IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL LEE RAUNIO,

Plaintiff,

v.

STEPHANIE HAHN,

Defendant.

OPINION and ORDER

06-C-163-C

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In this civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983, plaintiff Michael Lee Raunio contends that defendant Stephanie Hahn violated his Eighth Amendment right to be free from cruel and unusual punishment by deliberately failing to take steps to insure that his prescribed medication was transferred with him to the Marathon County jail from the New Lisbon Correctional Institution. Jurisdiction is present. 28 U.S.C. § 1331, 42 U.S.C. § 1983.

Now before the court are the parties' cross motions for summary judgment. From the undisputed facts, I conclude that a reasonable jury could not infer that defendant acted with deliberate indifference when she allowed plaintiff to be sent to the Marathon County jail without all of his medications. Therefore, defendant's motion for summary judgment will

be granted and plaintiff's motion will be denied.

Before setting out the facts, a brief note about the parties proposed facts is warranted. As described in this court's procedures regarding summary judgment, a party opposing a motion for summary judgment must respond to all of the moving party's proposed findings of fact if it does not want them to be treated as undisputed. Procedure to be Followed on Motions for Summary Judgment, II.C. Plaintiff has not done so in this case, so all of the facts proposed by defendant have been treated as undisputed. Further, a party must propose each and every fact that it wishes to rely upon. Id. at Introduction. Here, plaintiff collected a large amount of information in support of his claims. However, he proposed very few specific facts, and many of the facts that he did propose were disputed properly by defendant. For example, as one of his proposed facts, plaintiff simply directed the court to review documents in the record. What he should have done instead was state as fact the information he wanted the court to recognize in those documents.

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

FACTS

A. Parties

Plaintiff Michael Lee Raunio is incarcerated at the Racine Correctional Institution in

Sturtevant, Wisconsin. At times relevant to this lawsuit, he was housed at the New Lisbon Correctional Institution and the Marathon County jail.

Defendant Stephanie Hahn is a registered nurse, licensed to practice nursing in Wisconsin since 1996. From May 2004 until April 2006, she was employed as a Nurse Clinician 2 at the New Lisbon Correctional Institution, where her duties included assessing and treating patients, assisting the physician with medical services, managing medication, providing emergency care and maintaining medical records.

B. Plaintiff's Medical Conditions and Transfer to the Marathon County Jail

Plaintiff suffers from asthma, back pain and headaches. To manage these ailments, he has been prescribed several medications, including Advair, zafirlukast and albuterol for his asthma and naproxen for his pain. Plaintiff's asthma is mild.

Plaintiff was housed at the New Lisbon Correctional Institution from August 20, 2005 until November 2, 2005. During this period, he was transferred to the Marathon County jail for ten days, from October 14, 2005 until October 24, 2005. At the time of plaintiff's transfer to the jail, his Advair and albuterol were sent to the facility with him, but his zafirlukast and naproxen were not. Staff at the Marathon County jail did not order more medication for him.

On October 12, 2005, two days before plaintiff's transfer, defendant prepared a

Health Transfer summary sheet. The purpose of this summary was to provide information to staff at the Marathon County jail about plaintiff's medical conditions, health procedures and current medications. In the "Current Medications" portion of the health transfer summary she prepared for plaintiff, defendant referred to an attachment that listed the medications that plaintiff was taking, checked a box titled "Medications Sent" and wrote "(did not have his Naproxen 500 mg or his Zafirlukast 200 mg available to send)." Although she filled out this form, defendant does not recall whether she personally gathered plaintiff's medication in preparation for his transfer.

Prior to his transfer to the Marathon County jail, plaintiff was housed in the segregation unit at the New Lisbon Correctional Institution. When a prisoner who is in the segregation unit is transferred, the nursing staff preparing for the transfer gathers the prisoner's controlled medication from a cart stationed in the unit. If the medication is not in the cart, the nurse checks to see whether the medication is stocked for the patient in the medication room. If it is not, the nurse checks the general medication stock. If the medication cannot be located, the nurse contacts Central Pharmacy, which is located in Waupun, Wisconsin, and requests that the medication be reissued.

OPINION

A. Summary Judgment Standard

In addressing a motion for summary judgment, a court applies well-established standards. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). The Court of Appeals for the Seventh Circuit has stated repeatedly that summary judgment is the "put up or shut up" moment in a lawsuit. A party's failure to show what evidence he has to convince a trier of fact to accept his version of the facts entitles the opposing party to summary judgment in its favor. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). For ease and clarity of discussion, I will consider the parties' cross motions for summary judgment separately and turn first to defendant's motion. As the party that will bear the burden of proof at trial, plaintiff was required to respond to defendant's motion with evidence to support each element of his claim. E.g. Celotex v. Catrett, 477 U.S. 317, 322 (1986).

B. Eighth Amendment

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)). To prevail on an Eighth Amendment

claim, a prisoner must show that prison officials were deliberately indifferent to his serious medical needs. Estelle, 429 U.S. at 106. Therefore, to defeat a motion for summary judgment, plaintiff must sufficient facts from which a reasonable jury could infer that he had a serious medical need (objective component) and that defendant was deliberately indifferent to this need (subjective component). Id. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

To satisfy the first component, an inmate's medical need must be objectively serious. A condition meets this standard if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). 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, 111 F.3d at 1371.

As for the Eighth Amendment's subjective component, the Supreme Court has held that deliberate indifference 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, 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. A prison official has a sufficiently culpable state of mind when the official "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (citing Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002)). Negligence does not constitute deliberate indifference and even undisputed medical malpractice does not give rise to a constitutional violation. Id. Even medical care that is undisputedly poor may not reflect "deliberate indifference" if it is the result of garden-variety incompetence or bad decision-making and communication.

I turn first to the question whether plaintiff had a serious medical need. The parties appear to focus their arguments on plaintiff's lack of asthma medication while he was at the Marathon County jail, rather than on his lack of naproxen for pain. Considering the absence of evidence in the record about plaintiff's back pain or headaches, I will focus on plaintiff's asthma and asthma medications as well.

Asthma may constitute a serious medical condition, "depending on the severity of the attacks." Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005). In this case, it is difficult to discern how severe plaintiff's asthma is because plaintiff has adduced no evidence specific to his condition. Instead, he has submitted several articles regarding the disease and its

treatment. However, the facts reveal that plaintiff received several prescription medications for the treatment of his asthma. Although it is undisputed that plaintiff's asthma is mild, I am unable to determine with certainty whether asthma that is mild, but requires prescription medication for management and treatment, is a serious medical need. For the purpose of this opinion I will assume, without deciding, that the evidence is sufficient to demonstrate that plaintiff's asthma constituted a serious medical need.

Nevertheless, whether plaintiff's asthma was a serious medical need is not dispositive by itself. As I advised plaintiff in the order screening his complaint, to prevail on his claim that defendant was deliberately indifferent with respect to his asthma medication, he bears the burden of proving that 1) defendant was aware that plaintiff faced the risk of serious respiratory complications if his zafirlukast was not available to him for 10 days; 2) it was her responsibility to see to it that plaintiff's zafirlukast accompanied him to the jail; and 3) she deliberately refused to take the action necessary to insure that plaintiff received his "unavailable" medications. Therefore, to defeat defendant's motion for summary judgment, plaintiff needed to come forward with evidence from which a reasonable jury could infer that defendant was aware that plaintiff would face a substantial risk of harm if he was sent to the Marathon County jail without zafirlukast and that she disregarded this risk.

In her brief in support of her motion for summary judgment, defendant focuses nearly all of her scant argument on the second element, that is, whether she was responsible for

insuring that plaintiff's "unavailable" medications were sent to the Marathon County jail. She argues that she complied with a Department of Corrections policy that directs nurses at state correctional facilities to send prisoners' medications to county jails only if the jail requests them. However, the routine defendant described regarding her responsibilities suggests that the policy is not the practice that nurses at the New Lisbon Correctional Institution actually follow. (And this may be a good thing, as the standard policy appears to allow prisoners to be shipped off to county facilities without any assurance that critical medications will be available to them upon arrival.) Defendant's proposed findings of fact made it clear that when prisoners who are in the segregation unit at the New Lisbon Correctional Institution are to be transferred, the nursing staff checks several locations to gather the prisoner's controlled medication. If the medication is unavailable, a nurse contacts Central Pharmacy to request that the medication be reissued. Therefore, it is possible to infer from defendant's own statements that it was her responsibility to prepare plaintiff's medication in advance of his transfer and reorder medication that was not available. This is not what defendant did. Instead, she noted on his transfer sheet that he would arrive at the jail without zafirlukast or naproxen. It is hard to imagine that this would have been an acceptable response had the medications in question been for an acute heart condition or diabetes treatment.

Instead, it is on the first element that plaintiff's case falters. To prevail in this case

at trial, it would be plaintiff's burden to show not just that he had a serious medical need, but that defendant was aware that he faced the risk of serious respiratory complications if his zafirlukast was not available to him for 10 days. Therefore, to defeat defendant's motion for summary judgment, he needed to adduce some evidence from which a reasonable jury could conclude that he faced a serious risk of harm and that defendant was aware of this risk.

Although it is evident that plaintiff used a great deal of thought, skill and effort in preparing his materials for summary judgment, much of the evidence that he attempts to rely upon cannot be considered because it is hearsay or undisclosed expert testimony.[1] However,

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[1] For example, plaintiff submitted several articles about asthma and information about zafirlukast. This is "hearsay" because it is not possible for defendant to question the source of the information included in the documents to determine how reliable that information is. To prevail on a medical care claim, a plaintiff will almost always need an expert witness to submit an affidavit on summary judgment or testify at trial regarding plaintiff's health condition and the quality of care that plaintiff received. Such testimony would not be hearsay because the statements are made in court, where the opposing party may challenge and probe the accuracy of the expert's statements.

In addition, plaintiff made impressive efforts to gather information from nursing staff within the Department of Corrections and the University of Wisconsin. The information he requested and received from them was the result of their specialized training and knowledge and therefore "expert" testimony. Putting aside whether the information included in their letters and responses to inmate complaints would have been hearsay as well, if plaintiff wanted to rely on this expert testimony, he was required to disclose the individuals as experts. In keeping with the court's deadline included in the pretrial conference order, plaintiff disclosed one expert witness, Candace Warner, but not any of the other nurses whose statements he cites as supporting evidence.

plaintiff should know that even if I did consider all of the information he submitted, his claim would not withstand summary judgment.

When plaintiff was transferred from the New Lisbon Correctional Institution to the Marathon County jail he was using three medications to control and treat his asthma. Zafirlukast was one of these drugs; plaintiff had the other two while at the jail. Plaintiff has not adduced any evidence that the unavailability of the zafirlukast for ten days posed any problem for him. The fact that a doctor prescribed the medication to plaintiff suggests that it was helpful in controlling his asthma. However, it is not possible to infer from this information alone that a ten-day interruption placed plaintiff at serious risk of harm.

As discussed above, a party opposing a motion for summary judgment must come forward with evidence to support each element of his claim on which he will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In this case, plaintiff has failed to adduce any evidence that he faced a substantial risk of serious harm when he did not have zafirlukast while he was at the Marathon County jail for ten days.

Furthermore, plaintiff has not adduced evidence that defendant was aware of any risk. It is always difficult to demonstrate what another person was aware of at a particular time, and therefore a plaintiff may use circumstantial evidence to persuade the finder of fact that the defendant was aware that she was exposing plaintiff to serious risk. A defendant is not liable for obvious risks of which she remained unaware, but the obviousness of a risk may

be used as evidence that the defendant was aware that danger was present. Farmer, 511 U.S. at 842. Thus, if it was obvious that going without zafirlukast for ten days would place an asthma sufferer at a substantial risk of serious harm when he had access to and used two other asthma medications, then defendant's awareness of the risk could be inferred. However, as discussed above, plaintiff has adduced no evidence that going without zafirlukast placed him at such a risk. As a result, it is impossible to infer that it was so obvious that sending plaintiff to the Marathon County jail without his zafirlukast presented such a serious risk of harm to plaintiff that defendant must have been aware of the risk. Therefore, defendant's motion for summary judgment will be granted. Defendant has prevailed on her motion for summary judgment because I have found that plaintiff did not adduce sufficient evidence to put the elements of his claim into dispute. It follows that if he could not show why defendant's motion for summary judgment should not be granted, he cannot prevail on his own motion for summary judgment.

ORDER

IT IS ORDERED that:

1. Defendant Stephanie Hahn's motion for summary judgment is GRANTED.
2. Plaintiff Michael Lee Raunio's motion for summary judgment is DENIED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 26th day of February, 2007.

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