartels was somehow responsible for the disclosures would not have saved this claim.

Third, plaintiff argues that I erred in disregarding the fact that there were two parts to his Eighth Amendment claim relating to the medical care he received for his hypertension. Plaintiff should direct his attention to page 16 of the order where I stated that "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," and to page 17, where I identified the "second part of plaintiff's hypertension claim" as the "deni[al] [of] his prescribed medication" on certain dates. Op. & Order, dkt. #124, at 16-17.

The remainder of plaintiff's arguments suggest that he may have some misapprehensions about the scope of protection provided by the Eighth Amendment. It is true that the Eighth Amendment's prohibition on cruel and unusual punishment creates an affirmative obligation that states provide medical care to 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)). However, this does not mean that inmates are entitled to "the most intelligent, progressive, humane, or efficacious" treatment available. Anderson v. Romero, 72 F.3d 518, 524 (7th Cir. 1995); see also Oliver v. Deen, 77 F.3d 156, 161 (7th Cir. 1996). In fact, an Eighth Amendment violation will not lie even when a prison official

acts negligently or engages in conduct that in would amount to medical malpractice if it occurred in the private sector. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

Only the most egregious forms of knowing mistreatment constitute cruel and unusual punishment. Hudson, 503 U.S. at 8-9. "'[T]he Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* to that narrow class of deprivations involving serious injury inflicted by prison officials acting with a culpable state of mind." Snipes, 95 F.3d at 590 (quoting Hudson v. McMillian, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting)). It is not enough for plaintiff to show that a more effective medication was available. "Medical decisions that may be characterized as 'classic examples of matters for medical judgment,' such as whether one course of treatment is preferable to another, are beyond the [Eighth] Amendment's purview." Snipes, 95 F.3d at 591 (quoting Estelle, 429 U.S. at 107). Similarly, showing that a health care official did not provide treatment for maladies for which private citizens would not normally seek professional care does not establish cruel and unusual punishment. Cooper v. Casey, 97 F.3d 914, 916 (7th Cir.1996) ("A prison's medical staff that refuses to dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue — the sorts of ailments for which many people who are not in prison do not seek medical attention — does not by its refusal violate the Constitution.").

Plaintiff would have the court micro-manage the provision of health care services in

state prisons and second guess the decisions of trained medical professionals. As I have already explained, federal courts are neither empowered nor equipped to do either. Oliver, 77 F.3d at 161. Because plaintiff has not shown that it was error to conclude that the evidence he submitted does not prove that defendant Catalano, Bartels or Olson acted with deliberate indifference to a serious risk to his health, I will deny his motion for reconsideration.

ORDER

IT IS ORDERED that

1. Defendants Berge and Litscher's motion for reconsideration of the portion of the opinion and order dated March 15, 2005 relating to plaintiff Jonathan Cole's food deprivation claim is GRANTED;

2. Plaintiff's motion for reconsideration of the opinion and order dated May, 6, 2005 is DENIED;

3. Defendants Berge and Litscher are GRANTED summary judgment on plaintiff's Eighth Amendment food deprivation claim.

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

Entered this 26th day of May, 2005.

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