IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LAWRENCE J. KRUG,

Plaintiff,

vs.

TERRY STEWART, et al.,

Defendant.

No. CV 99-362-TUC-RCC

ORDER

Pending before the Court is Plaintiff's February 8, 2002 Motion for Summary Judgment. The motion is fully briefed and ready for decision. Plaintiff has requested oral argument on his motion. However, the Court believes it has sufficient information before it to decide the motion on the basis of the parties written briefs and will not hear oral argument. After consideration of the parties' arguments, the Court will deny Plaintiff's motion for summary judgment and grant summary judgment in favor of Defendants. Plaintiff has additional miscellaneous motions pending, which the Court will also address in this order.

Procedural Background

Plaintiff filed this lawsuit in July 1999 alleging essentially two claims against the Arizona Department of Corrections ("ADOC") and several individual employees of the ADOC. The first involved the ADOC's policy on confiscation of inmate mail and is currently on appeal before the Ninth Circuit Court of Appeals. The second claim, at issue in Plaintiff's pending

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motion for summary judgment, is against ADOC doctors and other medical staff who Plaintiff claims were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment, when they discontinued some of Plaintiff's medication and medical appliances for a period of approximately three months in 1998. Plaintiff initially filed his deliberate indifference claims against Dr. Mecoli, CRN Michalek, NP Fisher, FHA Clenney, Dr. Lutz, ADOC Director Terry Stewart, Assistant Director Ryan, and Dr. Milazzo. On March 30, 2001, the Court issued an order granting summary judgment in favor of Defendants Michalek, Stewart, Ryan, and Milazzo. Four defendants now remain: Dr. Mecoli, NP Fischer, FHA Clenney, and Dr. Lutz. Plaintiff filed the pending Motion for Summary Judgment on February 8, 2002. Defendants filed a cross motion for summary judgment on April 8, 2002 after requesting an extension of the dispositive motion deadline which the Court denied. On May 2, 2002 Plaintiff moved to withdraw his motion for summary judgment. The Court denied Plaintiff's motion to withdraw on August 14, 2002. Plaintiff's motion for summary judgment is now fully briefed and ready for decision.

Facts

Plaintiff met with Dr. Mecoli on October 19, 1998 to request that Dr. Mecoli renew medications Plaintiff had been receiving for an extended period of time. (Pl. SOF at ¶15, Def. SOF at ¶ 2.) As Dr. Mecoli had not previously treated Plaintiff, Dr. Mecoli informed Plaintiff that he could not renew Plaintiff's medications without independently reassessing Plaintiff's medical needs. (Pl. SOF at ¶ 16, Def. SOF at ¶3.) After the meeting, Dr. Mecoli discontinued the following medications for Plaintiff: Kaopectate, Pepto-bismal, Ponaris, Dimetapp, and Indocin. (Def. SOF at ¶2.) On October 29, 1998, Dr. Mecoli discontinued Plaintiff's medical appliances including athletic supporters or jockey briefs, and athletic shoes. (Pl. SOF at ¶17 & 19, Def. SOF ¶8.) Dr. Mecoli attests that "discontinued" meant that Plaintiff's medical appliances were not to be renewed but did not order that Plaintiff's existing supply be seized. (Def. SOF at ¶8.)

Plaintiff's medical chart indicates that Dr. Mecoli offered to issue Plaintiff a short prescription so that Plaintiff would continue to receive medications during the re-evaluation

process and that Plaintiff refused this offer. (Pl. Exh. 4, Def Exh. C.) Dr. Mecoli's notations also indicate that Dr. Mecoli consulted with Plaintiff's previous medical providers to determine whether the medicines and appliances provided to Plaintiff were medically necessary or optional. Based on these consultations, Dr. Mecoli discontinued Kaopectate, Pepto-bismal, and Indocin, but re-prescribed Plaintiff's prescription for Ponaris . (*Id.*)[1] Plaintiff's chart further indicates that during the period from October 18, 1998 to January 12, 1999, Plaintiff requested and received Kaopectate and or Pepto-bismal for the treatment of stomach illness. (*Id.*) An inventory of the inmate store from this period of time also suggests that several of the medications Plaintiff sought were available to inmates for over the counter purchase. (Def. Exh. D.) These items included Dimetapp or other nasal decongestants, a generic form of Kaopectate, a generic form of Pepto-bismal, saline spray, and Ibuprofen or Motrin. (Id.) Defendants offer evidence that Ponaris is a brand name for a saline spray used to relieve dryness in nasal passages and that Indocin is a prescription form of Ibuprofen or Motrin. (Def. Exh. C.)

Dr. Mecoli stopped providing patient care in early November 1998 in anticipation of retirement. (Pl. SOF at ¶4, Def SOF at ¶10.) Plaintiff's care was then taken over by Nurse Practitioner Charles Fisher. (Pl. SOF at ¶60, Def SOF at ¶11&12.) Fisher did not make any changes to Dr. Mecoli's discontinuance of Plaintiff's medications although he did treat Plaintiff in November 1998 for an intestinal flu. (Pl. SOF ¶61-62, Def. SOF at ¶12.) Fisher also responded to an inmate letter from Plaintiff in which Fisher advised Plaintiff he believed Plaintiff was receiving proper care and in which he advised Plaintiff that an appointment with an outside provider was being scheduled to assess Plaintiff's medical conditions. (Def. SOF at ¶13.)

Defendant Clenney is the Facility Health Administrator of the Arizona State Prison in Douglas. Clenney responded to Plaintiff's inmate letters which complained of the

[1] It should be noted however, the pharmacy records indicate this prescription was never filled although it was ordered by Dr. Mecoli and charted and noted by an attending nurse.

discontinuation of Plaintiff's medication. (Pl. SOF at ¶60, Def. SOF at ¶15.) Clenney's letters advised that Clenney had conveyed Plaintiff's medical concerns to the health care staff and directed Plaintiff to bring any further health care concerns to the attention of the nursing staff or to his provider in the form of a Health Needs Request. (Def. SOF at ¶15.) Clenney attests that he is not a physician or medical provider and that he cannot make or interfere with clinical decisions of licensed health care providers. (Def. Ex. K.) Clenney did not direct Nurse Practitioner Fisher to schedule follow up appointments with Plaintiff on the issue of Plaintiff's medication and did not direct Fisher to re-issue Plaintiff's medications. (Pl. SOF at ¶60.)

Defendant Dr. Lutz was the Deputy Director of Health Services at the time Plaintiff's medications were discontinued. (Pl. SOF at ¶27, Def. SOF at ¶16.) Plaintiff corresponded with Defendant Lutz about the discontinuation of his medications in December 1998. Dr. Lutz indicated in a response to an inmate letter dated December 21, 1998 that the medications which were discontinued for Plaintiff were contraindicated for indefinite use and that Dr. Lutz would arrange for a specialty consult to determine if Plaintiff required the medications. (Def. Supplement to Resp. to Pl's Mot. for Summ. J., attached Ex.)

Plaintiff was seen by Dr. Bowman, an outside specialist, on January 12, 1999. (Pl. SOF at ¶41, Def. SOF at ¶12.) After a physical evaluation of Plaintiff, Dr. Bowman found that "the medications of Indocin, Dimetapp, Ponaris, and [Plaintiff's] scrotal support, back support, and TENS unit are clinically indicated for the problems as described." (Pl. Ex. 15.) Dr. Bowman also found that "other medications such as bismuth, Kaopectate, hemorrhoidal cream, stool softeners, and topical therapy for his legs for eczema are on a purely as needed basis." (*Id.*)

Motion for Summary Judgment Standard

Summary judgment is proper where no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The initial burden rests on the moving party to point out the absence of any genuine issue of material fact, but the moving party need not support its motion with affidavits or other supporting materials. Fed.R.Civ.P. 56(a); *Celotex*, 477 U.S. at 323. Once satisfied, the burden shifts to the opponent to demonstrate through production of

probative (and admissible) evidence that an issue of fact remains to be tried. *Id.* at 323-24. The non-moving party may not rest on mere denials of the movant's pleadings, but must respond asserting specific facts showing a genuine issue exists precluding a grant of summary judgment. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. The Court must accept the non-movant's evidence as true and view all inferences in the light most favorable to the non-movant. *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987).

District courts "possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that [it] had to come forward with all of [its] evidence." *Celotex*, 477 U.S. at 326. Where the moving party's own evidence shows an undisputed material fact that bars the moving party's claims as a matter of law, the court may *sua sponte* grant summary judgment to the opposing party provided the moving party "had a full and fair opportunity to ventilate the issues involved in the motion." *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982.)

Plaintiff's Claims

Plaintiff claims that Defendant Mecoli's discontinuation of his medications, and Defendants Lutz, Fisher, and Clenney's failure to require renewal of those medications, constitutes deliberate indifference to Plaintiff's serious medical conditions. Specifically, Plaintiff claims that Dr. Mecoli and N.P. Fisher, as Plaintiff's health care providers, were obligated to schedule follow up appointments with Plaintiff to determine whether the discontinued medications were medically necessary. Dr. Lutz and Clenney, as health administrators, were required, according to Plaintiff, to respond to Plaintiff's grievances by directing the providers to administer the discontinued medications, and to ensure that the providers complied with a 1993 consent decree in which a state court ordered that ADOC provide Plaintiff with all medically necessary medications. Plaintiff claims Defendants' actions were deliberately indifferent to his medical needs because Plaintiff had been receiving the medications at issue since 1987 (Pl. Mot. for Summ. J. at 10.) Plaintiff asserts that the three month delay in receiving his medications was unreasonable as it took only 8-10 days to schedule an appointment with an outside provider. (Id. at 11.) Plaintiff claims that as a result

of the discontinuation of medications he suffered serious and wanton pain. This suffering, Plaintiff contends, was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Defendants' Claims

Defendants claim there was no Eighth Amendment violation first because Plaintiff's medical needs were not serious. Specifically, Defendants argue that all of Plaintiff's medical conditions were treatable using over the counter drugs which were available for purchase without a prescription in the inmate store. Additionally, Defendants point out that Plaintiff was able to afford these medications. Defendants also assert that other courts have held that the types of medical conditions at issue in this case do not constitute serious medical needs.

Additionally, Defendants argue that they were not deliberately indifferent to Plaintiff's medical needs. Defendants contend that a difference of opinion between an inmate and his health care providers does not constitute deliberate indifference nor is deliberate indifference established by the fact that a subsequent physician disagrees with the course of treatment prescribed by an earlier physician. Defendants argue that their actions in this case are the antithesis of deliberate indifference because it would have been negligent for a new physician like Dr. Mecoli to have continued to dispense medications that may not have been necessary. Similarly, Defendants argue Fisher was not indifferent because he treated Plaintiff when Plaintiff presented to him with a stomach problem and because he reviewed Plaintiff's chart and saw no need for re-prescribing the medications Dr. Mecoli had discontinued. Finally, Defendants assert neither Clenney or Lutz played an active role in Plaintiff's care.

Discussion

To establish a § 1983 Eighth Amendment claim for medical indifference, the prisoner must show that the defendant's acts or omissions [were] sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986). The requisite indifference may be manifested in the way an official responds to an inmate's needs, by denying or delaying medical care, or by interfering in a prescribed treatment. *Estelle*, 429 U.S. at 104-05. Only

deprivations that deny "'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). A serious medical need exists if failure to treat could either cause further significant injury or result in "unnecessary and wanton infliction of pain." *Doty v. County of Lassen*, 37 F.3d 540 (9th Cir. 1994) (*quoting McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)). A prisoner must also establish that the defendant had a sufficiently culpable state of mind. *See Wilson*, 501 U.S. at 297. To satisfy the deliberate indifference standard, a plaintiff must show that: (1) defendant is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists;" (2) defendant actually drew the inference; and (3) defendant nevertheless disregarded the known risk. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

In this case, all of the medications discontinued by Dr. Mecoli were available to the Plaintiff in some form as an over the counter medication. The inventory of the inmate store indicates that inmates could purchase nasal decongestant (Dimetapp), bismuth (Pepto-bismal), nasal saline spray, and Motrin. Defendants have provided the Court with evidence that Ponaris is the brand name for a nasal saline spray. Both parties have submitted medical records which indicate that the doctor who prescribed Indocin for Plaintiff indicated that Plaintiff be given "Motrin prn for pain (or Indocin)." (Pl. Exh. 22, Def. Ex. C.) Accordingly, although Plaintiff may have suffered an increase in symptoms of the chronic conditions from which he suffers during the time his medications were discontinued, he was not without remedy to relieve those symptoms. Plaintiff has not alleged that he could not afford to purchase his own medications after they were discontinued by Dr. Mecoli. Defendants cannot be found to be deliberately indifferent to Plaintiff's medical needs, when Plaintiff had available to him a way in which to timely obtain the treatment he sought.

Moreover, a delay in treatment must have caused substantial harm to constitute an Eighth Amendment violation. *Shapely v. Nevada Bd. of State Prison Com'rs*, 766 F.2d 404, 407 (9th Cir. 1985); *See Wood v. Housewright*, 900 F.2d 1332 (9th Cir. 1990) (confiscation

of sling which lead to a broken surgical pin in shoulder was not deliberate indifference.) While Plaintiff may have experienced pain and discomfort from the confiscation of his medical appliances,[2] Plaintiff does not contend that he suffered substantial or lingering harm.

Further, Plaintiff presents no evidence that Defendants possessed a sufficiently culpable state of mind to be deliberately indifferent to Plaintiff's medical conditions. Rather, the medical records submitted by both Plaintiff and Defendants indicate that: (1) Dr. Mecoli and Nurse Practitioner Fisher believed long term distribution of the medications Plaintiff was receiving was medically inappropriate without re-evaluation of Plaintiff's medical needs; (2) Dr. Mecoli contacted the doctors who had previously prescribed the discontinued medications in order to determine whether those doctors believed the medications to be medically necessary or optional; (3) Plaintiff's providers and the health care administrators employed by the ADOC at that time believed the best way to address Plaintiff's concerns about the discontinuation of medications was to have Plaintiff evaluated by an outside provider; (4) Plaintiff saw an outside provider; and (5) the ADOC health care providers complied with the recommendations of the outside provider. The records also indicate that Plaintiff was treated on an as needed basis for stomach problems during the period of time in question. Plaintiff's medical records do not indicate that Defendants believed Plaintiff would suffer a risk of substantial harm from the discontinuation of his medications and medical appliances and do not indicate Defendants disregarded any such risk. Consequently, Defendants' actions do not constitute deliberate indifference.

Summary judgment for Defendants is appropriate in this case because Plaintiff has had the opportunity to fully ventilate his claims. The issue of medical deliberate indifference was first considered by the Court through summary judgment motions which were resolved in March 2001. At that time, the Court believed there was insufficient evidence with respect to the four Defendants who remained in this suit to issue a dispositive ruling as to those

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[2]Whether Plaintiff's medical appliances were actually confiscated is not clear from the record. However, for the purpose of this order, the Court will assume the appliances were confiscated.

defendants. Plaintiff was permitted to proceed with discovery which not only included multiple time extensions but which also afforded Plaintiff the opportunity to personally depose the four remaining Defendants and to collect ample documentary evidence from Defendants. On this second round of summary judgment motions, Plaintiff has submitted evidence (his medical records) which supports the conclusion that Defendants were not deliberately indifferent to his medical needs during the period of October 1998 to January 1999. Consequently, the Court does not find an Eighth Amendment violation and will grant summary judgment in favor of Defendants.

Other Motions

Also pending are (1) Plaintiff's April 8, 2002 Request for Order Compelling Counsel and DOC Officials to Issue Certificate of Authenticity on Designated Exhibits; (2) Plaintiff's May 21, 2002 Request for Permission to Supplement Response to Defendants Notice of Provision of Affidavits, and (3) Plaintiff's June 14, 2002 Motion for Injunctive Relief and Issuance of TRO's. The April 8th and May 21st motions concern the authenticity of records and exhibits disclosed by Defendants to Plaintiff. The June 14th motion relates to Plaintiff's ability to access information about himself from the ADOC website in order to provide that information to a trial jury. As all of these motions relate to trial issues, they will be denied as moot.

IT IS THEREFORE ORDERED as follows:

1)Plaintiff's February 8, 2002 Motion for Summary Judgment [Doc. 318] is **DENIED**;

2)Summary Judgment is **GRANTED** in favor of Defendants;

3) Plaintiff's April 8, 2002 Request for Order Compelling Counsel to Issue Certificate of Authenticity [Doc. 345] is **DENIED AS MOOT**;

4) Plaintiff's May 21, 2002 Request for Permission to Supplement Response to Defendants Notice of Affidavits Authenticating Medical Records [Doc. 374] is **DENIED AS MOOT**;

5) Plaintiff's June 14, 2002 Motion for Injunctive Relief and Issuance of TRO's [Doc. 376] is **DENIED AS MOOT**;

6) The case is **DISMISSED WITH PREJUDICE**; and

7) the Clerk of the Court is Directed to enter judgment and close the case.

DATED this 10th day of October, 2002.

Raner C. Collins
United States District Judge