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Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

RICHARD SCHWEITZER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.: 15-2200-MMM**
	)	
	)	
CHIEF CHAD KOLITWENZEW, *et al.*,	)	
	)	
Defendants.	)	

ORDER

MICHAEL M. MIHM, U.S. District Judge:

This cause is before the Court on Defendants' motion for summary judgment. As explained more fully below, Defendants are entitled to the summary judgment that they seek on Plaintiff Richard Schweitzer's Fourteenth Amendment claim against them.

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Ruiz-Rivera v. Moyer,* 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.,* 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.,* 6 F.3d 1176, 1183 (7th Cir. 1993). "As with any

summary judgment motion, we review cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party." *Laskin v. Siegel,* 728 F.3d 7314, 734 (7th Cir. 2013) (internal quotation marks omitted).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he must do more than simply show that there is some metaphysical doubt as to the material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 261 (Brennan, J., dissenting) (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 252.

For a little over a year, Plaintiff Richard Schweitzer was a pretrial detainee at the Jerome Combs Detention Center ("Jerome Combs") in Kankakee, Illinois. Schweitzer was transferred to the Illinois Department of Correction's Danville Correctional Center ("Danville") in March 2016. During the relevant time, Defendant Chad Kolitwenzew was the Chief of Corrections at Jerome Combs; Defendant Brent Huffines was a physician's assistant at Jerome Combs; and Defendant Angie Kemps was a nurse at Jerome Combs.

Schweitzer filed this case under 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his serious medical needs in violation of his Due Process rights under the Fourteenth Amendment. During his deposition, Schweitzer clarified that Chief Kolitwenzew acted with deliberate indifference in that Chief Kolitwenzew was in charge at Jerome Combs and was responsible for the actions of the correctional officers at Jerome Combs, and on several

occasions, no correctional officer responded to or answered the intercom button on a timely basis when Schweitzer pushed the button and called for assistance. Schweitzer further clarified that P.A. Huffines acted with deliberate indifference towards the cysts on his back in that P.A. Huffines refused either to remove the cysts himself or to refer him to a physician to have the cysts removed. Finally, Schweitzer clarified that Nurse Kemps acted with deliberate indifference towards his serious medical need in that she failed to provide his proper medication, *i.e.*, Schweitzer claims that Nurse Kemps sporadically failed to provide one or two of his prescription medications.

Schweitzer filed a response to Defendants' motion for summary judgment, but his response is minimal, and he failed to provide or to cite any evidence with which to create a genuine issue of material fact sufficient to defeat Defendants' motion for summary judgment. Schweitzer's failure to cite any evidence is of no consequence, however, because Schweitzer made admissions during his deposition that demonstrate that Defendants are entitled to the summary judgment that they seek.

As for Chief Kolitwenzew, he lacked the personal involvement necessary to hold him liable under § 1983. "[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010)(quoting *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003)).

The Seventh Circuit has explained that the doctrine of *respondeat superior* (a doctrine whereby a supervisor may be held liable for an employee's actions) has no application to § 1983 actions. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010). Instead, in order for a supervisor to be held liable under § 1983 for the actions of his subordinates, the supervisor must "approve[] of the conduct and the basis for it." *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir.

2001); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)("An official satisfies the personal responsibility requirement of section 1983 . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent.")(internal quotation omitted). "[S]upervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Backes v. Village of Peoria Heights, Illinois*, 662 F.3d 866, 870 (7th Cir. 2011)(quoting *Chavez*, 251 F.3d at 651)). "In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." *Gentry*, 65 F.3d at 561.

Here, Schweitzer admitted during his deposition that he sued Chief Kolitwenzew because he was in charge of Jerome Combs. In other words, Schweitzer sued Chief Kolitwenzew relying upon the doctrine of *respondeat superior* to hold him liable. Schweitzer admitted during his deposition that he never spoke to Chief Kolitwenzew about his allegations, and Chief Kolitwenzew has denied ever seeing or responding to any grievance from Schweitzer regarding the lack of a timely response by any correctional officer to the intercom button when pushed by Schweitzer. Accordingly, Chief Kolitwenzew is entitled to summary because he lacked the personal involvement necessary to be held liable for deliberate indifference towards Schweitzer.

As for P.A. Huffines, he is entitled to summary judgment because no evidence exists that P.A. Huffines acted with a sufficiently culpable state of mind to be held liable for deliberate indifference. Because Schweitzer was a pretrial detainee during the relevant time, his deliberate indifference claim arises under the Fourteenth Amendment's Due Process Clause and not the Eighth Amendment. This is a distinction without a difference, however, because the Seventh

Circuit has held that the standards for both are the same. *Smith v. Sangamon County Sheriff's Dept.* 715 F.3d 188, 191 (7th Cir. 2013).

The Eighth Amendment prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "The Eighth Amendment safeguards the prisoner against a lack of medical care that may result in pain and suffering which no one suggests would serve any penological purpose." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011)(internal quotations and footnote omitted). "Prison officials violate the Constitution if they are deliberately indifferent to prisoners' serious medical needs." *Id*. (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 828 (7th Cir. 2009) ("Deliberate indifference to serious medical needs of a prisoner constitutes the unnecessary and wanton infliction of pain forbidden by the Constitution."); *Walker v. Benjamin*, 293 F.3d 1030, 1036-37 (7th Cir. 2002)(noting that the Eighth Amendment applies to the states through the Fourteenth Amendment).

The deliberate indifference standard requires an inmate to clear a high threshold in order to maintain a claim for cruel and unusual punishment under the Eighth Amendment. *Dunigan ex rel. Nyman v. Winnebago County*, 165 F.3d 587, 590 (7th Cir. 1999). "In order to prevail on a deliberate indifference claim, a plaintiff must show (1) that his condition was 'objectively, sufficiently serious' and (2) that the 'prison officials acted with a sufficiently culpable state of mind." *Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008)(quoting *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)(same).

"A medical condition is serious if it 'has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention.'" *Lee*, 533 F.3d at 509 (quoting *Greeno*, 414 F.3d at 653). "With respect to the

culpable state of mind, negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense." *Id*.; *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994)("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.").

In other words,

> [d]eliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts. And although deliberate means more than negligent, it is something less than purposeful. The point between these two poles lies where the official knows of and disregards an excessive risk to inmate health or safety or where the official is both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he . . . draw the inference. A jury can infer deliberate indifference on the basis of a physician's treatment decision when the decision is so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment.

Duckworth, 532 F.3d at 679 (internal quotations and citations omitted). The Seventh Circuit has cautioned, however, that "[a] prisoner [] need not prove that the prison officials intended, hoped for, or desired the harm that transpired. Nor does a prisoner need to show that he was literally ignored. That the prisoner received some treatment does not foreclose his deliberate indifference claim if the treatment received was so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition." *Arnett*, 658 F.3d at 751 (internal citations and quotations omitted).

Here, Schweitzer has failed to offer any facts showing that P.A. Huffines acted with criminal recklessness in his medical treatment of Schweitzer. During his deposition, Schweitzer

acknowledged and conceded that P.A. Huffines routinely treated all of his medical needs. Schweitzer further acknowledged that other medical providers attended to his medical needs, including a cardiologist outside of Jerome Combs.

Schweitzer's specific complaint (according to his deposition testimony) is that P.A. Huffines would not remove the two cysts from his back or would not refer him to a physician to have the cysts removed. However, P.A. Huffines' professional opinion was that the cysts did not need to be removed. In fact, this same opinion was shared by the medical staff at Danville after Schweitzer was transferred to that facility.

In any event, the law is clear that "a difference of opinion between a physician and the patient does not give rise to a constitutional right, nor does it state a cause of action under § 1983." *Carter v. Ameji*, 2011 WL 3924159, * 8 (C.D. Ill. Sept. 7, 2011). "A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." *Snipes v. Detella*, 95 F.3d 586, 592 (7th Cir. 1996). The Constitution guarantees a prisoner treatment of his serious medical needs, not to a doctor of his own choosing or to a course of treatment of his own choosing. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976); *United States v. Rovetuso*, 768 F.2d 809, 825 (7th Cir. 1985). The Constitution does not guarantee access to the latest technology or to a specific medical test. *Glenn v. Barua*, 2007 WL 3194051, * 3 (3d Cir. 2007)(noting that "a decision not to use an x-ray or other diagnostic technique is "a classic example of a matter for medical judgment, and does not by itself amount to constitutionally deficient treatment.")(internal quotation omitted). "A prisoner has the right to medical care; however, he does not have the right to determine the type and scope of the medical care he personally

desires." *Carter v. Ameji*, 2011 WL 3924159, * 8 (C.D. Ill. Sept. 7, 2011)(citing *Coppinger v. Townsend*, 398 F.3d 392, 394 (10th Cir. 1968)). "The [Constitution] does not require that prisoners receive unqualified access to healthcare. Rather, inmates are entitled only to adequate medical care." *Leyva v. Acevedo*, 2011 WL 1231349, * 10 (C.D. Ill. Mar. 28, 2011)(internal quotations omitted).

Schweitzer received medical treatment for his cysts. It was just not the treatment that he wanted or that he preferred. There simply is no evidence in the record to demonstrate that P.A. Huffines acted with deliberate indifference towards Schweitzer's cysts on his back. Therefore, P.A. Huffines is entitled to summary judgment.

Finally, as for Nurse Kemps, no evidence exists that she acted with deliberate indifference to Schweitzer's medical needs either. More to the point, even if Nurse Kemps had failed sporadically to provide Schweitzer with all of his medication, Schweitzer admitted during his deposition that he suffered no injury as a result. Without an actual injury, Schweitzer cannot prevail on his claim. *Williams v. Godinez*, 2012 WL 3245963, * 3 (N.D. Ill. Aug. 6, 2012) (quoting 42 U.S.C. § 1997(e)("Under the Prison Litigation Reform Act, "no Federal Civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury."). Moreover, failing to receive prescription medication exactly as scheduled and prescribed without suffering any damage to one's health does not demonstrate deliberate indifference. *Zentmyer v. Kendall County*, 220 F.3d 805, 811 (7th Cir. 2000).

IT IS, THEREFORE, ORDERED:

1. Defendants' Motion for Summary Judgment [25] is GRANTED. The Clerk of the Court is directed to enter judgment in Defendants' favor and against Plaintiff. All

other pending motions are denied as moot, and this case is terminated, with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

2. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3. If Plaintiff wishes to proceed in forma pauperis on appeal, his motion for leave to appeal in forma pauperis must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED this 30th day of January, 2017

/s Michael M. Mihm
MICHAEL M. MIHM
UNITED STATES DISTRICT JUDGE