

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

JEREMIAH J. LAMBERT,

Plaintiff,

v.

DR. KENNETH ADLER,

Defendant.

ORDER

11-cv-418-bbc

In this proposed civil action for monetary and injunctive relief, plaintiff Jeremiah Lambert contends that defendant Dr. Kenneth Adler violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment for his ear. Plaintiff has paid the \$350 filing fee.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

After reviewing the complaint, I conclude that plaintiff may proceed on his claim that defendant exhibited deliberate indifference to his medical needs in violation of the Eighth Amendment.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Jeremiah Lambert is a prisoner at the New Lisbon Correctional Institution. In December 2008, plaintiff began experiencing pain, drainage and bleeding in his right ear. Between December 2008 to March 2009, plaintiff submitted several health service requests and was seen by various nurses on several occasions regarding his ear. The health services unit gave him antibiotics.

On July 19, 2009, plaintiff submitted a health services request stating that he had pain in his right ear and was having difficulty swallowing food. On July 21, he was seen by defendant Dr. Kenneth Adler. Defendant looked into plaintiff's ear with an otoscope and told plaintiff that his ear was "a little congested" but that defendant did not see "anything to worry about." Plaintiff asked defendant if he could see a specialist about his ear and defendant told plaintiff he was being "over dramatic," that he could not "just send you guys out whenever you think something is wrong" and that "sometimes you guys are just looking for a field trip." Defendant prescribed plaintiff an over-the-counter decongestant.

Plaintiff continued to suffer from pain and drainage in his right ear during September and October 2009 and continued to use antibiotics given to him by various nurses. On October 5, 2009, he was seen by Dr. Glen Heinzl, who determined that plaintiff should be evaluated by an ear, nose and throat specialist. Heinzl submitted a request for plaintiff to be seen by a specialist, but defendant denied the request.

Plaintiff continued to complain about pain and drainage in his ear throughout October and November 2009. On November 3, 2009, plaintiff was seen by Dr. Heinzl. Heinzl asked defendant again for permission to send plaintiff to an ear, nose and throat clinic, but defendant denied the request, noting “no risk to patient vs. cost of consult.”

On January 19, 2010, plaintiff complained to the health services unit about pain and drainage in his right ear. Dr. Heinzl saw plaintiff the next day and called the ear, nose and throat clinic at the University of Wisconsin in Madison. A doctor at the clinic told Heinzl that he needed to see plaintiff in person, so Heinzl submitted another request for plaintiff to be seen by the clinic. On January 26, defendant approved the request.

Plaintiff was examined at the ear, nose and throat clinic on February 22, 2010. The clinic doctor found that plaintiff had “conductive hearing loss,” “tympanic membrane perforations,” “inflammatory middle ear changes” and “ossicular erosion and drainage in the middle ear space.” Some of the damage had been caused by recurring ear infections. In March, plaintiff received a CT scan on his right ear, which revealed that plaintiff had bone

erosion in the ear. In June 2010, plaintiff learned that his right ear had extensive damage that could be corrected only through surgery. In August 2010, plaintiff received multiple surgeries to repair his ear. Eventually, he will need a “total ossicular replacement prosthesis” for his right ear.

DISCUSSION

Plaintiff contends that defendant’s failure to refer him to a specialist to determine whether he was suffering from a serious ear condition constitutes deliberate indifference to his medical needs in violation of the Eighth Amendment. Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a “serious medical need” and that prison officials were “deliberately indifferent” to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, “significantly affects an individual’s daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v.

Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994).

“Deliberate indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). 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, 95 F.3d at 590-91. 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, 111 F.3d at 1374; 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.

Plaintiff alleges that he complained to defendant about ear problems and pain for several months and that defendant refused to send him to a specialist. Instead, defendant prescribed ineffective antibiotics and over-the-counter decongestants. Eventually, plaintiff’s ear problems became so severe that another doctor at the prison persuaded defendant to

send plaintiff to a specialist, who determined that plaintiff's ear problems required surgery. Plaintiff contends that if defendant had sent plaintiff to a specialist sooner or diagnosed plaintiff's ear problems properly, he could have received immediate treatment and avoided unnecessary pain and damage to his ear.

Plaintiff's allegations suggest that he had a serious medical need of which defendant was aware. If I construe plaintiff's complaint liberally, it is possible to infer that defendant acted with deliberate indifference by failing to determine the nature of plaintiff's ear problems and the correct course of treatment. These allegations are enough at this stage for plaintiff to proceed on his Eighth Amendment claim against defendant. However, plaintiff should be aware that in order to prove his Eighth Amendment claim, it will not be enough to show that defendant made an incorrect diagnosis or gave plaintiff the wrong treatment. Instead, plaintiff will have to show that defendant failed to use medical judgment in his treatment of plaintiff.

ORDER

IT IS ORDERED that

1. Plaintiff Jeremiah Lambert is GRANTED leave to proceed on his claim that defendant Dr. Kenneth Adler violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment.

2. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendant.

3. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 30th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge