

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

ALFONSO PERCY PEW : CIVIL ACTION
 :
 v. :
 :
 CONNIE, et al. : No. 94-4815

MEMORANDUM OF DECISION
Fed. R. Civ. P. 52(a)

Ludwig, S.J.

November 7, 1997

Plaintiff Alfonso Percy Pew, an inmate at the Pennsylvania State Correctional Institution at Graterford, brought this pro se civil rights action against several defendants, including Connie Lynn Szumski and Josephine Quinn.¹ 42 U.S.C. § 1983. Jurisdiction is federal question.² 28 U.S.C. § 1331.

¹ Claims against other defendants were referred to Magistrate Judge Thomas J. Rueter for proposed findings of fact and recommendations, 28 U.S.C. § 636(b)(1)(B). See Order, Apr. 10, 1997. Also the present claims were severed from the claim against defendant Arthur D. Boxer, a psychiatrist, who was found not liable by a jury for deliberate indifference to plaintiff's serious medical needs. See Tr. at 88, Apr. 2, 1996.

² Section 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. It is assumed that defendants are named in their individual capacities. See Will v. Michigan Dept. of State Police,
(continued...)

Plaintiff asserts that from April 21 to April 23, 1994 defendant Szumski, a nurse, retaliated against him by ignoring his nosebleeds. He also claims his due process rights were violated when she failed to follow prison rules.³ He claims that defendant Quinn, also a nurse, was deliberately indifferent to his serious medical need for Librium.⁴

I.

The following background facts are found based on evidence received at trial:

1. Beginning April 20, 1994, plaintiff Alfonso Percy Pew was incarcerated at SCI Graterford. He is serving a life sentence imposed by the Court of Common Pleas of Philadelphia following his February 1992 conviction of second degree murder. He was transferred from SCI Huntington.

²(...continued)
491 U.S. 58, 71, 109 S. Ct. 2304, 2311-12, 105 L. Ed. 2d 45 (1989) (no recovery against defendants in their official capacities, because as such they are not persons subject to suit under § 1983, and Eleventh Amendment bars suits against them in federal court). In addition, the burden of proof lies with plaintiff by a preponderance of the evidence. See Edwards v. Philadelphia, 860 F.2d 568, 572-73 (3d Cir. 1988).

³ Although the complaint makes a specific allegation of "deliberate indifference," plaintiff stated on the record that his nosebleed claim was not a claim for deliberate indifference to a serious medical need under the Eighth Amendment. Tr. at 16-17, 30, Apr. 25, 1997.

⁴ At trial, plaintiff and defendants moved for directed verdicts, Fed. R. Civ. P. 50(a). Rulings on those motions were deferred, and will be denied. These claims are adjudicated on the merits.

2. Plaintiff has a history of psychiatric problems and long-term mental illness. Tr. at 46, Apr. 25, 1996; Ex. P-5.

3. From April 20 to May 3, 1994, plaintiff was housed at M-Unit, a Restricted Housing Unit, in cell 263 at Graterford. Ex. D-22.

4. Defendants Connie Lynn Szumski⁵ and Josephine Quinn were nurses employed at Graterford by the Pa. Department of Corrections.

5. The Department of Corrections has certain administrative directives, one of which is entitled "Health Care for Inmates:"

Each state correctional institution . . . will follow the established procedures for the orderly maintenance of health care records as outlined in . . . "Policies for Maintenance of the Medical Record System."

Emergency Medical Care: Emergency medical care is available 24 hours a day and staff personnel have been trained to respond to these emergencies in the appropriate manner, so that medical care can be continuous.

Ex. P-1 (DC-ADM 820).

⁵ "Connie" as identified in the caption refers to Connie Lynn Szumski, a nurse. Tr. at 20-21, Apr. 25, 1996.

II.

Plaintiff's Nosebleed Claim
April 21-23, 1994
Pew v. Szumski

The following facts are found from the evidence:

1. In 1994, defendant Szumski came into contact with plaintiff while administering medication during rounds.

2. From April 21, at 5 p.m. to April 23, 1994 at 2:30 p.m., plaintiff had intermittent nosebleeds.⁶ Tr. at 35-36, Apr. 25, 1996.

3. On April 21, 1994 – the first day of the nosebleeds – an unidentified corrections officer in M-Unit asked defendant Szumski to see plaintiff. Id. at 28, 33. When Nurse Szumski arrived at his cell at 7:30 p.m., plaintiff's nose was not bleeding.⁷ Id. at 44-45. When she returned 10 minutes later, his nose again was not bleeding. Both of these occasions were reported by her on a "Dispensary Card."⁸ Ex. P-1.

4. Prior to April 21, defendant Szumski was unaware of any lawsuits involving plaintiff. Tr. at 42, Apr. 25, 1996.

⁶ At trial, it was stipulated that at one time certain bloodstained tissues and a T-shirt existed but could no longer be found at the institution. Tr. at 17, Apr. 10, 1997.

⁷ Defendant Szumski testified that she did not remember witnessing plaintiff's nosebleed. Tr. at 41, 44-45, Apr. 25, 1996. She said that if she had witnessed an inmate's nosebleed, she would ask the inmate to apply a light pressure to stop bleeding. Id. at 41.

⁸ A "Dispensary Card" is a form used by the Department of Corrections to identify and write up health incidents. Tr. at 58, Apr. 25, 1996.

5. The next day, April 22, 1994, plaintiff was examined for the nosebleed by a physician, Dr. Myron Sewell. Id. at 36. During the examination, plaintiff's nose was not bleeding. Id. at 36-37.

6. On April 23, 1994, plaintiff was taken to the dispensary by M-Unit officers. An unidentified nurse examined plaintiff and observed his left nostril bleeding. His vital signs were taken, and plaintiff was given an icepack to stop the bleeding. Id. at 37-38; Ex. P-1, "Medical Incident/Injury Report." After this examination, plaintiff was referred to an ear-nose-throat specialist.

7. On May 2, 1994, plaintiff was examined by Dr. Neifield, an ENT specialist. Id. at 37. Dr. Neifield noted plaintiff "[h]ad bleeding – not severe – from left nostril & left ear last week. Feels fine & no problem since that time." Id. at 37; Ex. D-25.

8. On May 23, 1994, plaintiff filed two "Official Inmate Grievances," nos. G-25758, G-25759, to which the Department of Correction responded.

9. Plaintiff no longer suffers from nosebleeds.

A.

Retaliation

In order to succeed on a retaliation claim under the First Amendment, plaintiff must demonstrate that defendant took an adverse action against plaintiff. Keenan v. City of Philadelphia,

983 F.2d 459, 466 (3d Cir. 1992). Plaintiff must produce sufficient evidence to show that defendant knew of the protected activity – which in this instance is alleged to have been plaintiff's suing prison officials.⁹ Id. Plaintiff must also demonstrate that the protected activity was a substantial or motivating factor in the decision to take an adverse action against plaintiff. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977); see Johnson v. Rodriguez, 110 F.3d 299, 310 (5th Cir. 1997) (discussing elements of retaliation claim).

Here, plaintiff claims that defendant Szumski retaliated against him by not rendering medical assistance for his nosebleeds. This claim cannot succeed because of lack of creditable evidence.

Defendant Szumski does not appear to have taken any action against plaintiff. She specifically testified that she did not "recall seeing [plaintiff] ever hav[ing] a nosebleed." Tr. at 45, Apr. 25, 1996. This testimony was consistent with her documentation that when she visited his cell at 7:30 and 7:40 p.m. on April 21, 1994, his nose was not bleeding.

Regardless, his claim must fail for the absence of notice of the protected activity. Plaintiff must show that defendant was aware of the protected activity at issue in order to be protected against retaliation. Keenan, 983 F.2d at 466. Here, the evidence

⁹ It is well-settled that a inmate's right of access to courts is protected activity under the First Amendment. Peterkin v. Jeffes, 855 F.2d 1021, 1035-38 (3d Cir. 1988).

establishes that defendant Szumski did not know of any lawsuits that plaintiff had instituted. Consequently, the notice element of a retaliation claim is lacking.

Furthermore, this retaliation claim is deficient because there is no proof of causation. Plaintiff must produce evidence that his prior grievances or lawsuits against prison officials were a substantial or motivating factor in defendant Szumski's alleged denial of medical treatment. *Id.* However, plaintiff had not filed a grievance against defendant Szumski, and she was not involved in any of plaintiff's litigations. This element of a retaliation claim – causation – is also lacking.

B.

Failure to Follow Prison Regulations

Plaintiff's second legal theory is predicated upon a Department of Corrections regulation that requires documentation of all medical claims. He contends defendant Szumski's failure to document his nosebleeds violated this regulation and, therefore, his right to due process. Here, the factual premise of this theory is that the nurse should have seen his nosebleeds and documented them.

Plaintiff must prove two elements in order to satisfy this due process claim. First, the regulations in question must create a liberty interest of an "unmistakably mandatory character." *Sandin v. Connor*, 515 U.S. 472, 480, 115 S. Ct. 2293, 2298, 132 L. Ed. 2d 418 (1995). Second, plaintiff must prove an "atypical and

significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 483, 115 S. Ct. at 2295. As the Supreme Court explained, an atypical or significant hardship on the inmate in relation to "ordinary incidents of prison life" would create a liberty interest worthy of protection under the Due Process Clause of the Fourteenth Amendment.¹⁰ Because these elements are lacking, plaintiff's claim cannot succeed.

While the Department of Corrections administrative directives on documenting medical incidents and emergency care are mandatory, the credited evidence is that plaintiff's nosebleeds were at most intermittent and were not observed by defendant Szumski. Moreover, periodic and temporary nosebleeds during a period of two days cannot be characterized, by themselves, as "atypical or significant." There was no evidence as to the seriousness of the nosebleeds or that they were symptomatic of any other condition or problem.

¹⁰ In Sandin, the Supreme Court found that confinement in disciplinary segregation for 23 hours and 10 minutes per day "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 515 U.S. at 485, 115 S. Ct. at 2301; see also Griffin v. Vaughn, 112 F.3d 703, 705-06 (3d Cir. 1997) (applying Sandin in context of placing prisoner in administrative custody).

III.

Librium Claim **Pew v. Quinn**

The following facts with respect to this claim are found from the evidence:

1. In 1994, defendant Quinn was working in the psychiatric department of SCI Graterford with Drs. Weiss and Boxer. Tr. at 57, Apr. 25, 1996.

2. On April 20, 1994, plaintiff was transferred to Graterford from SCI Huntington. Defendant Quinn was notified of his arrival. On that day, his medical records were also transferred.

3. These medical records showed that plaintiff had been receiving Librium prescribed in relation to a diagnosis of anxiety. Exs. P-3, P-4, P-5; Tr. at 47-48, Apr. 25, 1996.

4. On April 25, 1994, plaintiff was examined by Dr. Boxer, a psychiatrist, and defendant Quinn. Dr. Boxer noted that "no Librium from SCI Huntington [was] documented." Ex. P-1. Dr. Boxer did not believe that Librium was necessary and was unaware that it had been prescribed.

5. On May 2, 1994, plaintiff was again examined by Dr. Boxer and defendant Quinn. At that time, Dr. Boxer did not order Librium. Again, no documentation showing that it had been prescribed was brought to his attention. Tr. at 57, Apr. 25, 1996; Ex. P-1.

6. Defendant Quinn did not notify Dr. Boxer that plaintiff had been taking Librium while at Huntington.

7. Plaintiff suffered from high blood pressure as a result of not receiving Librium,¹¹ albeit the nature and extent of his condition was not evidenced. Tr. at 55, Apr. 25, 1996.

A.

Deliberate Indifference to Serious Medical Need

The state has an obligation to provide adequate medical care for those it incarcerates. Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment. Colburn v. Upper Darby Twp., 946 F.2d 1017, 1023 (3d Cir. 1991).

The first requirement of an Eighth Amendment claim for deliberate indifference to serious medical needs is that the medical need was "serious." Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 990, 1000, 117 L. Ed. 2d 156 (1992). "Seriousness" is determined by contemporary standards of decency. Id. As our Circuit has stated:

The concept of a serious medical need . . . has two components, one relating to the consequences of a failure to treat and one relating to the obviousness of those consequences. The detainee's condition must be such that a failure to treat can be expected to lead to substantial and unnecessary suffering, injury,

¹¹ Plaintiff's testimony to this effect was uncontroverted. No medical evidence was offered.

or death. Moreover, the condition must be one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.

Colburn, 946 F.2d at 1023.

Plaintiff must also demonstrate that a prison official's conduct constituted deliberate indifference to his serious medical need – the deliberate deprivation of adequate medical care or the defendant's action or failure to act despite his or her knowledge of a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 838-41, 114 S. Ct. 1970, 1979-81, 128 L. Ed. 2d 811 (1994). Mere negligence in diagnosing or treating a complaint does not state a valid claim of medical mistreatment under the Eighth Amendment. Durmer, 991 F.2d at 67. The requisite culpability is willfulness or subjective recklessness. See Farmer, 511 U.S. at 842, 114 S. Ct. at 1981 (“[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of harm.”).

B.

Plaintiff claims that defendant Quinn violated his constitutional rights by depriving him of Librium on April 20, 25 and May 2, 1994. Under the evidence, plaintiff is not entitled to prevail on this claim.¹²

¹² During the non-jury trial, plaintiff made reference to this claim as being one for retaliation, presumably in addition to the Eighth Amendment claim for deliberate indifference. Tr. at 32, Apr. 10, 1997. Inasmuch as the notice and causation elements
(continued...)

The evidence does not show that defendant Quinn acted with a culpable state of mind. Although a finding of express intent to inflict unnecessary pain is not required, some subjective showing of defendant's "deliberate indifference" is central to plaintiff's burden. See Whitley v. Albers, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986). Here, such showing is not present. Rather than deliberate indifference, the facts establish that defendant Quinn, at most, acted negligently in failing to advise Dr. Boxer of the prior Librium prescription. There is no evidence of animus or particularized ill-will toward plaintiff. Instead, the evidence suggests that this defendant's omission was an oversight or inadvertence that occurred when plaintiff was transferred from another correctional institution. While plaintiff's medical need may have been serious, it cannot be said that defendant Quinn acted with deliberate indifference. See id. at 319, 106 S. Ct. at 1084 (negligence in diagnosis or treatment does not suffice to make out a deliberate indifference claim).

IV.

Conclusions

The following conclusions are entered:

1. This court has jurisdiction over the action and the parties.

¹²(...continued)
do not appear to be met, this retaliation claim will be dismissed. Keenan v. City of Philadelphia, 983 F.2d 459, 466 (3d Cir. 1992).

2. The testimony of defendants' Szumski and Quinn was substantially credible and worthy of belief.

3. Plaintiff Alfonso Percy Pew did not sustain his burden of proving by a preponderance of the evidence actionable conduct on the part of defendants Szumski and Quinn.

4. It was not established that defendant Szumski retaliated against plaintiff for bringing lawsuits given the lack of adverse action, defendant's knowledge of grievances or lawsuits, and causation.

5. It was not established that defendant Szumski violated plaintiff's due process rights by not adhering to the prison regulations insofar as plaintiff's nosebleeds did not amount to an "atypical or substantial" hardship.

6. It was not established that defendant Quinn was deliberately indifferent to plaintiff's serious medical needs.

A decision will be entered in favor of defendants Connie Lynn Szumski and Josephine Quinn and against plaintiff.

Edmund V. Ludwig, S.J.