UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LEROY KAMIL HARRIS

PRISONER

v. Case No. 3:02cv706(AWT)

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION,
JOHN J. ARMSTRONG,
BRETT S. RAYFORD,
PATRICIA OTTOLINI,
RICHARD G. FUREY, and
DR. TIMOTHY SILVIS

RULING ON MOTION TO DISMISS

The plaintiff, Leroy Kamil Harris, is an inmate confined at the MacDougall Correctional Institution in Suffield, Connecticut. He filed this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. § 1915. He alleges that the defendants have failed to provide him with surgery to remove of a metal plate from his right leg. Pending is a motion to dismiss filed by the defendants. For the reasons that follow, the motion is being granted.

Standard of Review

When considering a Rule 12(b) motion to dismiss, the court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Thomas v. City of N.Y., 143 F.3d 31, 37 (2d

Cir. 1998). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000); Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." Branham v. Meachum, 77 F.3d 626, 628 (2d Cir. 1996) (quoting Grant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995) (internal quotations omitted). In its review of a motion to dismiss, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993). In reviewing this motion, the court is mindful that the Second Circuit "ordinarily require[s] the district courts to give substantial leeway to pro se litigants." Gomes v. Avco Corp., 964 F.2d 1330, 1335 (2d Cir. 1992).

Facts

The court accepts as true the following facts, taken from the complaint.

In 1979, the plaintiff suffered a gunshot wound to his

right leg which shattered his femur. A surgeon implanted a metal plate and a pin in the plaintiff's right hip. The metal hardware was to be removed within eighteen months of implantation. Before the plaintiff could have the hardware removed, he was arrested and incarcerated. In 1988 and 1990, two orthopedists recommended surgery to remove the metal hardware in the plaintiff's right leg. The plaintiff never underwent the surgery. In 1992, an orthopedist examined the plaintiff in the St. Mary's Orthopedic Clinic. The examining physician did not recommend that the hardware be removed. In September 1993, the Utilization Review Committee ("URC") denied the plaintiff's request for another opinion by an orthopedist at an outside medical facility, but indicated that the plaintiff could be seen at the orthopedic clinic at the Osborn Correctional Institution. The plaintiff was never examined at the orthopedic clinic at Osborn.

The plaintiff was transferred to a prison facility in Rhode Island on September 14, 1993, and did not return to Connecticut until April 1997. In November 1999, the plaintiff was transferred from Connecticut to a prison facility in Virginia. The Virginia medical personnel prescribed pain medication for the plaintiff's frequent complaints of pain and also took x-rays of the plaintiff's spine.

In May 2001, the plaintiff returned to MacDougall Correctional Institution in Suffield, Connecticut. X-rays were taken of the plaintiff's right leg. On October 31, 2001, Dr. Silvis prescribed Motrin for the plaintiff's chronic pain. On November 14, 2001, Dr. Silvis again examined the plaintiff. He recommended that the plaintiff wear a brace on his right knee and that he not play sports. He gave the plaintiff a bottom bunk pass and prescribed anti-inflammatory medication. As described below, the plaintiff made a further request for treatment by means of a letter dated December 27, 2001, and each of defendants Furey, Ottolini and Silvis was involved in the response to that letter.

The plaintiff seeks monetary damages and injunctive relief from the defendants.

Discussion

As a preliminary matter, the court addresses the claims against the State of Connecticut Department of Correction. A department of correction is not a "person" within the meaning of § 1983. See Santiago v. New York State Dep't of Corr. Servs., 725 F. Supp. 780, 783-84 (S.D.N.Y. 1989), rev'd on other grounds, 945 F.2d 25 (2d Cir. 1991), cert. denied, 502 U.S. 1094 (1992) (holding that state and state agencies are not persons under § 1983); Grabow v. Southern State Corr. Facility,

726 F. Supp. 537, 538-39 (D.N.J. 1989) (holding that state correctional facility and Department of Correction were parts of state government protected from suit under the Eleventh Amendment and consequently were not "persons" for purposes of § 1983); Richards v. New York Dep't of Corr. Servs., 572 F. Supp. 1168, 1172 (S.D.N.Y. 1983) (holding that Department of Correctional Services was an agency of the state and consequently was not a "person" subject to suit under §§ 1981, 1983, 1985); Sittig v. Illinois Dep't of Corr., 617 F. Supp. 1043 (N.D. Ill. 1985) (holding that Illinois Department of Correction and two of its facilities were not "persons" within the meaning of § 1983). Accordingly, there is no arguable legal basis for a § 1983 action against the State of Connecticut Department of Correction and all claims against the Connecticut Department of Correction are being dismissed. See 28 U.S.C. § 1915(e)(2)(B)(i) and (ii) ("the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted . . .").

The defendants argue several grounds in support of their motion to dismiss, including the following: (1) the plaintiff's claims for monetary damages against the defendants in their official capacities are barred by the Eleventh

Amendment; (2) the plaintiff failed to exhaust his administrative remedies before commencing this action; (3) the plaintiff's claims are barred by the statute of limitations; and (4) the plaintiff failed to allege facts stating a claim for deliberate indifference to serious medical needs. Because a consideration of these issues is dispositive of the case, the court does not reach the additional arguments present by the defendants.

I. Official Capacity Claims

The defendants argue that any claims for monetary damages against them in their official capacities are barred by the Eleventh Amendment. The court agrees.

Generally, a suit for recovery of money may not be maintained against the state itself, or against any agency or department of the state, unless the state has waived its sovereign immunity under the Eleventh Amendment. See Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 684 (1982). Section 1983 does not override a state's Eleventh Amendment immunity. See Quern v. Jordan, 440 U.S. 332, 342 (1979). The Eleventh Amendment immunity which protects the state from suits for monetary relief also protects state officials sued for damages in their official capacity. See Kentucky v. Graham, 473 U.S. 159, 169-70 (1985). A suit against a defendant in his

official capacity is ultimately a suit against the state if any recovery would be expended from the public treasury. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1984).

In his complaint, the plaintiff seeks monetary damages from the defendants in both their individual and official capacities. Any award of damages against the defendants in their official capacities is barred by the Eleventh Amendment. The plaintiff concedes that the defendants cannot be sued in their official capacities for monetary damages. Accordingly, the motion to dismiss is being granted as to all claims for money damages against the defendants in their official capacities.

II. Exhaustion of Administrative Remedies

The defendants argue that the plaintiff's complaint must be dismissed because it does not allege that the plaintiff has exhausted his administrative remedies. The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The Supreme Court has held that this provision

requires an inmate to exhaust administrative remedies before filing any type of action in federal court, see Porter v. Nussle, 534 U.S. 516, 532 (2002), regardless of whether the inmate may obtain the specific relief he desires through the administrative process. See Booth v. Churner, 532 U.S. 731, 741 (2001). This requirement of complete exhaustion of administrative remedies must be satisfied before a federal action is commenced. See Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001) (holding that an inmate may not avoid the requirements of 42 U.S.C. § 1997e(a) by exhausting administrative remedies after filing a civil rights action in federal court).

The court takes judicial notice of the administrative remedies for the Connecticut Department of Correction which are set forth in Administrative Directive 9.6, entitled "Inmate Grievances." Section 6.A. provides that the following matters are grievable:

> 1. The interpretation and application of policies, rules and procedures of the unit, division and Department.
> 2. The existence or substance of policies, rules and procedure of the unit, division and Department....
> 3. Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein.
> 4. Formal or informal reprisal for use of

or participation in the Inmate Grievance Procedure.

5. Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans with Disabilities Act, except as noted herein.

6. Property loss or damage.

Administrative Directive 9.6, section 6.B. provides that "[t]he following matters are not grievable: . . . 6. Health Services diagnoses or treatment decisions which are appealable through the Health Services appeal process."[1] Here, the plaintiff, as documented in the forms attached to his opposition to the motion to dismiss, pursued an appeal through the Health Services appeal process. He filed Inmate Grievance Form A, based on the complaint that forms the basis for this lawsuit. When that was denied, he next submitted Inmate Grievance Form B, and was informed that "Per AO 9.6B - you cannot grieve health services diagnosis or treatment. UR has denied your request." He was also informed that he could not appeal further. See Inmate Grievance Form B, dated April 19, 2002. Therefore, the court concludes that the plaintiff

[1] Because the allegations in the complaint concern a time period from November 1999 to March 7, 2002, the court considers the State of Connecticut Department of Correction Administrative Directives in effect during that time. The court notes that on October 24, 2002, the inmate grievance procedures set forth in Administrative Directive 9.6 were revised. Under the revised version of Directive 9.6, diagnoses and medical treatment decisions are now grievable.

exhausted his administrative remedies.

III. Statute of Limitations

The defendants contend that any claims by the plaintiff that rest on allegations concerning medical treatment provided to, or denied, him during the period from 1983 to April 1999 are barred by the statute of limitations.[2] The plaintiff represents in his memorandum in opposition that he is not pursuing claims against the defendants concerning medical treatment during the period prior to November 1999. He states that he only included the allegations concerning the earlier time period as background information to clarify his current medical condition. In fact, there are no allegations against the named defendants regarding the period of time prior to November 1999.

IV. Failure to State a Claim

The defendants also move to dismiss the claims against them because the plaintiff has failed to allege facts that support a claim of deliberate indifference to serious medical

[2] The plaintiff filed this action in April 2002, and in Connecticut, the general three-year personal injury statute of limitations period set forth in Connecticut General Statutes § 52-577 has been uniformly found to be the appropriate one for civil rights actions asserting constitutional torts pursuant to 42 U.S.C. § 1983. See Lounsbury v. Jeffries, 25 F.3d 131, 134 (2d Cir. 1994; In re State Police Litig., 888 F. Supp. 1235, 1248-49 (D. Conn. 1995).

needs. The Eighth Amendment protects inmates from deliberate indifference by prison officials to their serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). To prevail on such a claim, the plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. A prisoner must show intent to either deny or unreasonably delay access to needed medical care or the wanton infliction of unnecessary pain by prison personnel. See id. at 104-05. Mere negligence will not support a section 1983 claim; the conduct complained of must "shock the conscience" or constitute a "barbarous act." McCloud v. Delaney, 677 F. Supp. 230, 232 (S.D.N.Y. 1988) (citing United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970)). A treating physician will be liable under the Eighth Amendment only if his conduct is "repugnant to the conscience of mankind." Tomarkin v. Ward, 534 F. Supp. 1224, 1230 (S.D.N.Y. 1982) (quoting Estelle, 429 U.S. at 105-06).

The civil rights statute was not meant to redress medical malpractice claims that can be adequately resolved under state tort law. Thus, a claim of misdiagnosis, faulty judgment, or malpractice without more to indicate deliberate indifference is not cognizable under section 1983. See McCabe v. Nassau County

Med. Ctr., 453 F.2d 698, 704 (2d Cir. 1971); Tomarkin, 534 F. Supp. at 1230. In addition, mere disagreement with prison officials about what constitutes appropriate medical care does not state a claim cognizable under the Eighth Amendment. See Hyde, 429 F.2d at 868; Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Ross v. Kelly, 784 F. Supp. 35, 44 (W.D.N.Y. 1992), aff'd, 970 F.2d 896 (2d Cir.), cert. denied, 506 U.S. 1040 (1992).

There are both subjective and objective components to the deliberate indifference standard. See Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994), cert. denied sub nom. Foote v. Hathaway, 513 U.S. 1154 (1995). The alleged deprivation must be "sufficiently serious" in objective terms. Wilson v. Seiter, 501 U.S. 294, 298 (1991). See also Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting) ("'serious medical need' requirement contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain"). The Second Circuit has identified several factors that are highly relevant to the inquiry into the seriousness of a medical condition: "'[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the

existence of chronic and substantial pain.'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (citation omitted). Also, "[a] serious medical condition exists where the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Harrison v. Barkley, 219 F.3d 132, 136 (2d Cir. 2000) (internal quotation marks and citations omitted).

With respect to the subjective component of the deliberate indifference standard, an inmate must present evidence that the charged prison official acted with "a sufficiently culpable state of mind." Hathaway, 37 F.3d at 66. "[A] prison official does not act in a deliberately indifferent manner unless that official 'knows and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

The defendants do not dispute the fact that the pain the plaintiff has experienced due to the metal plate in his right leg constitutes a serious medical condition. The plaintiff alleges that he suffers from continuing pain in his right leg. The medical records attached to the complaint contain the physician's orders for pain medication, a bottom bunk pass and

a knee brace. In addition, following Dr. Silvis' review of the plaintiff's case, Dr. Silvis submitted a request to the URC for the orthopedic clinic to look at possible removal of the hardware in the plaintiff's let. Thus, the plaintiff's condition was clearly one that a physician thought important and worthy of comment and treatment. Drawing inferences in the light most favorable to the plaintiff, the court concludes that the plaintiff has alleged facts suggesting that he suffered from a serious medical condition prior to and at the time he filed the complaint in this case.

The defendants argue, however, as to the second component of the deliberate indifference standard, that the plaintiff fails to allege facts showing that any defendant acted with a sufficiently culpable state of mind. The court agrees.

There are no facts in the complaint indicating that Commissioner Armstrong was aware of or involved in the plaintiff's medical treatment during the period from November 1999 through the filing of the complaint in April 2002. In fact, there is no reference to Commissioner Armstrong other than in the listing of the defendants.[3] In addition, the only

[3] In opposition to the motion to dismiss, the plaintiff submits a letter from an attorney from the Inmates' Legal Assistance Program concerning the plaintiff's medical condition that was allegedly hand-delivered to Commissioner Armstrong on April 29, 2002. This case was filed on April 18,

reference to Dr. Brett Rayford, who is the Director of Health, Mental Health and Addiction Services for the Department of Correction, appears in a letter attached to the complaint. The plaintiff allegedly sent a copy of a letter addressed to Richard Furey to Dr. Rayford in January 2002. The plaintiff does not allege that he sent any letter directly to Dr. Rayford or that he attempted to inform him of his medical condition in any other manner.

The plaintiff was transferred to a Virginia prison in November 1999 and did not return to Connecticut until some time after May 2000. The plaintiff alleges that in October 2001, Dr. Silvis prescribed pain medication for the chronic pain in his right leg and that the medical department at MacDougall scheduled him to be examined by Dr. Silvis on November 14, 2001. After examining the plaintiff, Dr. Silvis prescribed a bottom bunk pass, a brace and anti-inflammatory medication and recommended that the plaintiff refrain from playing any sports.

In response to a December 27, 2001 letter from the plaintiff concerning his right leg pain and his request for a

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2002, ten days prior to the alleged delivery of the letter concerning the plaintiff's medical condition. Thus, these allegations were not included in the complaint and are not considered by the court in deciding the motion to dismiss.

consultation with an orthopedist, defendant Furey opined that pain medication and a brace were the proper forms of treatment to alleviate the plaintiff's pain. He also indicated that Dr. Silvis would review the plaintiff's medical condition. On January 23, 2002, defendant Furey informed the plaintiff that Dr. Silvis had reviewed his case and had submitted a request to the URC to have an orthopedist examine him and explore the possibility of removing the metal plate in his leg. Also on January 23, 2002, in response to a letter from the plaintiff, defendant Patricia Ottolini, who is the Director of Nursing for the State of Connecticut Department of Correction, indicated that defendant Furey had conferred with Dr. Silvis and that the plaintiff should be hearing from defendant Furey soon regarding his medical condition. In an undated memorandum, defendant Furey stated that he had confirmed that the plaintiff had been scheduled for another orthopedic appointment at University of Connecticut Health Center. On March 7, 2002, defendant Furey informed the plaintiff that the URC had reviewed his case and recommended that the plaintiff try another analgesic and continue to use the knee brace. The URC did not recommend removal of the hardware.

Based on these facts, the court concludes that the plaintiff has failed to allege that any of the defendants were

deliberately indifferent to the plaintiff's pain in his right leg. Defendants Furey and Ottolini responded to the plaintiff's complaint of pain and referred the plaintiff to the treating physician at the prison facility where the plaintiff was incarcerated. Dr. Silvis examined the plaintiff, prescribed medication, a brace and bottom bunk pass and submitted a request to the URC for an orthopedic consultation and requested that the possibility of removal of the metal plate be explored. Although several physicians recommended in 1988 and 1990 that the plaintiff undergo surgery to remove the metal plate in his right leg, no physician has recommended surgical removal of the hardware since then. In 1992, a physician at St. Mary's Hospital recommended against the surgery. In March 2002, following the referral from Dr. Silvis, the URC did not recommend surgical removal of the metal plate, but rather use of another analgesic and continued use of the knee brace.

Because the plaintiff has not alleged facts demonstrating that any defendant was deliberately indifferent to a serious medical need on his part, he has failed to state a claim under the Eighth Amendment. Accordingly, the motion to dismiss is being granted as to the plaintiff's medical treatment claim.

Conclusion

The defendants' Motion to Dismiss [**doc. # 12**] is hereby **GRANTED**. The claims against the State of Connecticut Department of Correction are hereby **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

The Clerk shall close this case.

SO ORDERED in Hartford, Connecticut, this _____ day of September 2003.

Alvin W. Thompson
United States District Judge