

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

STANLEY O. STIRES : CIVIL ACTION
 :
 v. :
 :
 RICHARD ZETTLEMOYER, et al. : NO. 98-1472

MEMORANDUM ORDER

This is a civil rights action brought under 42 U.S.C. § 1983. The pro se prisoner plaintiff seeks redress for alleged violations of his Eighth Amendment rights. Presently before the court is the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) of defendants Wood, Gombocz, Haskins and Scott (Doc. #11) and the like Motion to Dismiss of defendants Brackbill, Zettlemyer, Buskirk, O'Connell, Bulava, Pittaro and Kleinman, (Doc. #19).

Dismissal for failure to state a claim is appropriate only when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts

alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Plaintiff asserts that defendants violated his Eighth Amendment rights by denying or delaying medical care necessary to correct his degenerative sinus condition while he was an inmate in the Northampton County prison. The specific pertinent factual allegations in the complaint are as follow.

Plaintiff developed diseased growths in his nasal passages which obstructed the passage of air and fluid matter. This condition resulted in difficulty in breathing and eating, regular sinus infections, headaches and pain in the side of the face and skull. Plaintiff first reported his symptoms and requested treatment when he was incarcerated in April 1994. Following a history of abortive treatment, corrective surgery was recommended by a specialist in March 1995. It was not provided until February 1997, almost two years later. By this time plaintiff's condition had so deteriorated that the removal of large quantities of tissue was necessary. This resulted in his permanent loss of the sense of smell and a diminished sense of taste.

"In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence

deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106-07 (1976). To state a cognizable claim, "the deprivation alleged must be, objectively, sufficiently serious" and the prison official must have acted with a state of mind of "deliberate indifference to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 834 (1994).

Plaintiff has sufficiently alleged a serious medical need. A medical need which has been diagnosed by a physician as requiring treatment is "serious" for Eighth Amendment purposes. Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (citations omitted), cert. denied, 486 U.S. 106 (1988). Also, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Id. According to his pleadings, a doctor had diagnosed plaintiff's degenerative sinus condition as requiring treatment and he suffered a permanent total loss of one of his senses and a permanent partial loss of another.

Deliberate indifference can be shown by knowledge of the need for medical care accompanied by an intentional refusal to provide that care, delayed provision of the care for non-medical reasons or preventing the inmate from receiving recommended treatment. Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993). This subjective component requires a mental state of

actual knowledge or recklessness. Id.

Plaintiff alleges that defendant Kleinman was the nurse responsible for treating him, that she was aware of his worsening condition and of a doctor's recommendation for surgery yet she delayed for several months arranging for a necessary appointment with an outside specialist and again delayed recommended treatment for over a month by failing to arrange for a follow-up visit. From these allegations, one could reasonably infer that this defendant was aware of plaintiff's need for recommended treatment and delayed this care for non-medical reasons.

Plaintiff alleges that after examining him and his medical file which included a recommendation for surgery, defendant Scott failed to schedule the recommended surgery and persisted in prescribing treatment that had already failed to cure plaintiff's condition. This is sufficient to state a cognizable claim. See Lanzaro, 834 F.2d at 346 (prison officials may not with deliberate indifference to serious medical need of inmate, opt for easier and less efficacious treatment of inmate's condition).

Plaintiff alleges that after an unsuccessful attempt to treat plaintiff with a new medication, defendant Wood refused to prescribe any further treatment for plaintiff's condition and told him it would get better on its own although he had informed defendant Wood that the condition was continuing to deteriorate

and had not gotten better on its own for two years. One could reasonably infer from this allegation that defendant Wood was aware of the risks of continued degeneration and disregarded the risks by failing to undertake any further treatment. This is sufficient to state a claim. See Durmer, 991 F.2d at 68 (delay in providing recommended treatment evinces deliberate indifference where plaintiff's condition was deteriorating).

The remaining defendants are mentioned in the complaint merely to identify them as administrators with responsibility for the prison or medical staff. There is no respondeat superior liability under § 1983. Capone v. Marinelli, 868 F.2d 102, 106 n.7 (3d Cir. 1989).

There is no indication in the complaint that defendants O'Connell, Bulava, Pittaro or Brackbill had any knowledge of plaintiff's condition. Plaintiff contends that knowledge by defendants Gombocz and Haskins can be inferred because he filed medical requests in late 1995 and early 1996, and that defendants Zettlemyer and Buskirk were aware of his condition from a letter he sent explaining his situation. These allegations are insufficient because they fail to show that these defendants were personally involved in the denial or delay of treatment, and plaintiff was being seen at the time by members of the medical staff. See Durmer 991 F.2d at 69 (allegation that non-physician administrators failed to respond to letters explaining prisoner's

predicament insufficient to suggest deliberate indifference when prisoner was being seen by prison doctor).

ACCORDINGLY, this day of October, 1998, upon consideration of the Motion to Dismiss of defendants Wood, Gombocz, Haskins and Scott (Doc. #11), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that the claims against Deborah Gombocz and Todd Haskins are **DISMISSED** and is otherwise **DENIED**; and, upon consideration of the the Motion to Dismiss of defendants Brackbill, Zettlemyer, Buskirk, O'Connell, Bulava, Pittaro and Kleinman (Doc. #19), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that the claims against Richard Zettlemyer, Todd Buskirk, Terrance O'Connell, Roger Bulava, Mike Pittaro and Bill Brackbill are **DISMISSED** and is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.