IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND,

Plaintiff,

v.

WILLIAM POLLARD and MARTHA[1] ROLLI,

Defendants.

ORDER

10-cv-621-bbc

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In this action brought under 42 U.S.C. § 1983, plaintiff Dwayne Almond, a prisoner at the Green Bay Correctional Institution, alleges that he is being denied medication for treatment of schizophrenia. Both plaintiff and defendants William Pollard and Martha Rolli have filed motions for summary judgment, and the parties have completed briefing the motions. After considering the parties' submissions, I will grant defendants' motion for summary judgment and deny plaintiff's.

Also, plaintiff has filed a motion that I construe as one for injunctive relief concerning his legal loan. Plaintiff states that his legal loan was canceled and that the loan was the only way he could pay for resources to access this court. I will deny this motion because even following the cancellation of his legal loan defendant has been able to file several sets of documents (totaling more than 70 pages) in support of his motion for summary judgment

[1] I have amended the caption to include defendant Rolli's first name as provided by defendants.

or in opposition to defendants' motion. In short, plaintiff fails to show that his efforts to litigate this case have been hampered in any way.

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

UNDISPUTED FACTS

Plaintiff Dwayne Almond is incarcerated at the Green Bay Correctional Institution. Defendant Dr. Martha Rolli was employed by the Wisconsin Department of Corrections as the psychiatry director from August 2008 until August 2010. Defendant William Pollard was employed by the Department of Corrections as warden of the Green Bay prison during the time period relevant to this case.

Plaintiff has had varying psychiatric diagnoses over the last decade, some of which have included schizoaffective disorder. In particular, Dr. Robert McQueeney, a psychiatrist at the Green Bay prison, saw plaintiff at the prison on May 17, 2006 and stated that plaintiff's symptoms were "probably best described as schizoaffective disorder." In the past, plaintiff has been prescribed numerous medications, including Lorazepam, a drug used in treatment of anxiety and depression. Plaintiff has a history of polysubstance dependence, including dependence on cannabis, cocaine and alcohol.

Plaintiff states that he hears voices in his head, which force him to eat his own feces. On January 5, 2010, plaintiff met with McQueeney. Plaintiff requested a prescription for Lorazepam. Plaintiff stated that he did not want to take alternative medications Haldol or Loxapine. McQueeney told plaintiff that a request for Lorazepam would likely be denied

because of plaintiff's history of polysubstance dependence. After meeting with plaintiff, McQueeney stated the following in his psychiatric report:

> The patient's presentation is consistent with a personality disorder. I am aware that WRC had described him having schizoaffective disorder; however, previous diagnoses and workup from other psychiatric professionals documents the patient has an absence of these symptoms and diagnoses. There are psychological tests that have shown the patient to be malingering psychotic symptoms. I do not see the patient as having psychotic symptoms, nor do I see that he is in any acute distress. He does not appear depressed, and he does not appear to be experiencing any anxiety. I believe the symptoms and behavioral presentation the patient is exhibiting are related to his personality disorder. I will be deleting the diagnosis of schizoaffective disorder because I do not believe that is accurate.

Despite this diagnosis, McQueeney placed a Non-Formulary Psychotropic Drug Request for Lorazepam for plaintiff, stating:

> Patient has had multiple trials of medications, he reports the other medications have harmed his insides and have caused impotence. He currently is not taking any psych meds. [The Wisconsin Resource Center] has [diagnosed patient] with schizoaffective disorder. Dr. Knuppel and others have previously documented malingering of psychotic symptoms. Psych testing has shown malingering. [Patient] insists I request [Lorazepam] for him.

Defendant Rolli reviewed the request made by McQueeney. Rolli noted that Lorazepam is not recommended for long-term use because such use has not been assessed by systematic studies. Also, Lorazepam is addictive, both physically and psychologically. A patient like plaintiff, with a history of serious substance dependence, is almost never an appropriate candidate for long-term Lorazepam use. From her own professional knowledge of Lorazepam and the information from the January 5, 2010 psychiatric report and the Non-Formulary Psychotropic Drug Request, defendant Rolli reached the opinion that Lorazepam was not a good option for plaintiff. She denied the request for Lorazepam.

Plaintiff filed an inmate grievance about the denial of this medication. Institution

complaint examiner Michael Mohr recommended dismissing the complaint; plaintiff appealed; and reviewer Cynthia Thorpe accepted that recommendation. Plaintiff appealed further to corrections complaint examiner Welcome Rose, who recommended dismissing the complaint, and then to the Office of the Secretary. Ismael Ozanne accepted Rose's recommendation to dismiss the complaint, ending the internal grievance process.

Defendant Pollard had general supervisory authority over operations of the Green Bay prison during these events, but he did not supervise the day-to-day medical decisions of medical and clinical personnel. Pollard is not a psychologist and cannot order clinical care and treatment.

OPINION

Plaintiff was granted leave to proceed on claims that defendants Rolli and Pollard violated plaintiff's Eight Amendment right to adequate medical care; Rolli by rejecting a request for Lorazepam and Pollard by rejecting plaintiff's complaints out of personal animosity for plaintiff.

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 do not constitute 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.

The parties have submitted proposed findings of fact very similar to those they submitted regarding plaintiff's motion for preliminary injunctive relief, which I denied in an April 7, 2011 order. In briefing the summary judgment motion, the parties flesh out plaintiff's medical record. These records show that doctors disagreed about whether plaintiff has schizophrenia, and that McQueeney originally diagnosed schizoaffective disorder in 2006 but then changed his mind in January 2010 after noting that previous tests suggested that plaintiff was malingering.

Unfortunately for plaintiff, he continues to rely almost exclusively on these past diagnoses without explaining why defendant Rolli acted with deliberate indifference. But it is not enough for plaintiff to show that he was once diagnosed with schizophrenia; McQueeney and defendant Rolli disagreed with previous diagnoses of schizophrenia, but this disagreement does not sustain a deliberate indifference claim. Gutierrez v. Peters, 111 F.3d at 1374 (7th Cir. 1997). Instead, the record shows that Rolli saw serious problems with prescribing Lorazepam, in particular plaintiff's previous substance abuse history, and concluded that the medication was a not a good option for plaintiff. Plaintiff does not produce any evidence, such as expert testimony, suggesting that Rolli's decision to deny the request for Lorazepam was a "substantial departure from accepted professional judgment," which is necessary to show that Rolli was deliberately indifferent. Estate of Cole, 94 F.3d at 261-62. Accordingly, I conclude that defendants should be granted summary judgment on plaintiff's claim against defendant Rolli.

As for defendant Warden Pollard, plaintiff has adopted a different argument from than the one he used in support of his motion for preliminary injunctive relief. In the court's April 7, 2011 order, I rejected plaintiff's argument that Pollard was deliberately indifferent by failing to respond to a February 2011 letter plaintiff wrote about his medication, stating that plaintiff failed to show what "Pollard was in position to do about McQueeney's or defendant Rolli's treatment decisions." Dkt. #34. Now plaintiff argues that "Pollard has personally looked on as [plaintiff] suffers from mental/physically; abusive behavior from him and his GBCI staff[] . . ." and that Pollard "has the last . . . words of authority" on his inmate grievance concerning his medication.

These proposed findings of fact are not sufficient to support a claim against defendant Pollard. Plaintiff does not propose any facts suggesting that Pollard was personally involved in denying plaintiff medication. Even crediting plaintiff's exceptionally vague proposed finding that Pollard "looked on" while he suffered, plaintiff fails to show how Pollard could have been personally responsible for plaintiff's medical care. High ranking officials may not be held liable under 42 U.S.C. § 1983 simply because they supervise other employees who treat prisoners. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir. 2009) ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise.") Plaintiff concedes that Pollard did not serve as a reviewer at any stage of the grievance process, so there is nothing backing his assertion that Pollard had "the last words . . .of authority" on his inmate complaint. It is undisputed that Pollard cannot order clinical care or treatment; it follows that he cannot overturn the diagnoses made by medical professionals. Id. at 595 (prison officials "entitled to relegate to the prison's medical staff the provision of good medical care"). Therefore I will grant defendants' motion for summary judgment on plaintiff's claim against Pollard.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond's motion for injunctive relief regarding his legal loan, dkt. #58, is DENIED.

2. Plaintiff's motion for summary judgment, dkt. #48, is DENIED.

2. Defendants Martha Rolli's and William Pollard's motion for summary judgment,

dkt. #58, is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 24th day of October, 2011.

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