

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

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ONTARIO DAVIS,

Plaintiff,

v.

OPINION AND ORDER

BARBARA DELAP, SGT. NOVINSKA,  
NURSE JANE DOE, and  
PETER HUIBREGTSE,

Defendants.

10-cv-674-slc

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Plaintiff Ontario Davis, an inmate at the Wisconsin Secure Program Facility, has been granted leave to proceed on his civil complaint under 42 U.S.C. § 1983, in which he raises Eighth Amendment claims against defendants Barbara DeLap and Peter Huibregtse for failing to provide an adequate number of dentists and dental equipment, resulting in delay and unnecessary pain to plaintiff, and against defendants Sgt. Novinska and nurse Jane Doe for failing to provide adequate medical care for plaintiff's headaches and mouth pain. Presently before the court is plaintiff's motion for a preliminary injunction, dkt. 36, in which he asks the court to order defendants DeLap and Huibregtse to provide him with an outside consultation and possible extraction of his wisdom tooth from a licensed oral surgeon not affiliated with the prison.<sup>1</sup>

With respect to his motion for a preliminary injunction, plaintiff must show that he has some chance of success on the merits of his Eighth Amendment claim and that the balance of harms favors immediate relief. *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 473 (7th

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<sup>1</sup> Even if plaintiff could show that he is entitled to injunctive relief, an injunction could not issue against defendant Huibregtse because he is no longer employed at Wisconsin Secure Program Facility and has no authority regarding plaintiff or his treatment.

Cir. 1998). Because plaintiff has failed to meet that standard, I must deny his motion for a preliminary injunction.

For the sole purpose of deciding the motion for preliminary injunction, I find from the parties' submissions that the following facts are material and undisputed:

## FACTS

Plaintiff has a wisdom tooth that has been causing him pain and discomfort since at least 2005. In 2009, plaintiff was placed on the list at the Wisconsin Secure Program Facility to have his wisdom tooth extracted. After months without getting an appointment, plaintiff filed grievances complaining of the delay. In March 2010, he had an appointment with Dr. Weber. Dr. Weber determined that he could not extract the tooth until he had a "pan x-ray" showing the entire area; however, a pan x-ray machine was not available at the institution at that time. Plaintiff did not receive the pan x-ray until February 25, 2011, approximately one year after Dr. Weber ordered it.

On March 25, 2011, plaintiff was transported to Dodge Correctional Institution for a consultation with Dr. Bruce P. Kelly, an oral surgeon working for the Department of Corrections. Dr. Kelly's nurse indicated that defendant Barbara DeLap, the Department of Corrections' Dental Director, had called and set up the appointment and was interested in hearing the outcome. Dr. Kelly compared plaintiff's 1998 x-ray to his 2011 x-ray and explained that the involved wisdom tooth appeared to have shifted from a 90-degree angle to a 45-degree angle. Dr. Kelly told plaintiff that there was a high risk of permanent nerve damage if he had his wisdom tooth extracted and that plaintiff would have to weigh that risk against the bouts of pain and headaches that would occur if the tooth was not removed.

When plaintiff asked Dr. Kelly what he should do, Dr. Kelly told plaintiff that he could not and would not make the decision for him; he advised plaintiff to take some time to think it over. At Dr. Kelly's direction, plaintiff began to sign a form indicating that he was refusing surgery at that time, but then had a change of heart and told Dr. Kelly that he wanted to go ahead with the extraction. At that point, Dr. Kelly stated, "I'm going to make the decision for you" and said he would treat the visit as a "consultation." Dr. Kelly then wrote: "Pt. indecisive, 45 minutes for consultation" on the AUTHORIZATION AND CONSENT TO SURGERY AND DRUG ADMINISTRATION FORM.

On July 8, 2011, Dr. Weber examined plaintiff at the WSPF. Mary Miller, a nursing supervisor, stood in the examination room providing input and asking questions of plaintiff, including asking him if he was going to have the tooth extracted. When plaintiff said he wanted to be examined by an independent dental surgeon, Miller responded: "That's not going to happen." Dr. Weber prescribed ibuprofen and penicillin to plaintiff for his tooth pain.

The Department of Corrections customarily contracts with doctors from the University of Wisconsin-Madison to perform surgery and other difficult treatments that the Department is unable to perform.

### OPINION

A plaintiff asking for emergency or preliminary injunctive relief is required to make a showing with admissible evidence that (1) he has no adequate remedy at law and will suffer irreparable harm if the injunction is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits; and (4) the injunction would not frustrate the public interest.

*See Palmer v. City of Chicago*, 755 F.2d 560, 576 (7th Cir. 1985). At the threshold, plaintiff must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, then the court moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997).

Plaintiff has failed to demonstrate that he will suffer irreparable injury if his motion is denied. For preliminary relief to be granted, the irreparable harm must also be likely, that is, there must be more than a "mere possibility" that the harm will come to pass. *Michigan v. U.S. Army Corps of Engineers*, -- F.3d--, 2011 WL 3836457, \*22 (7th Cir. Aug. 24, 2011) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21–23 (2008)). Although the alleged harm need not be occurring or be certain to occur before a court may grant relief, there still must be a "presently existing actual threat" of harm. *Id.* (citations omitted).

Here, plaintiff has not identified what harm will come to him if his motion is not granted, much less that such harm is imminent. Plaintiff is asking the court to order defendants to have him evaluated by an oral surgeon for consultation and the possible extraction of his tooth. However, defendants have already done this; plaintiff was transported to the Dodge Correctional Institution in March 2011 to see Dr. Kelly for this very purpose. Plaintiff does not allege that Dr. Kelly refused to extract the tooth, but only that he advised plaintiff to think it over first because of the risks involved. The evidence currently in the record suggests that plaintiff is free to request an appointment with Dr. Kelly to have the tooth extracted, if that is what plaintiff decides to do.

What plaintiff wants is a *second* consultation by a dentist from outside the prison system because plaintiff does not trust the advice Dr. Kelly gave him. Plaintiff suspects that Dr. Kelly overstated the risks of surgery in order to protect defendant DeLap, but this suspicion is supported by nothing but plaintiff's own speculation. Plaintiff has not demonstrated that Dr. Kelly's advice or treatment was deficient, that he will not extract plaintiff's tooth if plaintiff chooses, or that Dr. Kelly lacks the training or expertise to perform the surgery. Further, plaintiff admits that he was seen by the dentist, Dr. Weber, as recently as three months ago and that plaintiff's treatment options were discussed at that time. Just because it might be easier for plaintiff to make up his mind if he gets one more opinion does not mean that defendants must provide the opinion or that plaintiff will be irreparably harmed without it.

Not only has plaintiff failed to show a risk of irreparable harm, but he cannot show that he is likely to succeed on the merits of his underlying § 1983 action with respect to defendants' refusal to send him to an oral surgeon outside the institution. Prison officials are not deliberately indifferent to a prisoner's medical needs simply because they deny him the particular medical treatment of his choice. *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997); *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

#### ORDER

IT IS ORDERED that plaintiff Ontario Davis's motion for a preliminary injunction, dkt. 36, is DENIED. Defendants' motion to strike, dkt. 43, is DENIED as moot.

Entered this 6<sup>th</sup> day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge