

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAWN McGARVEY,

Plaintiff,

v.

THOMAS BORGAN,  
ANDREW BATH and  
BRIAN DOMMISSE,

Defendants.  
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OPINION AND  
ORDER

04-C-269-C

This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Shawn McGarvey contends that defendants Thomas Borgan, Andrew Bath and Brian Dommissse violated his Eighth Amendment rights by cancelling his scheduled medical appointments and discontinuing prescribed treatment for his work-related injuries. Plaintiff brought other claims against defendants that have been dismissed either for lack of jurisdiction or for plaintiff's failure to exhaust his administrative remedies. Now before the court is defendants' motion for summary judgment on plaintiff's Eighth Amendment claim. Jurisdiction is present. 28 U.S.C. § 1331.

Defendants' motion will be granted. None of the evidence suggests that defendants

Borgan and Dommissé even knew about plaintiff's work-related injuries, much less that they had anything to do with his medical treatment. Although defendant Bath cancelled plaintiff's scheduled medical appointment and did not make any alternative treatment arrangements, plaintiff has not pointed to any evidence suggesting that defendant Bath acted with deliberate indifference. Because I conclude that defendants are entitled to judgment on the merits, it is unnecessary to address their argument that they are entitled to qualified immunity.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

#### UNDISPUTED FACTS

Plaintiff Shawn McGarvey is a Wisconsin state inmate. He was incarcerated at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, from April 16, 2003 through December 28, 2004. At all relevant times, defendant Thomas Borgan was the warden of the Fox Lake facility, defendant Andrew Bath was a sergeant and defendant Brian Dommissé was responsible for supervising correctional staff working with the facility's work release program.

After plaintiff arrived at the Fox Lake facility, he applied to participate in the work release program. Inmates must meet certain eligibility requirements in order to participate. Plaintiff's application was accepted on May 2, 2003. After being accepted into the program,

plaintiff signed release forms, agreeing to abide by both program rules and any rules of an employer to which he might be assigned. On June 5, 2003, plaintiff began working at Samuel's Recycling Center in Waupun, Wisconsin.

On June 30, 2003, while working at Samuel's, plaintiff fell off a ladder and injured his left thumb. Because the injury was sustained while plaintiff was working, treatment was paid for and managed by Samuel's worker's compensation carrier. Immediately after the accident, plaintiff was taken to the Beaver Dam Community Hospital where medical staff determined that he had fractured his thumb. The medical staff recommended that plaintiff wear a splint and refrain from working with his left hand. In addition, they recommended that plaintiff be evaluated by an orthopedic specialist. On July 3, 2003, plaintiff was examined by an orthopedic specialist, who encouraged plaintiff to continue wearing the splint and prescribed him pain medication.

Plaintiff had follow-up appointments at the orthopedic clinic on July 14, July 31 and August 22. At the July 31 appointment, plaintiff indicated that he was having symptoms in his right arm in addition to the continued pain in his left thumb. At the August 22 appointment, plaintiff's treating physician concluded that plaintiff's thumb was healed although he might have some lingering soreness. Plaintiff received prompt and appropriate treatment for his left thumb injury from the date of injury through August 22, the date on which plaintiff's treating physician concluded that his thumb had healed.

On September 4, 2003, plaintiff was removed from the work release program for refusing to work at Samuel's with the restrictions set by the insurance carrier. Plaintiff had two subsequent examinations at the orthopedic clinic for his right arm: one on September 10 and the other on September 30. On September 15, 2003, the worker's compensation carrier informed plaintiff that he had been scheduled for an independent medical examination with Dr. Richard Lemon on September 29. Defendant Bath made travel arrangements for plaintiff to be taken to this examination. Between September 15 and October 1, plaintiff had six therapy sessions for his right arm.

On October 1, Samuel's worker's compensation carrier concluded that the injury to plaintiff's right arm was not work-related and therefore, that it would no longer pay for treatment. The carrier informed staff at the Fox Lake facility of its determinations. That same day, health services unit staff determined that they would need plaintiff's medical records from the orthopedic clinic in order to make any determinations about future treatment. In order to obtain these records, they sent plaintiff a copy of a release authorization form with a request for his signature. The orthopedic clinic could not release plaintiff's records without written permission. (The parties dispute whether plaintiff signed the release form; plaintiff avers that he did and defendants contend that he refused.)

On October 2, 2003, plaintiff received a similar letter from Samuel's worker's compensation carrier, advising him that it had concluded that his left thumb injury had been

healed as of August 22, 2003 and that his right arm symptoms were not related to the workplace accident he had on June 30. Sometime that week, defendant Bath, who was aware of plaintiff's thumb injury and complaints related to his right arm, was notified of the worker's compensation carrier's decision to cease payment for future treatment of plaintiff's right arm. As directed by the carrier, defendant Bath cancelled an October 27 appointment that plaintiff had with a physician at the orthopedic clinic for treatment of his right shoulder. Defendant Bath advised plaintiff of the cancellation and indicated that if plaintiff wished to continue treatment at the clinic, he would be responsible for payment. (There is a dispute over what defendant Bath told plaintiff about his ability to obtain treatment for his right arm through the facility health services unit. According to plaintiff, defendant Bath said that he would take care of all the arrangements necessary for plaintiff to continue his treatment at the facility health services unit. Defendant Bath contends that he referred plaintiff to the facility's health services if he thought he needed additional treatment.)

The function of providing health care services to inmates at the Fox Lake facility is performed by the health services unit. It is responsible for the care and treatment of all inmates except for inmates who have work-related injuries. Those injuries are managed according to the directions of an employer's worker's compensation carrier. Defendant Borgan has no control over the actions of the health service unit medical staff and he does not provide inmates with medical care. Defendant Dommissie also had no involvement with

or authority over any decisions related to plaintiff's medical care. Defendants Borgan and Dommissie were both unaware that plaintiff had any serious medical problems while incarcerated at the Fox Lake facility. Defendant Bath had no authority to schedule or cancel medical appointments for plaintiff without direction from Samuel's worker's compensation carrier.

The Fox Lake health services unit charges co-payments to those inmates who can afford them. No inmate has ever been denied health care for his inability to make a co-payment. Defendant Bath is not involved in making determinations whether a particular inmate has the means to make a co-payment. Inmates seeking medical treatment must complete a designated request form. Plaintiff submitted several treatment request forms but none were related to either his left thumb or right arm.

## OPINION

### A. Personal Involvement

Plaintiff contends that defendants acted with deliberate indifference to his serious medical needs in violation of the Eighth Amendment when they cancelled his scheduled medical appointments. In his complaint, plaintiff attributed the cancellation to "defendants" without differentiating among the three defendants that he had named in the caption of his complaint. Because courts are to read the allegations of a pro se litigant's complaint

generously, Haines v. Kerner, 404 U.S. 519, 521 (1972), I granted plaintiff leave to proceed under 28 U.S.C. § 1915 on his Eighth Amendment claim against all three defendants. However, with the factual development of the record, it has become clear that plaintiff has no Eighth Amendment claim against defendants Borgan and Dommissie. They were not personally involved with plaintiff's medical care in any way.

Liability under § 1983 must be based on an official's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. Although plaintiff does not concede explicitly that he has no claim against defendants Borgan and Dommissie, he makes no argument why summary judgment should not be granted in their favor. More to the point, none of plaintiff's evidence suggests that either defendant was involved personally in any decision made or action taken relating to plaintiff's medical care. In fact, plaintiff concedes that neither defendant was aware of his thumb or arm injury. A deliberate indifference claim cannot withstand a motion for summary judgment absent some indication that the defendants were aware that the plaintiff was in need of medical care. Boyce v. Moore, 314 F.3d 884, 889 (7th Cir. 2002). Because there is no evidence from which a reasonable jury

might conclude that defendants Borgan and Dommissie were personally involved in any decision relating to plaintiff's medical care, I will grant their motion for summary judgment.

Defendants argue that plaintiff also has failed to show that defendant Bath was personally involved in the wrongs that plaintiff alleges. They make the point that he was simply following directions from Samuel's worker's compensation carrier. When a plaintiff is pursuing a failure-to-intervene theory of personal involvement, lack of authority to take action is lethal to the claim. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, when a prison official has taken actions that contribute to the alleged violation, "there is no 'just following orders' defense under § 1983." Cherry v. Berge, Nos. 02-C-544-C and 02-C-394-C (W.D. Wis. June 26, 2003) (citing Gonzales v. Cecil County, Maryland, 221 F. Supp. 2d 611, 617 (D. Md. 2002)); see also O'Rourke v. Hayes, 378 F.3d 1201, 1210, n.5 (11th Cir. 2004) ("since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order") (citation and punctuation omitted). Because defendant Bath was the official who canceled plaintiff's October 27, 2003 orthopedic appointment, he has sufficient personal involvement. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) (act demonstrating acquiescence is sufficient). Thus, I turn to the question whether his actions violate the Eighth Amendment.



## B. Eighth Amendment

“Prison officials violate the Eighth Amendment’s proscription against cruel and unusual punishment when they display ‘deliberate indifference to serious medical needs of prisoners.’” Greeno v. Daley, No. 01-4119, \_\_\_ F.3d \_\_\_, 2005 WL 1540261, at \*5 (7th Cir. Jul. 1, 2005) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To succeed on an Eighth Amendment claim that the denial of medical care amounts to cruel and unusual punishment, 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).

Defendants do not contend that plaintiff’s injuries do not qualify as serious medical conditions. Instead, they argue that defendant Bath was not deliberately indifferent to plaintiff’s medical needs. 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.

On the evidence presented, no reasonable jury could find that defendant Bath exhibited deliberate indifference to plaintiff's left thumb by cancelling his October 27 orthopedic appointment. As defendants emphasize, plaintiff's left thumb injury, the only injury he mentioned in his complaint, had healed two months before the cancelled appointment. Plaintiff concedes that he received appropriate care for his left thumb. None of the evidence indicates that defendant Bath thought that plaintiff would not be able to obtain appropriate care from the facility health services unit. This record does not even support a finding of negligence, much less deliberate indifference.

Instead of defending the claim he made in his complaint, plaintiff attempts to redefine his theory of liability. He argues that the jist of his claim is that defendant Bath broke his promise to make arrangements with the health services unit for the continued treatment of plaintiff's right arm. Plaintiff did not mention either his arm injury or defendant Bath's supposed promise in his complaint. Although pleading requirements are not stringent, a complaint must provide defendants with fair notice of a plaintiff's claim.

Speedy v. Rexnord Corp., 243 F.3d 397, 405 (7th Cir. 2001). Defendants' review of plaintiff's medical records may have suggested that plaintiff's right arm injury was in play but they had no way of knowing that he would attempt to re-work his claim around defendant Bath's alleged promise. It would be particularly unfair to allow plaintiff to modify his claim in this manner mid-litigation in light of the fact that defendant Bath remembers only suggesting to plaintiff that he use the facility's health services unit, not promising to make arrangements for him.

Even if plaintiff had made these allegations in his complaint, I would not have granted him leave to proceed. Defendant Bath's alleged promise had no bearing on plaintiff's ability to obtain appropriate medical treatment. Plaintiff was free to seek this treatment independently. The limitations that the Eighth Amendment places on a prison official's conduct are quite narrow; the Constitution prohibits only acts that amount to punishment that is cruel and unusual. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996). Contrary to plaintiff's impression of the law, a prison official's pledge to do more than is constitutionally required does not raise this standard. E.g., White v. Henman, 977 F.2d 292, 295 (7th Cir. 1992) ("violation of an administrative rule is not the same thing as the violation of the Constitution") (quoting Kramer v. Jenkins, 806 F.2d 140, 142 (7th Cir.1986)).

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Thomas Borgan, Andrew Bath and Brian Dommissie is GRANTED on plaintiff Shawn McGarvey's Eighth Amendment deliberate indifference claim. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 3rd day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge