IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

v.

CYNTHIA THORPE and DR. COX,

Defendants.

OPINION and ORDER

09-cv-532-bbc

- -

Plaintiff Willie Simpson is proceeding in forma pauperis on his claims that defendants Burton Cox and Cynthia Thorpe are denying him adequate medical care for weight loss and lesions on his organs, in violation of the Eighth Amendment. Defendants have filed a motion for summary judgment. After considering the parties' submissions, I will grant defendants' motion and direct the clerk of court to enter judgment in their favor.

The parties' submissions leave something to be desired. Plaintiff failed to submit detailed proposed findings of fact or responses to defendants' proposed findings, instead arguing that (1) because I denied plaintiff's motion for summary judgment in a July 13, 2010 order, dkt. #76, I concluded that there were already material facts in dispute making trial necessary; and (2) "defendants have not proposed any facts material in this action." Plaintiff

is incorrect on both counts. First, the court is not bound by the proposed findings of fact raised in the previous round of summary judgment briefing; as I noted in the July 13, 2010 order, I presented disputed and undisputed facts submitted by the parties "for the sole purpose of deciding [plaintiff's] motion for summary judgment." Further, rather than concluding there were disputed issues of material fact on the question of deliberate indifference, I concluded that plaintiff failed to present evidence that defendant Thorpe acted with deliberate indifference:

> In order to show that Thorpe was deliberately indifferent, plaintiff would have to show that her decisions to uphold the treatment decisions of others were based on "such substantial departure[s] from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision[s] on such a judgment." Estate of Cole, 94 F.3d at 261-62. At this point, the evidence adduced by the parties shows that medical staff believed that plaintiff's cyst and lesions were benign and that the high protein/high calorie snack bag was appropriate for plaintiff's medical condition. Accordingly, I will deny plaintiff's motion for summary judgment.

Moreover, plaintiff's statement that defendants have failed to assert any material facts is clearly incorrect. Defendants have proposed findings regarding plaintiff's treatment history and subsequent inmate grievances. On this round of briefing, plaintiff has failed to dispute the facts proposed by defendants. However, I note that defendants' proposed findings supporting their motion for summary judgment are virtually identical to their proposed findings regarding plaintiff's earlier motion for summary judgment. Therefore, I will consider plaintiff's responses to defendants' earlier proposed findings of fact in addressing defendants'

motion.

As for defendants' submissions, they seem to include plaintiff's entire history of medical treatment at the Wisconsin Secure Program Facility, including appointments for allergies, a pressure ulcer on plaintiff's hip and possible ear infection. If these facts are relevant, defendants have failed to explain why. In addition, defendants list many different medications or medical tests whose purposes are unclear, making it difficult to tell whether those treatments are relevant to plaintiff's claims. Because I must draw all reasonable inferences in the record in plaintiff's favor, Schuster v. Lucent Technologies, Inc., 327 F.3d 569, 573 (7th Cir. 2003), I will disregard proposed findings of fact regarding plaintiff's treatment where the relevance of that treatment to the case at hand is not clear. In the future I encourage counsel to either pare down its proposed findings of fact or provide an explanation of their relevance to this non medical expert audience.

After considering defendants' proposed findings of fact as well as plaintiff's responses to defendants' virtually identical previous proposed findings, I find the following facts to be material and undisputed, unless otherwise noted.

UNDISPUTED FACTS

A. Plaintiff's Medical Treatment

Plaintiff Willie Simpson was incarcerated at the Wisconsin Secure Program Facility

from April 24, 2009 until his transfer to the Green Bay Correctional Institution on February 23, 2010. Defendant Dr. Burton Cox is employed by the Wisconsin Department of Corrections as a physician at the Wisconsin Secure Program Facility's Health Services Unit. Cox attends to the medical needs of inmates, diagnosing and treating illness and injuries and arranging for professional consultation when warranted.

Plaintiff is HIV positive and suffers from lesions in his spleen and liver. He weighed 195 pounds in January 2009. When plaintiff arrived at the Wisconsin Secure Program Facility in April 24 2009, Health Services Unit staff reviewed his chart and conducted an Intake/Transfer/Receiving Screening and noted that plaintiff had a modified diet of double portions. Staff also noted upcoming appointments plaintiff had at the University of Wisconsin Hospital and Clinic. Defendant Cox continued plaintiff's order for double portions diet. Cox changed plaintiff's diet to high calorie/high protein snack bag on April 27, 2009.

Defendant Cox saw plaintiff on June 10, 2009, to discuss his ongoing HIV treatment and upcoming flu labs and clinics. Plaintiff's main concern was weight loss he believed to be caused by "muscle wasting" caused by his HIV status. Cox noted that plaintiff had lost 11 pounds in six weeks and 13 pounds in three months. Even though his viral load was low, plaintiff wanted his double portions back. Cox discontinued Tamsulosin and prescribed benzapril 10 milligrams for one year and ordered that his vital signs be checked every two

weeks for six months and no bologna or salami in his high calorie/high protein snack bag. Also, Cox ordered a double portions diet.

On June 17, 2009, plaintiff was seen in the Health Services Unit for a lab draw for HIV viral load and other tests. On June 22, 2009, defendant Cox changed plaintiff's diet back to regular with a high calorie/high protein snack bag.

Plaintiff was seen by University of Wisconsin Hospital and Clinics-Hepatology physician assistant Sarah Affeldt on July 2, 2009. Affeldt noted that plaintiff was complaining of weight loss but found that he had actually gained two pounds since she had last seen him in May. In his response, plaintiff notes that Affeldt recommended that plaintiff receive double portions, but Cox did not order this.

In reliance on Affeldt's recommendations from her visit with plaintiff, defendant Cox ordered a lab draw for HIV viral load and other tests and a follow-up with the UW Immunology Clinic in six weeks. On August 5, 2009, plaintiff was seen in the Health Services Unit for the lab draw.

On August 20, 2009, Cox ordered a followup with UW Immunology with pre-clinic labs of HIV viral load and other tests. That same day, plaintiff was again seen by Affeldt. Plaintiff informed Affeldt that he believed that he should be on double portions or have his diet changed. Affeldt noted that plaintiff was getting a multivitamin, but because he had gained weight, she stated she would not recommend double portions at that time. (Plaintiff

states that Affeldt recommended that he be seen by a nutritionist, but Affeldt's medical report states only that plaintiff requested such an appointment.)

Plaintiff was seen by Lisa Cervantes of UW Gastroenterology and Heptology on September 11, 2009, by telemedicine. Cervantes recommended that plaintiff be scheduled for a pelvic CT scan with IV contrast and that a telemedicine followup be scheduled for one week after the CT scans were done. Defendant Cox ordered the CT and followup. The CT scan of the pelvis/abdomen was performed at the UW Hospital on October 15, 2009.

Plaintiff was seen by the UW GI clinic by telemedicine on October 23, 2009, regarding the CT scan results. Plaintiff was informed by UW staff that the CT scan showed no clear source in the abdomen or pelvis for his weight loss and the numerous hepatic small hypodense lesions were felt to represent benign cavernous hemangiomas. A plan was made to follow up in about three months.

On November 11, 2009, Health Services Unit staff conducted a lab draw for HIV viral load.

Plaintiff was seen by Affeldt at the UW Hospital on December 3, 2009. Affeldt noted that plaintiff had gained six pounds between September and December, that the CT scan results indicated that the lesions on his liver were most likely benign hemangiomas and that the splenic cyst had not changed in size and could continue to be watched. (Plaintiff cites Affeldt's December 3 report, arguing that she recommended an appointment to get a second

opinion on the nature of plaintiff's cyst and lesions and if necessary, a biopsy. However, in her report, Affeldt stated that she was hesitant to recommend any further procedures because they were not recommended by radiology or GI. She stated, "I believe he wants a General Surgery visit, as he thinks that he should get these biopsied. Please feel free to schedule an appointment with General Surgery if you would like him to get a second opinion . . .")

Defendant Cox ordered a followup with the UW Immunology clinic in three months with the pre-clinic labs on December 7, 2009. On December 10, 2009, Cox requested a consultation at the UW Hospital for evaluation of plaintiff's liver, hemangiomas and splenic cyst. Cox had no further involvement with plaintiff's medical care after February 23, 2010.

Plaintiff's weight fluctuated from 195 pounds in January 2009, to 181 pounds on June 10, 2009; to 180 pounds on July 19, 2009; to 188 pounds on August 22, 2009; to 175 pounds on September 2, 2009; to 179 pounds on October 8, 2009; and to 179 pounds on November 2, 2009.

B. Plaintiff's Inmate Complaints and Defendant Thorpe's Role

Defendant Cynthia Thorpe has been employed by the Wisconsin Department of Corrections as Health Services Nursing Coordinator since February 25, 2001. In Thorpe's capacity as Health Services Nursing Coordinator, she is responsible for coordination and oversight of health services provided at adult and juvenile facilities in the Department of

Corrections with an emphasis on adult institutions. Thorpe does not participate in decisions regarding specific medical treatments. Such decisions are made by the health services staff within each institution.

At times, Thorpe also serves as a reviewing authority on offender complaints filed by inmates within the inmate complaint review system. In this capacity, Thorpe receives recommendations of the institution complaint examiners who have taken action on inmate complaints. Under Wis. Admin. Code § DOC 310.12, a reviewing authority is authorized to review and decide an inmate complaint.

Plaintiff filed offender complaint WSPF-2009-10452, which was received on May 7, 2009, complaining about being denied double meal portions. Ellen Ray, the institution complaint examiner at the Wisconsin Secure Program Facility, conducted an investigation concerning plaintiff's complaint. Ray contacted the Food Services Manager, Ms. Iverson, who reported that defendant Cox changed plaintiff's diet order to "high calorie/high protein HS snack bag." Ms. Iverson stated that the high calorie/high protein diet is believed to be the most effective for plaintiff's condition in accordance with the DOC Diet Manual. Ray determined that both Health Services Unit and Food Service agreed that this diet was the correct one for plaintiff and therefore, recommended that the complaint be dismissed.

On May 11, 2009, acting as a reviewing authority within the inmate complaint review system, defendant Thorpe followed Ray's recommendation and dismissed the offender

complaint. Plaintiff appealed the decision all the way to the Office of the Secretary, where it was dismissed.

Plaintiff filed offender complaint WSPF-2009-13852, which was received on June 22, 2009, complaining about not getting proper nutritional treatment for HIV wasting. Ellen Ray conducted an investigation concerning plaintiff's complaint. Ray contacted the Health Services Unit staff, Ms. Miller, who reported that defendant Cox changed plaintiff's diet order to "regular high calorie/high protein HS snack bag. no bologna or salami." On the basis of the information provided by Miller, Ray recommended that the complaint be dismissed.

On June 23, 2009, acting as a reviewing authority within the inmate complaint review system, defendant Thorpe followed Ray's recommendation and dismissed the offender complaint. Plaintiff appealed the decision all the way to the Office of the Secretary, where it was dismissed.

DISCUSSION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving

party is proper. Celotex, 477 U.S. at 322.

Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

"Deliberate indifference" means that prison officials know of and disregard an excessive risk to inmate health and safety. Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's

erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

A. Defendant Cox

Defendants have moved for summary judgment on plaintiff's claims that defendant Cox was deliberately indifferent to plaintiff's serious medical needs by discontinuing his double-portion meals and failing to treat his spleen and liver lesions. I will address each claim in turn.

1. Weight loss

Defendants argue both that plaintiff has failed to present any evidence indicating that his weight loss was a serious medical need and that he has failed to show that defendant Cox acted with deliberate indifference in treating him. Even assuming that plaintiff's weight loss was a serious medical need given that he was being "treated" in a fashion with extra portions or snack bags, I conclude that the undisputed facts show that Cox did not act with deliberate indifference.

Rather, the undisputed facts show that defendant Cox did not ignore plaintiff's

nutrition. When plaintiff arrived at the Wisconsin Secure Program Facility, Cox continued plaintiff's order for a double portions diet. He changed plaintiff's diet to high calorie/high protein snack bag on April 27, 2009. When Cox saw plaintiff on June 10, plaintiff raised a concern about weight loss from HIV wasting, although Cox noted that plaintiff's "viral load was low." Cox noted that plaintiff had lost 11 pounds in six weeks and 13 pounds in three months and decided to reinstate the double portions diet. Cox then switched plaintiff back to a regular diet with high calorie/high protein snack bag on June 22, 2009. Cox made all of these decisions while monitoring plaintiff's health through lab testing.

Doubtless, plaintiff would have preferred being kept on a double portion diet, but he is not entitled to treatment of his choosing. Anderson v. Romero, 72 F.3d 518, 524 (7th Cir. 1995). Plaintiff focuses on the July 2, 2009 report by UW Hospital physician assistant Sarah Affeldt recommending that plaintiff receive double portions, but at most this reflects a difference of opinion among medical staff, and in any case, Affeldt's August 20, 2009 report noted that plaintiff was gaining weight and she would not recommend double portions. Plaintiff has not produced any expert testimony showing that Cox's decision to treat plaintiff by authorizing an extra snack bag was a substantial departure from accepted professional judgment, and no layperson could make that determination. Therefore, I will grant defendants' motion for summary judgment regarding defendant Cox's treatment of plaintiff's weight loss.

2. Spleen and liver lesions

Next, plaintiff alleges that defendant Cox acted with deliberate indifference in failing to properly treat lesions on his spleen and liver. Defendants argue that these lesions are not a serious medical need. Defendants proposed facts indicting that the lesions on his liver were diagnosed as "most likely benign" and the splenic cyst "had not changed in size and could continue to be watched." Plaintiff did not provide any evidence disputing these diagnoses; he argues that the lesions could rupture, causing him serious harm, but he does not provide any expert testimony suggesting that this is the case.

Also, plaintiff argues that the lesions should have been biopsied, but he does not explain why it would be deliberate indifference for defendant Cox to fail to order biopsies after initial testing showed that the lesions were not a threat. As stated above, plaintiff is not entitled to the treatment of his choice, and he has no evidence that Cox's failure to order biopsies after the initial tests was a substantial departure from accepted professional judgment. (Plaintiff attempts to characterize Affeldt's December 3, 2009 report as containing a recommendation for a second opinion about the nature of the lesions or even a biopsy. However, in her report, Affeldt stated that she was hesitant to recommend any further procedures because they had not been recommended by other departments, and instead merely passed along information that plaintiff wanted a biopsy.) Therefore I will grant summary judgment to defendants on plaintiff's claim against defendant Cox for treatment

of the lesions on his liver and spleen.

B. Defendant Thorpe

Plaintiff is proceeding on claims that defendant Thorpe was deliberately indifferent to his serious medical needs by dismissing his complaints about defendant Cox's discontinuation of his double-portion meals and his decision to not treat his spleen and liver lesions. In order to prevail on these claims, plaintiff would have to show that it was Thorpe's role to exercise control over Cox's medical decisions and that she acted with deliberate indifference in denying plaintiff's complaints. The undisputed facts show that Thorpe does not participate in decisions regarding specific medical treatments and that she relied on the investigations into plaintiff's grievances that had led to a finding that medical staff believed that plaintiff was receiving appropriate care. Thorpe is "entitled to relegate to the prison's medical staff the provision of good medical care." Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009). Therefore, I will grant defendants' motion for summary judgment on plaintiff's claims against defendant Thorpe.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Burton Cox and Cynthia Thorpe, dkt. #87, is GRANTED.

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

Entered this 7th day of February, 2011.

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