

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAXCELL CLARK, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
DR. JOHN DOE, MD et al.	:	NO. 99-5616
	:	
O'NEILL, J.	:	OCTOBER , 2000

MEMORANDUM

Plaintiff Maxcell Clark, an inmate at SCI-Somerset, has brought this pro se action under 42 U.S.C. § 1983 alleging violations of his civil rights under the Eighth Amendment to the United States Constitution. Plaintiff also asserts a number of state law negligence and medical malpractice claims. Clark has hepatitis C and the human immunodeficiency virus (HIV) and makes a number of allegations concerning his treatment for these illnesses, mostly involving a failure to properly administer medication. Defendants Dr. John Doe, M.D., Stacey Miles, R.N., Irwin Goldberg, Cynthia Ward, R.N., Joanne Cranston, R.N., and Jane Doe #1, #2, and #3 have moved to dismiss plaintiff's complaint pursuant to Fed. R. of Civ. P. 12(b)(6) or in the alternative for a more definite statement under Fed. R. Civ. P. 12(e). Plaintiff has moved pursuant to Fed. R. Civ. P. 15(a) for leave to file an amended complaint and has requested the appointment of legal counsel. My attempts to obtain legal counsel for plaintiff have not been successful.

I. STANDARD OF REVIEW

In resolving a motion to dismiss all well-plead factual allegations in the complaint are

presumed to be true and all reasonable inferences are to be drawn in favor of the non-moving party. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). A court should not dismiss a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” Conley v. Gobson, 355 U.S. 41, 45-46 (1957). Additionally, pro se complaints must be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

II. BACKGROUND

Plaintiff commenced this action on November 9, 1999, and leave to proceed in forma pauperis was granted on December 16, 1999. Plaintiff’s complaint contained 180 paragraphs asserting a series of incidents involving alleged medical misconduct between June, 1997 and May 1999, all of which took place at Wackenhut Corrections Corporation Delaware County Prison (“Wackenhut”).¹

Plaintiff’s allegations include a number of incidents where his requests for a medical examination were delayed. For example, on June 25, 1997 plaintiff asked to see a physician. He was told an appointment had been made but he was never examined. On July 6 plaintiff renewed his request and received a response the next day asking for a more detailed explanation of his medical problem. On July 13, plaintiff submitted a more specific request and was seen by a physician on or around July 15, 1997. (Pl.’s Comp. ¶¶ 155-165).

¹ While it is not clear from plaintiff’s complaint it appears that Clark has been temporarily housed at the Wackenhut facility on a number of separate occasions. The incidents Clark alleges occurred at Wackenhut cover the following time periods: May 14 - 27, 1999; January 24 - February 12, 1999; May 25 - June 23, 1998; January 14 - 30, 1998; June 25 - August 4, 1997.

Mr. Clark also objects to the manner and course of his treatment while an inmate at Wackenhut. Specifically, plaintiff alleges that double portion meals were required by his condition and were improperly denied by prison authorities. (¶ 167). When Clark complained to prison officials he was told that double meals would be reinstated if after re-evaluating his lab reports and weight the doctor thought it advisable. (¶¶ 169, 173). Clark also understood that many of his medications were not to be taken on an empty stomach and therefore milk, rather than water, would be provided when the drugs were administered. (¶¶ 59, 111, 132, 167). On a number of occasions milk was not provided. (¶¶ 60-65, 133-154). After notifying prison authorities Clark was told that the drug administration schedule could not revolve around one inmate; however, a “keep on person” privilege might be extended to him so that Clark could carry pills with him and take them at meal times. (¶ 115). Plaintiff maintains his medications must be taken at specific times of the day, some of which are not at meal times. (¶ 72). Plaintiff also requested certain drugs to relieve headaches, back pain, sore muscles, colds, and fevers. In response plaintiff was told that Tylenol and other similar medicines were available at the prison commissary. (¶¶ 175-179).

A number of plaintiff’s allegations revolve around changes in treatment when he was temporarily transferred from SCI-Camp Hill to Wackenhut from May 14, 1999 to May 27, 1999. Clark alleges he received no medical treatment at all for the first forty-eight hours after his arrival. (¶ 22). At Camp Hill Clark received 800 milligrams of ibuprofen but Wackenhut officials refused to provide such medication. When he complained a nurse told Clark that his prescription had expired. (¶ 36). Another nurse suggested he take four Advil instead. (¶ 12). Plaintiff alleges that other medications necessary to treat his illnesses were discontinued as well.

This change in treatment took place following a medical examination by Wackenhut officials on May 19 (¶¶ 4,9). Clark put in a request for these additional drugs and received a written response stating that Wackenhut prison officials had verified his medications with Camp Hill medical personnel who stated that such drugs were not part of his course of treatment. (¶ 28). Plaintiff also alleges he received two unnecessary injections; one a test for tuberculosis. (¶ 17). Lastly, Clark states that the nursing staff at Wackenhut treated his “oral thrush”² with alcohol swabs instead of the medication plaintiff had understood the doctor had prescribed. (¶19).

III. DISCUSSION

Clark asserts claims against defendants for damages and injunctive relief under 42 U.S.C. § 1983, alleging violations of the Eighth Amendment’s prohibition on cruel and unusual punishment. It is well settled that inmates are entitled to reasonable medical care and may hold prison officials liable under the Eighth Amendment if such care is inadequate. See Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). However, in order to establish that his treatment rose to the level of a constitutional violation, plaintiff must demonstrate that defendants exhibited “deliberate indifference to [his] serious medical needs.” Petrichko v. Kurtz, 52 F. Supp.2d 506, 507 (E.D. Pa. 1999). Clark’s HIV-positive status is without question a medically “serious” one. See, e.g., Freed v. Horn, No. 95-CV-2824, 1995 WL 710529 (E.D. Pa. Dec. 1, 1995); Taylor v. Barnett, 105 F. Supp. 2d 483 (E.D. Va. 2000); Walker v. Peters, 989 F. Supp. 971 (N.D. Ill. 1997). However, I hold that plaintiff’s allegations, if proved, do not amount to deliberate indifference to his condition.

² Described as open blisters on plaintiff’s gums and throat.

In Estelle the Supreme Court established a framework for evaluating the viability of inmate claims alleging inadequate medical care. The Estelle Court noted:

[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute “an unnecessary and wanton infliction of pain” or to be “repugnant to the conscience of mankind.” Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend “evolving standards of decency” in violation of the Eighth Amendment.

Estelle, at 106-07. In applying this standard courts have consistently rejected Eighth Amendment claims where an inmate has received some level of medical care. See Wilkins v. Owens, Civ. A. No. 87-0954, 1987 WL 11940 (E.D. Pa. May 29, 1987). Inmates’ disagreements with prison medical personnel about the kind of treatment received have also generally have not been held to violate the Eighth Amendment. See Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985). The required “deliberate indifference” may be demonstrated by either actual intent or reckless disregard on the part of defendants. See Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir 1990). However plaintiff must demonstrate that defendants’ acts or omissions were “[s]o grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness.” Id. I recognize that a pro se complaint, “however inartfully pleaded,” must be held to “less stringent standards than formal pleadings drafted by lawyers,” Haines v. Kerner, 404 U.S. 519 (1972); but accepting all Clark’s allegations as true there is nothing in his complaint to indicate that defendants’ acts or omissions rose to the level of “deliberate indifference” required under Estelle.

Most of Clark's allegations center around differences of opinion as to the proper course of his treatment. Clark believed that certain medications should not have been discontinued when he arrived at Wackenhut; prison officials disagreed. Even if this change in medication seriously threatened plaintiff's health – a conclusion not supported by the complaint – Clark still must establish that the defendants were sufficiently deliberately indifferent. See Nolley v. County of Erie, 776 F. Supp. 715, 740 (W.D.N.Y. 1991) (holding that the occasional failure of a correctional facility to provide an HIV-positive inmate with her AZT medication was due to a negligent medication delivery system and did not violate the Eighth Amendment). Clark maintains that the double sized meals he had received at Camp Hill prison were improperly denied by Wackenhut officials. Wackenhut medical personnel agreed to reinstate larger portion meals if they felt that it was necessary following an examination. Similarly, Clark expected the sores in his mouth to be treated with medication prescribed by a doctor. Instead alcohol swabs were used. Although Clark does not agree with the medical staff about the kind of treatment he received such “disagreement does not give rise to a claim for deliberate indifference to serious medical needs.” Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 811 (10th Cir. 1999).

Further, it appears that prison officials considered and acted upon almost all of Clark's complaints and requests, even if he was not satisfied with the answers he received. When he wanted higher doses of ibuprofen he was told that his prescription had run out and that he could take smaller more frequent doses of Advil. When he requested medical attention he generally was seen in a reasonable amount of time. When he complained about not having milk with his medications he was told to take them at meal times. When he requested that he be given his medication at different times he was told the schedule could not be altered for one inmate. While

this was not what he wanted Clark can hardly be said to have been deprived of “the minimal civilized measures of life’s necessities” required to establish a violation of the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337, 347.

Finally, even if Clark received inadequate medical treatment he must actually suffer some degree of harm in order to allege he has been the victim of cruel and unusual punishment. In affirming that the plaintiff had not established a constitutional violation for unreasonable medical care the Fifth Circuit in Mayweather v. Foti, 958 F.2d 91 (5th Cir. 1992), stated: “[plaintiff’s] [t]reatment may not have been the best that money could buy, and occasionally a dose of medication may have been forgotten, but these deficiencies were minimal, they do not show an unreasonable standard of care, and they fall far short of establishing deliberate indifference by the prison authorities.” Id. Clark is similarly unable to establish deliberate indifference on the part of defendants. The only injuries that Clark alleges are sporadic “pain and sitting posture difficulty” after he was denied 800 hundred milligrams of ibuprofen (Pl.’s Comp. ¶ 20, ¶ 37) and a general concern that his “health [was] in danger because [he was] not getting the medical treatment [he] deserve[d].” (¶ 179). Such injuries are insufficient to establish a constitutional violation. See Burton v. Cameron, Tex., 884 F. Supp. 234, 238-39 (rejecting a prisoner with AID’s claim that medical personnel’s erratic treatment increased his risk of injury after a doctor testified that the delays in getting medication did not effect his physical or mental health).

With respect to plaintiff’s motion for leave to amend his complaint, the Federal Rules of Civil Procedure provide that leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The Supreme Court has held that in the absence of any apparent reason not to, “this mandate is to be heeded.” Forman v. Davis, 371 U.S. 178, 182 (1962). A court may

however, justify the denial of a motion to amend where the amendment would be futile. See In Re Burlington Coat Factory, 114 F.3d 1410 (3d Cir. 1997). In making this determination a court “applies the same standard of legal sufficiency as applies under Fed. R. Civ. P. 12(b)(6),” taking all facts in the complaint as true and viewing them in the light most favorable to the plaintiff. Id. at 1434. As discussed above, Clark’s complaint alleges no facts that might raise defendants’ conduct to the level of deliberate indifference required to bring a claim of cruel and unusual punishment under the Eighth Amendment. Any amendment to his complaint would be futile.³

I recognize the serious nature of plaintiff’s condition and do not condone a number of the actions attributed to defendants. Plaintiff should not have gone without medical attention for forty-eight hours from May 14 to May 16. Plaintiff should also not have been forced to make repeated requests for medical examinations and I am concerned over Clark’s allegations that at times his pain medication was inadequate. Even when taken in the light most favorable to the plaintiff however, Clark’s allegations at best suggest nothing more than negligence on the part of defendants.⁴ They simply may not be construed to constitute the “deliberate indifference” to

³ In his motion for leave to file an amended complaint, filed March 14, 2000, Clark includes a proposed amended complaint that is simply a list of the various causes of action under which he intends to proceed, and refers to his lack of legal training and in forma pauperis status. It is clear that plaintiff is attempting to respond to defendants’ motion to dismiss or in the alternative for a more definite statement, filed February 12, 2000. While Clark’s complaint is repetitive and not listed in any sort of chronological order his allegations concerning his medical treatment are sufficiently clear for me to conclude that they are well below the standard for deliberate indifference established in Estelle. Allowing plaintiff to more precisely plead these allegations in an amended complaint would be futile.

⁴ I agree with the court in Walker however, which noted the possible distinction between a failure to treat a prisoner with back pain (as in Estelle) and a failure treat a prisoner who is HIV positive. 989 F.Supp. at 976 n.3. A failure to treat an HIV positive inmate will almost certainly shorten that inmate’s life. Like the court in Walker I do not hold that there is no qualitative difference between HIV and other illnesses, and I acknowledge that a complete refusal to treat an

plaintiff's health or the "unnecessary and wanton infliction of pain" so as to be "repugnant to the consciousness of mankind" required under Estelle. Defendant's motion to dismiss will therefore be granted.

An appropriate Order follows.

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HIV positive inmate might rise beyond the level of mere negligence or medical malpractice. Id.

MAXCELL CLARK, JR.

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DR. JOHN DOE, MD et al.

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CIVIL ACTION

NO. 99-5616

ORDER

AND NOW, this day of October, 2000, in consideration of defendants' motion to dismiss, plaintiff's response thereto, and plaintiff's motion to file an amended complaint, it is ORDERED that:

1. Plaintiff's motion for leave to amend the complaint is DENIED.
2. Defendants' motion to DISMISS the complaint is GRANTED and the complaint is DISMISSED WITH PREJUDICE.

THOMAS N. O'NEILL, JR., J.