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DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MICHAEL GRANIERI,
Plaintiff,

v.

BRUCE BURNHAM, M.D., ET AL.,
Defendants.

**MEMORANDUM DECISION
AND ORDER**

Case No. 2:03CV771DAK

This matter is before the court on Defendants' Motion for Summary Judgment. The court held a hearing on the motion on April 22, 2004. Plaintiff was represented by Budge W. Call, and Defendants were represented by Alain C. Balmanno. Having fully considered the motion, memoranda, affidavits, and exhibits submitted by the parties and the facts and law relevant to this motion, the court enters the following Order.

BACKGROUND

Plaintiff, Michael Granieri, was an inmate at the Central Utah Correction Facility ("CUCF") in Gunnison, Utah. In March 2002, he began having severe abdominal pains, along with diarrhea and vomiting, and was seen by the physicians, physicians assistants, and nursing staff at the facility's infirmary. Plaintiff's conditions continually worsened over the next six weeks and he lost between twenty-five to thirty pounds before his condition was properly

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diagnosed. Plaintiff was treated by the medical staff approximately eighteen times and, at first, was given over-the-counter medications to treat his symptoms. The staff ran blood tests and did at least one stool sample. Michael told the staff that the medications were not working and that his pain was increasing. At one point, he was also prescribed a steroid-based medication that reportedly helped while he was taking it. However, after the medication was discontinued his symptoms returned. Plaintiff's expert opines that this fact alone should have been an indication to the medical staff that prompt medical attention was necessary.

Plaintiff and other inmates reported that his pain was crippling and that he would lie on the floor in a fetal position and cry because of the pain. Plaintiff began telling the medical staff that he thought he was dying. Despite these reports, the medical staff made comments to Plaintiff that "there's nothing wrong with you" or "you are just complaining" and made a comment to another inmate that Plaintiff was "playing games." Plaintiff's mother began communicating with CUCF staff urging that they provide Plaintiff with medical attention. On one occasion, Plaintiff was denied his appointment at the infirmary because an attack that required him to be in the bathroom made him late.

On May 6, 2002, Plaintiff was transferred to the Draper facility and was treated at the facility's infirmary. Plaintiff pleaded with the medical department to take him to a hospital. He was told he could not go to the hospital because they did not know what was wrong with him. Plaintiff felt something burst inside his stomach and he called to the staff for help and was told to "shut up and leave us alone." Other inmates tried to get the medical staff to help Plaintiff but they were also ignored. The doctor at the Draper facility infirmary ordered a blood test, IV fluids, and prescribed several medications.

On May 8, 2002, Plaintiff was transported and admitted to the University of Utah Medical Center. Upon arrival, Plaintiff was diagnosed with peritonitis and a working diagnosis of a ruptured appendix. Plaintiff underwent surgery the next day. Plaintiff's appendix was removed, twelve to eighteen inches of his intestines were removed, and a four inch section of his colon was removed. Plaintiff's diagnosis was Crohn's disease with secondary small bowel perforation. Plaintiff lost his distal ileum, which prevents him from absorbing bile salts and necessitates the need for cholestyramine, his terminal ileum will never "grow back," and he has chronic diarrhea which will cause some degree of disability.

Plaintiff was discharged from the University of Utah Medical Center on May 20, 2002 to the Utah State Prison and returned to the CUCF on May 28, 2002. Plaintiff was prescribed Chlorestyramine and Pentasa and told to eat a bland diet to help with the Crohn's disease. Plaintiff was also given literature about Crohn's disease and dietary information. When he returned to CUCF, the doctors substituted Sulfasalazine for the Pentasa, the information on Crohn's disease was taken away from him, and no special diet was allowed.

On a follow up visit at the University of Utah Medical Center on June 3, 2002, Plaintiff had a five pound weight gain. However, Plaintiff's doctor instructed him not to take Sulfasalazine as a replacement for Pentasa and again prescribed Pentasa. Upon return to CUCF, the staff again refused to give Plaintiff Pentasa. Plaintiff was also told that he would not be given a special diet and he would have to "do the best you can when your food tray is served." Even though the diet is medically necessary, Defendant's counsel represented at oral argument that the medical staff at CUCF has no control over whether inmates are allowed special diets.

DISCUSSION

Defendants' Motion for Summary Judgment

Defendants argue that Plaintiff cannot establish an Eighth Amendment claim for cruel and unusual punishment as a matter of law and, therefore, they are entitled to qualified immunity on his claims.

A. Cruel and Unusual Punishment

“[T]he Supreme Court has not wavered in its holding that the Eighth Amendment . . . is, *inter alia*, intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental.” *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1977). “[W]hile an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being.” *Id.* at 401, 403.

The states have a constitutional duty to provide necessary medical care to their inmates. *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). “[T]his duty necessarily requires that the State ‘make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates.’” *Id.* (quoting *Battle v. Anderson*, 376 F. Supp. 402, 424 (E.D. Okla. 1974) (reversed on other grounds)). “When prison officials are deliberately indifferent to an inmate’s serious medical needs, they violate the inmates right to be free from cruel and unusual punishment.” *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). Therefore, to establish an Eighth Amendment claim, an inmate must show that his

medical needs were serious and that prison officials were deliberately indifferent to those needs. *Id.*; *Olsen v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993) (to prove a violation of the Eight Amendment for failure to provide medical care “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”).

“A medical need is serious if it is ‘one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.’” *Riddle*, 83 F.3d at 1202 (quoting *Ramos*, 639 F.2d at 575).

In this case, there appears to be no dispute that Plaintiff’s condition pre-surgery was serious. Based on the medical records, it was obvious that Plaintiff was suffering from severe abdominal pains and continual vomiting and diarrhea such that he was incapacitated much of the day. Plaintiff’s condition significantly changed his regular daily activities and, at times, caused him to curl up in a fetal position and cry or lose consciousness. Plaintiff has submitted evidence that visiting family members, guards, and other inmates recognized that he was in need of immediate medical attention and that they expressed their concern to the medical staff. Because Plaintiff’s symptoms were obvious to lay persons at the prison and continued to worsen, there is adequate evidence that the condition was serious.

As to Plaintiff’s post-surgery condition, he has been diagnosed with Crohn’s disease and has been directed to take certain medications and follow a certain diet. Accordingly, Plaintiff’s post-surgery condition also falls within the definition of a serious medical need. Therefore, the focus of the court’s decision on this motion is whether Plaintiff has introduced sufficient facts demonstrating Defendant’s alleged deliberate indifference to Plaintiff’s serious medical needs to send the issue to a jury or whether Defendants are entitled to judgment as a matter of law.

“[T]o establish the requisite deliberate indifference, plaintiff must show that defendants knew he faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it.” *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). In attempting to define “deliberate indifference,” the Supreme Court has stated that while it “entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Farmer*, 511 U.S. at 835.

The test for deliberate indifference “affords considerable latitude to prison medical authorities in the diagnosis and treatment of medical problems of inmates.” *Gomm v. DeLand*, 729 F. Supp. 767, 779 (D. Utah 1990). “Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgment.” *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985). “[A]ccidental or inadvertent failure to provide adequate medical care, or negligent diagnoses or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment.” *Ramos*, 536 F.2d at 575; *Riddle*, 83 F.3d at 1203. “[A] mere difference of opinion between the prison’s medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment.” *Id.* “[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 Conduct which, at most, is medical malpractice redressable in state court does not represent cruel and unusual punishment.’” *Riddle*, 83 F.3d at 1203.

Defendants argue that Plaintiff's medical records and the Declarations of Dr. Burnham and Physician's Assistant Mitten-Hennagir establish that the defendants were not deliberately indifferent to Plaintiff's medical needs. Defendants at CUCF and the Draper facility met with Plaintiff, evaluated and monitored his medical condition, ran tests, prescribed medication, consulted with each other, and referred Plaintiff to the University of Utah Medical Center for treatment when his condition continued to worsen. Defendants assert that Plaintiff's claims amount to a difference of opinion as to treatment or, at most, claims of medical negligence, neither of which are actionable under the Eighth Amendment.

On summary judgment, this court must consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff, the nonmoving party. *See Cooperman v. David*, 214 F.3d 1162, 1164 (10th Cir.2000). There is no dispute in this case that Defendants did provide some medical attention to Plaintiff. However, the court concludes that Plaintiff has raised sufficient facts that would support a finding that Defendants knew he faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it and, therefore, that the issue of deliberate indifference should be presented to a jury. *Farmer*, 511 U.S. at 847. Defendants knew of Plaintiff's severe pain, debilitating symptoms, and allowed the situation to persist without a diagnosis for six weeks. On occasion, Plaintiff was refused medical treatment for the mere fact that he was late for an appointment even though he was late because of his condition. Defendants made statements to Plaintiff, his mother, and other inmates that Plaintiff was playing games, just complaining, and that his condition was not urgent even though the condition was worsening.

In addition, Plaintiff's expert witness opines that Defendants should have been concerned

and alerted to his serious need for medical attention when his condition was alleviated by steroid-based medications. It is also questionable that Defendants saw an improvement with the medications and allowed the condition to again worsen without re-prescribing the medications. Although Defendants argue that this demonstrates merely negligence or medical malpractice, the court believes that these facts combined with all the facts above would allow a jury to conclude that more than mere negligence occurred. The amount of time Defendants allowed to elapse before gaining a diagnosis for a condition that was as debilitating as Plaintiffs also raises enough of a question that a jury should determine whether it is deliberate indifference. Therefore, the court concludes that there are too many facts supporting Plaintiff's claim for this court to rule as a matter of law that a constitutional violation did not occur. Accordingly, Defendants' motion for summary judgment on this issue is denied.

As for Plaintiff's claims relating to the post-surgery conditions, Defendants argue that there is merely a difference of opinion as to the proper medications and the named Defendants do not have any control over the diets provided to Defendants. Although Defendants made these representations at oral argument, they did not address these claims in their motion papers and have not provided any evidence to support their oral representations. Plaintiff has presented evidence that the gastrointestinal specialist who treated him at University Hospital did not consider Sulfasalazine a replacement for Pentasa and instructed Plaintiff not to take Sulfasalazine. Defendants have not provided any testimony rebutting the unreasonableness of making the substitution.

Also, Defendants' counsel's representation that the medical staff at CUCF has no control over whether inmates are allowed special medically necessary diets is not admissible evidence to

support a finding that such a representation is true. Even though a special diet is medically necessary, Plaintiff was told that he would not be given a special diet and he would have to “do the best you can when your food tray is served.” Plaintiff also presented evidence that the staff at CUCF took away the informational literature he received at the hospital. The court concludes that Defendants failure to provide a special diet coupled with Defendant’s actions in taking away the information Plaintiff needs to be able to make his own informed choices with respect to his diet is enough for a jury to determine whether Defendants were acting with deliberate indifference. Once Plaintiff was diagnosed with Crohn’s disease and it was known to Defendants the severe consequences of such a condition not being treated, Defendants knew of Plaintiff’s special needs in order to prevent substantial harm and their conduct appears to be refusing him the means to abate such harm. Therefore, a jury should be allowed to determine whether such actions are deliberate indifference. Accordingly, Defendants motion for summary judgment must also be denied as to Plaintiff’s post-surgery claims of medical indifference.

B. Qualified Immunity

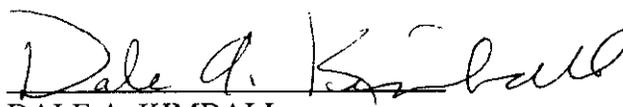
Defendants argue that although Plaintiff could establish that the right to medical care was clearly established, he cannot show that the Defendants acted in violation of that right and they are, therefore, entitled to qualified immunity. If a Section 1983 plaintiff states facts sufficient that a jury could find a violation of a clearly established constitutional or statutory right, “the burden shifts back to the defendant, who must prove that ‘no genuine issues of material fact’ exist and that the defendant ‘is entitled to judgment as a matter of law.’” *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002). “Therefore, the defendant still bears the normal summary judgment burden of showing that no material facts remain in dispute that would defeat

the qualified immunity defense.” *Id.* “When the record shows an unresolved dispute of fact relevant to the qualified immunity analysis, a motion for summary judgment based on qualified immunity should be ‘properly denied.’” *Id.* (quoting *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir.1991) (applying the qualified immunity analysis in the context of a *Bivens* action, in which material facts relating to the violation of a constitutional right were in dispute at the summary judgment stage)). Because this court has found that there is a question of fact sufficient to go to a jury as to whether Defendants were deliberately indifferent to Plaintiff’s serious medical needs, it would be inappropriate to grant qualified immunity. Accordingly, Defendant’s motion is denied.

CONCLUSION

Based on the above reasoning, Defendants’ Motion for Summary Judgment is DENIED.

DATED this 28th day of April, 2004.



DALE A. KIMBALL
United States District Judge

United States District Court
for the
District of Utah
April 29, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00771

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