IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

PHILLIP E. BACON,

Plaintiff,

v. MEMORANDUM and ORDER

SHARRON HARDER, PAUL TRITES, DEB LEMKE and KENNETH ADLER, 06-C-455-S

Defendants.

Plaintiff Phillip E. Bacon was allowed to proceed on his Eighth Amendment deliberate indifference claim against defendants Sharron Harder, Paul Trites, Deb Lemke and Kenneth Adler. In his complaint he alleges that the defendants were deliberately indifferent to his broken foot.

On December 4, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Plaintiff Phillip E. Bacon is an inmate at the Jackson Correctional Institution, Black River Falls, Wisconsin (JCI). Defendant Sharon Harder, a registered nurse, is the Health Services Unit (HSU) Manager at JCI. Defendant Paul Trites, a physician, provided medical services at JCI until January 2006. Defendant Deborah Lemke, a physician, provided medical services at JCI in January and February 2006. Defendant Kenneth Adler has been employed as the physician at JCI since March 4, 2006.

On December 30, 2005 HSU staff was called to recreation by unit staff because plaintiff had seriously injured his left ankle. Because HSU staff thought plaintiff's ankle might be broken or

dislocated, plaintiff was transported to Black River Memorial Hospital for evaluation and treatment.

At the hospital an examination of plaintiff's left ankle revealed significant lateral soft tissue swelling. Plaintiff would not allow the staff to move or examine his ankle stating he was in too much pain. X-rays of the tibia, fibula and ankle were taken and did not indicate any fracture. The hospital staff diagnosed plaintiff with a left ankle sprain and prescribed ice, elevation, activity as tolerated and Motrin and Tylenol for pain. Plaintiff was given 100 mg of Ultram at the hospital, provided an air cast and advised to use crutches as needed. Plaintiff was advised that it could be several weeks before he was back to even 80 or 90% of his baseline.

On January 2, 2006 plaintiff was seen by Dr. Trites at the HSU for his ankle injury. Dr. Trites noted marked swelling around plaintiff's ankle. Dr. Trites prescribed Vicodin 4 times a day as necessary for plaintiff and ice and elevation at least three times a day. Dr. Trites restricted plaintiff from sports and work, provided him with a low bunk, extra pillows, hot/cold bag 4 times daily, crutches Ace wrap, tape and a wheelchair.

On January 9, 2006 plaintiff submitted an HSU request stating that he was in extreme pain and was seen by Dr. Trites that same day. Dr. Trites prescribed additional pain medication for

plaintiff. He also provided plaintiff with a cold bag 6-7 times daily.

On January 14, 2006 plaintiff was seen by a nurse in the HSU. X-rays were negative. Plaintiff had trace swelling of his foot but stated that the ice was working. Staff advised plaintiff that his recovery could take weeks or even months.

On January 16, 2006 plaintiff was seen by staff in HSU for continued complaint of pain. He was given a work restriction and more ice treatments for a week. The appointment was terminated because plaintiff became argumentative.

On January 17, 2006 plaintiff was seen by Dr. Lemke. Dr. Lemke noted that plaintiff had swelling and pain around his left ankle. She requested a repeat of the ankle films as well as foot x-rays. Plaintiff told Dr. Lemke that he did not want to go to the emergency room so she initiated an orthopedic referral and ordered X-rays for the next Tuesday. She prescribed plaintiff with more pain medication, no recreation, no work, a left foot splint and a cold bag for at least 4 times a day.

The January 24, 2006 x-rays indicated minimal spurring at the insertion of the Achilles tendon on the calcaneus. These x-rays did not reveal any fracture of the foot or ankle. On January 28, 2006 plaintiff requested to be allowed "disability recreation." On January 30, 2006 Dr. Lemke ordered that plaintiff might attend therapeutic recreation including upper body work-outs but

prohibiting any weight bearing on his left foot. On February 1, 2006 Dr. Lemke ordered plaintiff more pain medication. On February 8, 2006 staff informed plaintiff that Dr. Lemke had submitted his case to Madison for approval for an orthopedic evaluation. On February 14, 2006 plaintiff was again provided a wheelchair restriction.

On February 15, 2006 plaintiff submitted a complaint to HSU about his continued pain and an orthopaedic evaluation. Dr. Lemke advised plaintiff on February 17, 2006 that she was waiting for approval from Madison for the orthopedic evaluation. Dr. Lemke informed plaintiff that the x-rays showed no fracture.

On February 26, 2006 plaintiff submitted a request for a refill of Ibuprofen and a change from Vicodin to Tylenol II. On March 2, 2006 HSU staff informed plaintiff that he was scheduled to see a doctor on March 8, 2006 and that he had no further refills for Ibuprofen.

Plaintiff was seen by Dr. Adler on March 8, 2006 who noted there was no swelling and that plaintiff was having less pain. He noted that plaintiff had a fair range of motion of his left ankle. Dr. Adler reviewed the previous x-rays and concluded that plaintiff had a slow-healing ankle sprain. He ordered a walking boot, physical therapy, wheelchair, lower bunk, whirlpool and Darvocet N-100s 4 times a day as needed for pain for one month. Dr. Adler discontinued the orthopaedic consult because he believed that

plaintiff should undergo conservative management before consideration of surgery.

On March 12, 2006 plaintiff wrote HSU staff complaining about Dr. Adler's decision and stating that he had not received the boot or the physical therapy that Dr. Adler had ordered. On March 20, 2006 plaintiff was provided with a left ankle brace and an Ace wrap. Om March 21, 2006 plaintiff was seen in HSU to have the whirlpool explained to him and was issued an ankle sleeve for support.

Plaintiff saw Dr. Adler on April 14, 2006. Dr. Adler's impression was that plaintiff's pain was lessening but continuing longer than expected. He ordered more x-rays. Dr. Adler granted plaintiff's request to return to work.

On April 18, 2006 more x-rays were taken of plaintiff's left ankle and compared to the January 24, 2006 x-rays. There was a very small calcific density lying just lateral to the inferior talar region on the AP view that could represent a very minimal avulsion fracture.

Dr. Adler saw plaintiff on May 18, 2006. Plaintiff reported that the walking boot helped a lot. He was mainly reporting pain with moving ankle. On exam plaintiff's ankle was not swollen or tender to the touch. Dr. Adler recommended physical therapy. The possible fracture was in an area of the ankle where plaintiff was not having pain. Dr. Adler concluded that the possible fracture was not related to his pain.

On May 20, 2006 plaintiff submitted a request that his recreation restriction be lifted immediately. On May 30, 2006 Dr. Adler allowed plaintiff to return to regular recreation.

Plaintiff had a physical therapy appointment on June 5, 2006. The ankle had full range of motion but some decreased muscle strength. Strengthening exercises were recommended. Plaintiff had a physical therapy appointment on June 14, 2006 and some increase in ankle strength was noted. On July 10, 2006 plaintiff had a physical therapy appointment and his ankle strength was almost completely normal. He was then discharged from physical therapy.

Dr. Adler saw plaintiff on July 10, 2006. Plaintiff requested Aleve and a pillow for his ankle. Dr. Adler prescribed Naproxen 500 mg twice as day as needed for pain for one year. Plaintiff's lower bunk restriction was discontinued because Dr. Adler believed that climbing to an upper bunk could help strengthen plaintiff's ankle.

Plaintiff was seen by Dr. Adler on September 22, 2006. On exam he had full range of motion with no swelling and mild tenderness on inner ankle. Dr. Adler believed plaintiff may have a new sprain of a ligament on his inner ankle. He was prescribed prednisone and low bunk restrictions. An ankle x-ray was ordered. The October 10 x-rays of plaintiff's ankle showed no evidence of fracture or dislocation.

Dr. Adler saw plaintiff on November 8, 2006. Plaintiff continued to complain of pain. Dr. Adler's impression was that plaintiff's ankle symptoms were due to de-conditioning. Dr. Adler provided plaintiff an ankle support and referred him to physical therapy.

Since December 30, 2005 until November 8, 2006 plaintiff was seen by HSU staff 21 times.

MEMORANDUM

Plaintiff was allowed to proceed on his Eighth Amendment deliberate indifference claim against the defendants. There is no genuine issue of material fact, and this case can be decided on summary judgment as a matter of law.

Deliberate indifference of a serious medical need violates an inmate's Eighth Amendment rights. Estelle v. Gamble, 429 U.S. 97 (1976). Plaintiff must first show that he has a serious medical need and that the defendant acted with deliberate indifference to his condition.

Plaintiff was diagnosed by a doctor at the emergency room at Black River Falls Hospital with an ankle sprain on December 30, 2005. He was seen by three doctors at JCI in January, February and March 2006 who concluded that he had an ankle sprain. The December 30, 2005 x-ray, the January 24 x-ray and the x-rays taken in February 2006 showed no fracture. An April x-ray showed a possible minimal avulsion fracture but Dr. Adler concluded that this

possible fracture could not be causing the pain. A subsequent October 10, 2006 x-ray showed no fracture. Plaintiff had a sprained left ankle which was not a serious medical need.

Had plaintiff's sprained left ankle been a serious medical need, the defendants were not deliberately indifferent to it. They provided plaintiff with consistent medical treatment from December 30, 2005 until November 8, 2006. He was prescribed pain medication including narcotic pain medication. He was proscribed mobility aids as well as physical therapy and access to a whirlpool. He received wraps, splints, braces and a cast and was restricted from work, recreation and an upper bunk. After the treatment he received, plaintiff was able to return to work, recreation and an upper bunk. He had recovered from his injury.

Although plaintiff may have wanted additional or different treatment he has not shown that defendants were deliberately indifferent to his sprained ankle in violation of the Eighth Amendment. Accordingly, defendants are entitled to judgment as a matter of law on plaintiff's Eighth Amendment claim and their motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

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ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 28th day of December, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge