

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

JOSE SOTO,

Plaintiff,

v.

DALIA SULIENE, LILLIAN TENEBRUSCO,
CAPTAIN MORGAN, JANEL NICKEL,
STEVE HELGERSON, C.O. HAAG and
JANE DOE NURSE "K",

Defendants.

ORDER

11-cv-567-slc¹

In this proposed civil action for monetary and injunctive relief, plaintiff Jose Soto contends that several defendants employed at the Columbia Correctional Institution violated his constitutional rights by failing to provide him adequate medical care for his feet. He is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his proposed amended complaint and dismiss any portion that is legally

¹ For the purpose of issuing this order, I am assuming jurisdiction over the case.

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 claims that defendants Dalia Suliene, Lillian Tenebrusco, Captain Morgan, Janel Nickel, Steve Helgersen, C.O. Haag and Jane Doe Nurse K violated his constitutional rights by failing to provide him adequate medical treatment for his feet. However, plaintiff may not proceed on his claim that defendants violated his right to equal protection.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Jose Soto, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has had foot problems for several years. In particular, he has had skin grafts on his feet and has problems with the arches in his feet that cause knee and hip pain. He has received special shoes for his problems at correctional institutions in the past. In October 2010, plaintiff was transferred to the Columbia Correctional Institution and placed in administrative segregation. The segregation is non-punitive with an indefinite release date.

In December 2010, plaintiff began to experience sharp pains in the bottoms of his

feet. He told defendant Dr. Suliene that his feet were in excruciating pain and that he needed shoes with arch support and softer soles. Suliene told plaintiff that she would not issue shoes or insoles to plaintiff because he could buy them at the canteen. Plaintiff did not have money to purchase insoles at the canteen and continued to complain about his feet and leg problems for the next several months. Suliene saw plaintiff again on April 11, 2011 and issued a “medical restriction” stating that plaintiff “is to have arch support insoles.” However, Suliene told plaintiff again that the health service unit would not give him arch support insoles because he could purchase them at the canteen. Defendants Lillian Tenebrusco, the health services manager, Nurse Helgersen and another nurse, Jane Doe “K”, also told plaintiff that the health service unit would not provide insoles to plaintiff regardless of medical need or restriction because he could purchase them at the canteen.

Plaintiff told defendants Dr. Suliene, Tenebrusco, Helgersen and Jane Doe K that he could not purchase arch supports because they were not sold at the canteen in segregation and that even if they were, he was indigent and had no money in his account to purchase them. He showed them a statement from his account showing that he could not afford insoles. Suliene, Tenebrusco, Helgersen and Jane Doe K told plaintiff to “deal with the pain” and purchase the insoles when he was out of segregation. Plaintiff wrote to them stating that his feet were bruised and swollen and that his ankles, knees and hip hurt. Suliene responded that plaintiff’s complaints had been “noted,” but none of the defendants came to examine

plaintiff's feet or provide him with any treatment for his pain.

Plaintiff complained several times to defendant Captain Morgan, the segregation unit manager, about his feet problems and told him that he had a medical restriction stating that he needed arch supports. Plaintiff also told defendant Nickel, the Security Director at the institution, that he had a medical restriction and needed arch supports and asked her whether he could have them in segregation. Morgan and Nickle denied plaintiff's request for arches, stating that plaintiff could purchase them when he was out of segregation.

On May 11, 2011, plaintiff told defendant Haag that he needed to see someone from the health service unit for pain in his feet. Haag refused to contact the health service unit and told plaintiff "I'm not dealing with this shit."

All defendants are aware that plaintiff will be in administrative segregation indefinitely. Plaintiff's feet continue to cause him severe pain and he has received no treatment for them. He has resorted to soaking his feet in the toilet and lying on his back with his feet raised to reduce the swelling.

DISCUSSION

A. Medical Care

Plaintiff contends that all defendants violated his constitutional rights by failing to provide him adequate treatment for his feet. 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 v. Gamble, 429 U.S. 97, 104 (1976); 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).

Thus, under this standard, plaintiff’s claim has three elements:

- (1) Did plaintiff need medical treatment?
- (2) Did defendants know that plaintiff needed treatment?
- (3) Despite defendants’ awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Plaintiff alleges that he has severe foot, knee and hip pain. I can infer that plaintiff’s

problems are serious medical needs that require treatment. Additionally, plaintiff alleges that all defendants knew plaintiff had foot problems but refused to provide him any treatment for his pain. In particular, all defendants knew that defendant Suliene had concluded that plaintiff needed arch supports, that plaintiff could not afford to buy arch supports and that arch supports were not allowed in segregation where plaintiff would be housed indefinitely. Nonetheless, defendants refused to provide arch supports or *any* form of treatment to plaintiff. These allegations imply that defendants knew plaintiff needed treatment for his medical needs and did not take reasonable measures to address those needs. Thus, plaintiff may proceed on his Eighth Amendment health care claim against all defendants.

Plaintiff should be aware that in order to prevail on his Eighth Amendment claims against the medical personnel at summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment for his foot problems, such as whether the arch supports were absolutely necessary. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006). Similarly, it will not be enough for plaintiff to show that arch supports would have been helpful. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by defendants was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). The law is clear that "[m]ere differences of opinion among

medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference.” Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996); Snipes, 95 F.3d at 591 (decision “whether one course of treatment is preferable to another” is “beyond the [Eighth] Amendment’s purview”). In addition, he will have to show that each of the defendants was aware that plaintiff needed treatment for his feet and refused to provide the necessary treatment, despite an ability to do so.

With respect to defendants Morgan and Nickel, plaintiff will have to show that they had authority to grant his request for medical care and arch supports. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (“Public officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another’s job.”)

Plaintiff has named a Jane Doe defendant. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendant and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendant.

B. Equal Protection

Plaintiff states that in addition to his claim for inadequate medical treatment under Eighth Amendment, he is bringing a claim for violation of his right to equal protection under the Fourteenth Amendment. Under the equal protection clause, government officials must have at least a rational basis for different treatment, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and in the case of different treatment because of race, even more is required. *Johnson v. California*, 543 U.S. 499, 506 (2005) (heightened scrutiny applies). Plaintiff has no allegations that would support a claim of equal protection, because he does not explain the basis for his equal protection claim or why he believes he was treated differently from any similarly situated prisoner. Therefore, I will dismiss this claim.

ORDER

IT IS ORDERED that

1. Plaintiff Jose Soto is GRANTED leave to proceed on his claim that defendants Dalia Suliene, Lillian Tenebrusco, Captain Morgan, Janel Nickel, Steve Helgersen, C.O. Haag and Jane Doe Nurse K violated his rights under the Eighth Amendment by failing to provide him adequate medical health care.

2. Plaintiff is DENIED leave to proceed on his claim that defendants violated his right to equal protection under the Fourteenth Amendment.

3. 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 defendants. 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 defendants.

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

5. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 11th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge