

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

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| W. CONINCK LIEFSTING | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| H. BOKHARI | : | NO. 05-0703 |
| | : | |
| O'NEILL, J. | : | MAY 3, 2006 |

MEMORANDUM

Plaintiff, Willem Coninck Liefsting, pro se, a prisoner at the Philadelphia Federal Detention Center, filed a complaint on February 15, 2005 against defendant, H. Bokhari, alleging that defendant's failure to diagnose a broken toe correctly over a period of two months violated plaintiff's Eighth Amendment right to be free from "cruel and unusual punishment." Before me now is plaintiff's complaint, defendant's motion to dismiss, and plaintiff's response thereto.

BACKGROUND

On October 21, 2004, Liefsting sought medical treatment from Bokhari, a medical doctor at the prison. Liefsting alleges that his foot was "swollen with a blueish discoloration." Bokhari examined the foot, diagnosed the condition as a sprain,¹ and prescribed seven days' worth of Ibuprofen. Because the pain in Liefsting's foot continued after the medication ran out, he sent several "sick-call-slips" to request another consultation with a doctor.

¹There is appears to be a discrepancy in plaintiff's complaint as to the extent of Bokhari's examination of his toe. Liefsting stated in paragraph three of his complaint that Bokhari examined his middle-toe; however, Liefsting asserted in paragraph four of his reply that Bokhari did not touch or examine his foot.

Liefsting met with Bokhari again about two months after the original consultation. During the second visit, Bokhari X-rayed Liefsting's foot and realized that the toe had been broken, not sprained as he originally diagnosed. Because Liefsting's fracture was not diagnosed for almost two months, the toe had healed improperly. After an examination by another doctor, Liefsting was prescribed arch supportive shoes. Liefsting alleges that the arch supports have not been effective in relieving his foot pain. The second doctor told Liefsting that there are no surgical procedures that can remedy the pain. Liefsting alleges that he will have pain in his foot for the remainder of his life.

STANDARD OF REVIEW

In deciding a motion to dismiss, I must accept all of plaintiff's well-pleaded allegations and any reasonable inferences that may be drawn therefrom as true. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). I must construe the complaint of a pro se litigant liberally, no matter how inartfully pleaded. Haines v. Kerner, 404 U.S. 519, 520-521 (1972). Even though the complaint is to be construed liberally, I do not need to accept plaintiff's bald assertions, unwarranted factual inferences, or unsupported conclusions. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997); City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n. 13 (3d Cir. 1998). Granting a Rule 12(b)(6) motion is proper only if no reasonable reading of the facts would entitle plaintiff to relief. Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir. 2004).

DISCUSSION²

Liefsting alleges that Bokhari's incorrect diagnosis of his broken toe was so egregious

²Bokhari argues in a footnote to his motion that Liefsting has not exhausted his administrative remedies, but I do not reach this issue.

that it amounts to the “unnecessary and wanton infliction of pain.” See Estelle v. Gamble, 429 U.S. 97, 103 (1976) citing Gregg v. Georgia, 428 U.S. 153, 173 (1976). Although the Supreme Court has held that the “Constitution does not mandate comfortable prisons,” it does prohibit “cruel and unusual punishment.” Farmer v. Brennan, 511 U.S. 825, 832 (1994). Prison officials thus are required to provide prisoners with basic necessities such as medical care. Estelle 429 U.S. at 103. In order to assert a valid Eighth Amendment claim for the denial of medical care, Liefsting must allege conduct by a prison official that “shocks the conscience.” See Rochlin v. California, 342 U.S. 165, 172, 175 (1952).

The Supreme Court set forth a two part test to determine whether a prison official has violated the Eighth Amendment by “denying or delaying access to medical care.” Estelle, 429 U.S. at 104. “In order to establish a violation of [Liefsting’s] constitutional right to adequate medical care, evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need.” Natale v. Camden County Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003) citing Rouse v. Planteier, 182 F.3d 192, 197 (3d Cir. 1999) citing Estelle, 429 U.S. at 106.

I. Serious Medical Need

The Court of Appeals has defined a “serious medical need” to mean one which has been “diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor’s attention.” Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987). The seriousness of an injury is measured by an “objective” standard. Montgomery v. Pinchak, 294 F.3d 492, 499 (3d Cir. 2002). The Court of Appeals has evaluated the seriousness of a medical condition by examining the effect of denying

the medical care. Monmouth County, 834 F.2d at 347. The Court of Appeals has found that an injury is serious if left untreated will “cause[] an inmate to suffer a life-long handicap.” Id. Liefsting alleges that his broken toe will be a permanent disfigurement and a constant cause of pain. Liefsting also alleges that the condition cannot be repaired through surgery or other medical procedure.

Liefsting argues that his broken toe is an objectively serious injury. See Brown v. Hughes, 814 F.2d 1533, 1536 (11th Cir. 1990) (holding that the immobilization of and two broken bones in the foot was a serious injury); Reynolds v. Barnes, 84 F.App’x 672, 673 (7th Cir. 2003); Nance v. Kelly, 912 F.2d 605 (2d Cir. 1990) (reversing the district court’s holding that sore feet were not a serious medical condition). Bokhari, by contrast, argues that foot and toe injuries do not meet the threshold of seriousness. Veloz v. New York, 35 F. Supp. 2d 305, 312 (S.D.N.Y. 1999); Richardson v. EMSA Med. Dept., Civ. A. No. 92-6784, 1992 WL 368506 at *1 (E.D. Pa. 1992). I need not address whether a broken toe constitutes a serious injury because, as discussed below, Liefsting fails to show deliberate indifference on the part of Bokhari.

II. Deliberate Indifference

As discussed above, Liefsting must allege that the prison official was deliberately indifferent to his medical condition. Estelle, 429 U.S. at 106. Unlike the serious injury prong, deliberate indifference is a subjective test. Liefsting must allege that the prison official recognized the “substantial risk of serious harm” that could arise from the medical condition and “disregard[ed] that risk by failing to take reasonable measures to abate it.” Farmer, 511 U.S. at 847. Deliberate indifference is more than just mere negligence, accident or inadvertence.

Estelle, 429 U.S. at 105. A prison official must have had actual consciousness of the risk and then “failed to act despite his knowledge of a substantial risk of serious harm.” Farmer, 511 U.S. at 843. Although, deliberate indifference is more than negligence, it does not require an actual intent to cause the harm to the prisoner. Id. at 835. Therefore, to assert a claim for which relief can be granted, Liefsting must allege that Bokhari knew there was a risk that the toe was broken, ignored that risk, and delayed additional treatment knowing that Liefsting’s injury would likely cause excessive pain.

Liefsting claims that Bokhari’s choice not to X-ray the foot during the first visit and the resulting incorrect diagnosis of the condition amounted to deliberate indifference. Liefsting also claims that the two month interval between his visits with Bokhari was an intentional delay to withhold necessary medical treatment.

A. Incorrect Diagnosis

With respect to Liefsting’s first contention, the Supreme Court rejected this argument in Estelle. 429 U.S. at 107. The prisoner in Estelle claimed that a doctor’s incorrect diagnosis of his lower back problem was deliberate indifference because an X-ray could have led to an appropriate diagnosis. Id. The doctor who first examined the prisoner treated him for a lower back strain and prescribed a pain relief and muscle relaxant drug. Id. Despite the prisoner’s constant complaints of severe back pain, the doctors continued to treat the prisoner with pain relievers for a period of three months. Id. at 100-101,107. The prisoner argued that the doctors should have used an X-ray to diagnose his condition and the failure to do so resulted in cruel and unusual punishment. Id. at 107. The Court rejected that argument and held that the choice to use an X-ray is a “classic example of a matter for medical judgment. . . [and] at most it is medical

malpractice.” Id. Liefsting claims that his condition would have been diagnosed correctly if Bokhari had chosen to use an X-ray during the first visit. Liefsting, like the prisoner from Estelle, also complained that the medication was not the proper treatment for his injury. However, following the reasoning from Estelle, the Court of Appeals has held that an inadvertent failure to provide adequate medical care, without a more culpable state of mind, is insufficient to present a constitutional violation. Rouse, 182 F.3d at 196 citing Curmer v. O’Carroll 991 F.2d 64, 67 (3d Cir. 1993). “Nor does mere disagreement as to the proper medical treatment support a claim of an eighth amendment [sic] violation.” Monmouth County, 834 F.2d at 346

Liefsting received medical treatment for his injury. Bokhari gave his medical opinion and thought that the swollen, black and blue foot was a sprain. Liefsting does not allege that Bokhari suspected or knew that the toe was broken. Because deliberate indifference is a subjective test and Bokhari could not have ignored the risks of the broken toe if he did not perceive that there was risk, Liefsting’s first argument fails. See Roach v. SCI Graterford Med. Dep’t, 398 F. Supp. 2d 379, 386 (E.D. Pa. 2005) (holding that although a medical diagnosis may be wrong, a prisoner must also show that the doctor had “knowledge of a substantial risk of serious harm” for the doctor to be deliberately indifferent). An incorrect diagnosis of a medical condition is not a constitutional violation when the doctor’s actions are merely negligent. Estelle, 429 U.S. at 107. Liefsting alleges only that Bokhari’s diagnosis was negligent. Liefsting may have a cognizable claim for medical malpractice for the incorrect diagnosis, but malpractice is not a constitutional violation. See id.

B. Two Month Interval

Liefsting also claims that the two month interval between his visits with Bokhari was an

intentional delay to withhold necessary medical treatment. An unreasonable delay in rendering medical treatment can be evidence of deliberate indifference. Farrow v. West, 320 F.3d 1235 (11th Cir. 2003) (holding that a failure to provide dentures for a prisoner after eleven months was deliberate indifference because it was known that the prisoner needed the dentures); Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999) (holding that there was deliberate indifference when the doctor knew that the prisoner risked losing an arm and still refused to make an appointment for the prisoner after six months). However, because deliberate indifference is a subjective test, Liefsting must allege facts that Bokhari had actual knowledge that there was a risk of a life-long handicap if the injury was left untreated. See Beers-Capitol v. Whetzel, 256 F.3d 120, 131 (3d Cir. 2001). While Liefsting submitted “several sick-call-slips” after meeting with Bokhari the first time, there are no allegations that Bokhari intentionally delayed revisiting the injury with knowledge that there was a substantial risk that the delay would cause Liefsting further harm. “[A] delay in treatment based on a bad diagnosis or erroneous calculus of risks and costs” can be considered mere malpractice. Harrison v. Barkley, 219 F.3d 132, 139 (2d Cir. 2000). Since there are no allegations Bokhari had actual knowledge of a risk of further harm, Bokhari’s action cannot be considered deliberate indifference. See Farmer, 511 U.S. at 837.

Additionally, the time in between medical visits is not deliberate indifference when there is no need for emergency medical care. See Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990) (opining that a two months of delay before finally surgically removing broken pins in the prisoner’s shoulder was not deliberate indifference because the prisoner had already received some treatment and the delay did not cause substantial harm); Jackson v. Runnels, No. Civ.S-02-2756, 2005 WL 1712268, 4-5 (E.D. Cal.) (holding that the doctor was not deliberately indifferent

when he initially prescribed Ibuprofen for a foot injury and then waited a month to see the prisoner again to diagnose the injury as a broken foot). Bokhari already treated Liefsting by offering his medical opinion and prescribing a pain relief and anti-inflammatory drug. See Roach v. Klingman, 412 F. Supp. 521, 525 (E.D. Pa.1976) (“[W]here plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim”).

“Prison conditions may be restrictive and even harsh.” Farmer 511 U.S. at 833. Not every injury suffered by a prisoner “translates into constitutional liability for prison officials responsible for the victim’s safety.” Id. at 834. Sometimes “the desire that there be a maximum opportunity for the exercise of rights and privileges may often collide with the practical necessities of managing and administering a complicated penal community.” Gittlemacker, 428 F.2d at 4. Even though the a different method of diagnosis and treatment may have prevented Liefsting’s pain, without any basis that the delay between visits was done deliberately and with knowledge that a substantial risk the injury may have been a serious medical condition there cannot be a constitutional violation.³

An appropriate order follows.

³I decline to dismiss Liefsting’s complaint without prejudice and allow him to amend his complaint because he cannot allege any facts consistent with his prior allegation — that he received treatment for his foot injury the instant he complained of the injury — to show deliberate indifference on the part of Bokhari.

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NO. 05-0703

ORDER

AND NOW, this 3rd day of May 2006, upon consideration of defendant's motion to dismiss, plaintiff's response, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion to dismiss is GRANTED and the complaint is DISMISSED.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.