IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENN T. TURNER,

Plaintiff,

OPINION AND ORDER

12-cv-502-bbc

v.

BURTON COX, JR.
and JOLINDA WATERMAN,

Defendants.

- -

In an order dated November 26, 2013, dkt. #98, I granted the motion for summary judgment filed by defendants Burton Cox, Jr. and Jolinda Waterman on plaintiff Glenn Turner's claims under the Eighth Amendment that defendants, who are a doctor and nurse at the Wisconsin Secure Program Facility, refused to treat plaintiff's h. pylori infection from 2005 until March 2007 and that defendant Waterman failed to respond to plaintiff's emergency call in September 2006. Judgment was entered the same day. Dkt. #99. Now plaintiff has filed a timely motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) in which he challenges the summary judgment decision as well as other orders leading up to it. Because I am not persuaded by any of plaintiff's arguments, I am denying his motion in full.

Dismissal of defendants at screening. In the order screening plaintiff's complaint pursuant to 28 U.S.C. § 1915A, I dismissed the complaint as to some of the defendants

including "Ms. Campbell" and "John/Jane Doe HSU Manager." With respect to Campbell, I wrote:

> [T]he only allegation in the complaint against her is that she examined plaintiff once in September 2006 for "epigastic pain," that he asked her whether it could be "from the odor fr. his toilet" and that she gave him alamag plus, which is an antacid tablet. Although the medication Campbell gave plaintiff may not have been effective, plaintiff's allegation shows that Campbell did not disregard plaintiff's symptoms; she tried to treat them. Because plaintiff includes no other allegations suggesting that Campbell should have known that he needed additional treatment, he has not stated a claim against her.

Dkt. #5 at 4. With respect to the unnamed health services unit manager, I wrote:

> [P]laintiff does not allege that [the health services unit manager was] personally responsible for denying him heath care. Rather, he alleges that [the manager was] "aware or should have been aware that there was an h. pylori outbreak at WSPF" and [he or she] failed to stop it from spreading.
>
> This claim fails for multiple reasons. First, to the extent that [the health services unit manager] "should have known" that other prisoners had become infected, that would not be sufficient to state a claim under the Eighth Amendment. Plaintiff must show that [a] defendan[t] actually knew about the problem. Farmer, 511 U.S. at 843 n.8 ("It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly."). Second, [a] defendan[t] cannot be held liable unless [he or she was] aware of a substantial risk that plaintiff would be seriously harmed. Id. at 837. Even if I assume that [the manager] knew that eight other prisoners had the infection before plaintiff did, this suggests that [he or she was] aware of some risk that other prisoners could become infected as well, but it does not necessarily suggest that they were aware of a substantial risk. Brown v. Budz, 398 F.3d 904, 911 (7th Cir. 2005) ("substantial" risks are "so great that they are almost certain to materialize if nothing is done"). Finally, plaintiff does not identify any reasonable measures [the manager] could have taken to prevent other prisoners such as him from getting the infection.

Dkt. #5 at 4-5.

Plaintiff argues that the court erred by dismissing these two defendants, but he does

not make any attempt to challenge the court's reasoning for doing so. Accordingly, I see no reason to revisit that decision.

Denial of motions for appointment of counsel and appointment of expert. In an order dated July 17, 2013, dkt. #59, Magistrate Judge Stephen Crocker denied plaintiff's request for assistance in recruiting counsel and for appointment of an expert. In accordance with Pruitt v. Mote, 503 F.3d 647, 653-54 (7th Cir. 2007), the magistrate judge concluded that the legal and factual complexity of the case did not exceed plaintiff's ability to the litigate the case. In addition, the magistrate judge concluded that it "is not clear from the record that an expert would substantially aid the court in adjudicating this matter, not to mention the fact that plaintiff appears to want an expert for the purpose of supporting his case rather than weighing competing evidence." Dkt. #59 at 4-5.

In his motion, plaintiff argues that the court should have appointed counsel for him because he has "limited education" and the case involves complex medical issues. In addition, he cites Greeno v. Daley, 414 F.3d 645, 658 (7th Cir. 2005), for the proposition that courts should appoint counsel in cases requiring expert testimony. He develops no new arguments about the decision to deny the appointment of an expert, so I decline to consider that aspect of his motion.

With respect to assistance in recruiting counsel, I am not persuaded that the magistrate judge erred in denying plaintiff's motion. Despite any limits in plaintiff's education, he has shown throughout this case that he is capable of understanding the law, developing the facts in support of his claim and drafting motions and briefs. Further,

although plaintiff's claim raised medical issues, the Court of Appeals for the Seventh Circuit has never held that a lawyer must be appointed in the context of every case in which a pro se plaintiff alleges that he did not receive adequate medical care. E.g., Romanelli v. Suliene, 615 F.3d 847, 851-54 (7th Cir. 2010) (affirming district court's decision to deny motion for appointment of counsel in medical care case because plaintiff did not show that "exceptional circumstances" were present). Finally, Greeno is distinguishable because I assumed in the order granting summary judgment that plaintiff did not need an expert to prove his claim. In addition, the district court in Greeno applied the wrong legal standard and the prisoner had demonstrated that he was incapable of performing basic litigation tasks.

Dismissal of claim that defendants failed to screen plaintiff for h. pylori before March 2007. Plaintiff argues that the decision to dismiss this claim was incorrect for two reasons. First, he says that the court "chose to apply its own view of the symptoms or lack thereof of an h. pylori infection." Second, he says that the court "relied upon defendants' self-serving, unverified notes and entries."

Although plaintiff's first argument is not easy to follow, I understand him to be saying that the court acted as its own expert when granting summary judgment on this claim. It is true that I noted that plaintiff's symptoms of nausea and vomiting could be caused by many common ailments unrelated to h. pylori, but that is hardly an expert opinion. Fed. R. Evid. 201 (court may take judicial notice of "fact that is not subject to reasonable dispute"). In any event, the bottom line was that plaintiff failed to adduce evidence showing that before March 2007 his symptoms were so obviously indicative of an h. pylori infection that

defendants violated his Eighth Amendment rights by failing to test him for it. Steele v. Choi, 82 F.3d 175, 178-79 (7th Cir. 1996) (affirming summary judgment to prison medical staff on prisoner's Eighth Amendment claim that defendants failed to diagnose hemorrhage when plaintiff's symptoms did not make it obvious that he had suffered hemorrhage). Plaintiff has not adduced additional evidence to support his claim now.

Plaintiff's second argument focuses on the following two sentences in the summary judgment opinion: "[P]laintiff points out that he asked for an h. pylori test when defendant Cox examined him in January 2005. Cox denies that plaintiff complained at that time of any symptoms suggestive of h. pylori and Cox's testimony is supported by his contemporaneous notes." Dkt. #98 at 14. Plaintiff seems to believe that I "relied" on Cox's testimony to grant summary judgment in plaintiff's favor, but that is inaccurate, as the next sentence made clear: "[E]ven if I credit plaintiff's testimony that he told Cox that he was suffering from nausea and acid reflux in January 2005, plaintiff has adduced no evidence to show that one complaint of those symptoms is enough to make it obvious that plaintiff needed to be tested for h. pylori." Id. Again, regardless of any testimony by defendants, the problem with plaintiff's claim was that he did not have evidence to support it.

Refusal to consider claim that defendants did not test plaintiff for h. pylori in March 2007. Plaintiff says that the court erred when it "chose to side with defendants Cox and Waterman in the disputed issue [whether] an h. pylori test was actually done on plaintiff in March 2007." Dkt. #102 at 8. This argument is misplaced for three reasons. First, plaintiff did not cite any evidence to dispute defendants' proposed finding that he was

tested for h. pylori in March 2007. Plt.'s Resp. to Dfts.' PFOF ¶ 60, dkt. #76. Second, as I noted in the summary judgment opinion, plaintiff did not include a claim in his complaint about the adequacy of treatment he received in March 2007 or later. Third, it was undisputed that defendants began treating plaintiff's h. pylori in March 2007 and plaintiff still does not point to any evidence suggesting that the treatment he received was inadequate in any respect. In other words, regardless whether defendants properly tested plaintiff for h. pylori in March 2007, plaintiff has not pointed to any evidence that he was harmed by any failure to conduct additional tests at that point.

Dismissal of claim against defendant Waterman regarding September 5, 2006. Plaintiff alleged in his complaint that defendant Waterman violated his Eighth Amendment rights by failing to respond to an emergency health request he made on September 5, 2006. In the summary judgment decision, I dismissed this claim because plaintiff had not cited any evidence that Waterman knew about his medical complaint and because, even if she did know, the facts showed that the only symptom reported to the health services unit was nausea, which is not a serious medical need by itself, at least in the sense that it would require immediate treatment.

In his motion, plaintiff says that it is "undisputed" that defendant Waterman stated that she did not respond to the call because she believed it was another prisoner that needed help, but plaintiff does not cite any evidence to support that view. In his reply brief, he cites his declaration, in which he averred that Waterman "admitted" to plaintiff on September 6, 2006, that "her reason for not coming to check on plaintiff . . . is because she was given

a wrong name." Dkt. #78, ¶ 49. However, he does not argue that he cited this portion of his affidavit in his proposed findings of fact, which he was required to do if he wanted to the court to consider it. Helpful Tips for Filing a Summary Judgment Motion, attached to dkt. #12, at 13 ("All facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact."). See also Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626, 630-31 (7th Cir. 2010)("We have routinely held that a district court may strictly enforce compliance with its local rules regarding summary judgment motions."). In any event, plaintiff does not address the second ground for dismissing this claim, which is that a failure to respond immediately to a report of nausea would not violate the Eighth Amendment.

ORDER

IT IS ORDERED that plaintiff Glenn Turner's motion to alter or amend the judgment, dkt. #101, is DENIED.

Entered this 31st day of January, 2014.

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