

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

FREDERICK ROGERS,

OPINION AND ORDER

Plaintiff,

04-C-977-C

v.

C. O. HERWIG,

Defendant.

This is a civil action for injunctive, declaratory and monetary relief brought under 42 U.S.C. § 1983, in which plaintiff Frederick Rogers contends that defendant corrections officer Herwig violated his rights under the Eighth Amendment when he denied plaintiff an inhaler for his asthma.

This case is before the court on cross motions for summary judgment. I will deny both parties' motions because there are material facts in dispute.

In determining the material and undisputed facts, I disregarded those proposed findings of fact and responses that constituted legal conclusions, were argumentative or

irrelevant, were not supported by the cited evidence or were not supported by citations specific enough to alert the court to the source for the proposal. From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Frederick Rogers is an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin.

Defendant Herwig is a corrections officer at the Racine Correctional Institution in Racine, Wisconsin.

B. Background

At the time of the incident giving rise to this lawsuit, plaintiff was incarcerated at the Racine Correctional Institution. Defendant was a corrections officer in plaintiff's unit.

Plaintiff suffers from a lung condition and a doctor prescribed him certain medications, including an inhaler to help control his asthma. On the morning of April 27, 2003, plaintiff turned in an empty inhaler to defendant. That afternoon, a new inhaler arrived from the health services unit. Defendant went to plaintiff's cell and told him the health services unit ordered that the inhaler was to be controlled by the officers, which

meant that the unit staff was to retain the inhaler and provide it to plaintiff when needed.

Later that evening on April 27, 2003, plaintiff pushed the medical emergency button in his cell and told the individual who answered that he could not breathe and needed to go to the hospital. Plaintiff lay on the floor in his cell, in pain and gasping for air. After some time he became unconscious. When officer Roberts woke him up about three hours later, his chest and lungs felt as if they were on fire.

OPINION

On a motion for summary judgment, if the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. Celotex 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).

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)). Government officials who fail to provide such care may be held liable if a plaintiff can prove that the defendant officials acted with deliberate indifference to a serious medical need. Estelle, 429 U.S. 97 at 103.

The Court of Appeals for the Seventh Circuit has held that “serious medical needs” 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 v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). In addition, the court has recognized that a “‘serious’ medical need is one that has been diagnosed by a physician as mandating treatment.” Id., at 1373.

As to deliberate indifference, the Supreme Court has held that it 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 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also 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 apparent.” Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Plaintiff has established that he had a serious medical need. He was seen by a doctor for his lung condition and was prescribed medication, including an inhaler. Plaintiff

contends that defendant was deliberately indifferent to his need because he knew that on the evening on April 27, 2003, plaintiff could not breathe and yet failed to bring him his inhaler. Defendant disputes plaintiff's assertion, contending that after plaintiff pushed the emergency button and announced he could not breathe, defendant offered plaintiff his inhaler.

The answer to the question whether defendant was deliberately indifferent to plaintiff's need depends on whether defendant did or did not offer plaintiff the inhaler after he pushed the emergency button. Because the parties dispute the answer to this question I must deny both of their motions for summary judgment.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendant Herwig is DENIED.
2. The motion for summary judgment filed by plaintiff Frederick Rogers is DENIED.

Entered this 20th day of October, 2005.

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