

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

ZEBBIE CLIFTON,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 00-5836
	:	
CORRECTIONAL PHYSICIAN	:	
SERVICES, INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

JULY 2, 2001

Presently before this Court is the Motion to Dismiss Plaintiff's Amended Complaint filed by Defendants Correctional Physician Services, Inc. ("CPS"), Stanley Hoffman, M.D. ("Dr. Hoffman"), Dennis Moyer, M.D. ("Dr. Moyer"), Emer Beken, M.D. ("Dr. Beken"), and Kenan Umar, M.D. ("Dr. Umar") (collectively "the Defendants"). In his Amended Complaint, Pro Se Plaintiff Zebbie Clifton ("Clifton") alleges that the Defendants failed to provide him with necessary medical care in violation of 42 U.S.C. section 1983 ("§ 1983"). For the following reasons, the Defendants' Motion is granted.

I. BACKGROUND

Clifton is currently incarcerated in the Graterford State Correctional Institution in Pennsylvania ("Graterford"). CPS maintains the responsibility of providing medical care to the inmates at Graterford. Dr. Hoffman, Dr. Moyer, Dr. Beken, and

Dr. Umar are, or were, employed by CPS. Since 1991, Clifton has complained to the physicians at Graterford of pain in his legs and back. Since 1991, Clifton has been continuously provided medical treatment, including medication. Clifton has also been provided various tests such as a Computerized Axial Tomography scan ("CAT scan") and three Magnetic Resonance Imaging scans ("MRI scan") which were eventually approved after various doctor referrals and denials of the referrals.

According to the Amended Complaint, on March 24, 1993 a CAT scan revealed that Clifton's pain was due to arthritis and an "inclusive mass subject around the spine area." (Am. Complaint, ¶ 31). On April 25, 1997, Clifton's first MRI scan revealed an "accumulation of fat, namely, 'Adipose Lipoma' located to [sic] the 5th lumbar." (Id., ¶ 46). Clifton's second MRI scan occurred on February 19, 2000. Between 1993 and the present, two neurologists and a orthopedist have recommended consultation with a neurosurgeon for possible surgery to remove the accumulation of fat. However, at the same time, another neurologist, another orthopedist, Dr. Beken and Dr. Moyer have expressed the opinion that the consultation and surgery were unnecessary. On December 28, 1998, Clifton did have an appointment with a neurosurgeon, however, the neurosurgeon would not see him because his MRI scans had not been forwarded to the surgeon.

On October 6, 2000, Clifton filed his first Official

Inmate Grievance ("Grievance") stating that he needed surgery and that he had not received it. As a result of the Grievance, Clifton was given more medical evaluations including a third MRI scan on November 9, 2000. According to the Amended Complaint, the third MRI scan uncovered a new injury, a ruptured or herniated disk. On November 16, 2000, Clifton filed his first Complaint with this Court. We dismissed his claim for failure to exhaust his administrative remedies on November 28, 2000.

On November 30, 2000, Clifton submitted his second Grievance in which he claimed that his first Grievance was not suitably resolved and that surgery was still necessary. On January 10, 2001, Dr. Beken informed Clifton that "surgical [sic] removal of the 'adipose lipoma' is 'not the way to proceed' and regarding surgery for the disc re-set would also 'not be good' as in both situations would result in one being unable to walk." (Id., ¶ 78). The Amended Complaint also states that Dr. Beken recommended medications rather than surgery because it was the "'less [sic] of two evils'". (Id., ¶ 78).

After exhausting his administrative remedies, Clifton filed his Amended Complaint in this Court on February 26, 2001. In the Amended Complaint, Clifton alleges that the Defendants have violated his Eighth Amendment rights and that they were deliberately indifferent to his serious medical needs in violation of § 1983. The Defendants filed the present Motion to

Dismiss on May 23, 2001.

II. STANDARD

A motion to dismiss, pursuant to FED. R. CIV. P. 12(b) (6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. ANALYSIS

A. **Section 1983**

In order to establish a claim under § 1983 based on the Eighth Amendment, Clifton must show that the Defendants were deliberately indifferent to a serious medical need. In Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979), the Court stated that "[f]ailure to provide adequate treatment is a violation of the eighth amendment when it results from 'deliberate indifference to a prisoner's serious illness or injury.'" Id. at 762 (quoting Estelle v. Gamble, 429 U.S. 97

(1976). However, “[c]ourts will ‘disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . (which) remains a question of sound professional judgment.’” Id. (quoting Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977)). Therefore, a mere difference of opinion concerning the treatment received by the inmate is not actionable under the Eighth Amendment and § 1983. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3rd Cir. 1987). Claims of medical malpractice in the prison setting are also not actionable under § 1983. Parham v. Johnson, 126 F.3d 454, 458 n. 7 (3rd Cir. 1997) (recognizing “the well-established law in this and virtually every circuit that actions characterizable as medical malpractice do not rise to the level of ‘deliberate indifference’ under the Eighth Amendment.”). In order for there to be deliberate indifference, the prison physician’s acts must constitute “an unnecessary and wanton infliction of pain”, be “repugnant to the conscience of mankind” or offend the “evolving standards of decency.” Estelle, 429 U.S. at 106.

In this case, Clifton acknowledges that the Defendants have treated and tested his conditions since 1991. However, Clifton alleges that his Eighth Amendment rights have been violated because he was not given the opportunity to meet with a neurosurgeon. While Clifton supports his argument by stating that three physicians recommended a consultation with a

neurosurgeon, he also states that four other physicians felt that a consultation was unnecessary. Furthermore, "(w)here the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim.'" Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978)(quoting Roach v. Kligman, 412 F. Supp. 521, 525 (E.D. Pa. 1976)). Moreover, according to the Amended Complaint, Dr. Beken explained to Clifton that he believed that surgery would result in Clifton losing the ability to walk, providing Clifton with a reasonable explanation for the denial. Under these circumstances, denying Clifton an appointment with a neurosurgeon which could have lead to surgery does not constitute "acts which were either intentionally injurious, callous, grossly negligent, shocking to the conscience, unconscionable, intolerable to the fundamental fairness or barbarous." Id. Therefore, even under the relaxed standard afforded to a pro se plaintiff, Clifton cannot establish that the Defendants were deliberately indifferent to a serious medical need. Estelle, 429 U.S. at 106. Accordingly, dismissal of the Amended Complaint is warranted.

B. The Rehabilitation Act of 1973 and The Americans with Disabilities Act of 1990

To the extent that Clifton alleges violations of the Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794, et seq. ("Rehabilitation Act") or the Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12101, et seq. ("ADA"), these

allegations are completely factually unfounded and shall be dismissed. Although Clifton does not allege violations of the Rehabilitation Act or the ADA in his Complaint, his Complaint does state that jurisdiction is partially conferred upon this Court by the Rehabilitation Act. Furthermore, in his Response to the Present Motion to Dismiss, while Clifton appears to admit that he has failed to state a claim under the Rehabilitation Act, he states that "[i]n prison cases, the Supreme Court held that a Prisoner can challenge under [the] ADA Accordingly, at this stage of [the] litigation, the provisions of the [ADA] are present." (Pl.'s Resp. Mot. Dismiss at 4-5). However, Clifton does not allege that he is a qualified individual with a disability or that he has been a victim of discrimination based upon that disability. 29 U.S.C. § 794(a); 42 U.S.C. § 12112. Clifton does not allege any facts which would support a claim under either of these two acts and therefore any such claims must be dismissed.

An appropriate Order follows.

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CORRECTIONAL PHYSICIAN	:	
SERVICES, INC., et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 2nd day of July, 2001, upon consideration of the Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Dkt. No. 16), and all Responses and Replies thereto, it is hereby ORDERED that the Motion is GRANTED and Plaintiff's Amended Complaint is DISMISSED with prejudice against all Defendants.

BY THE COURT:

Robert F. Kelly, J.