

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROMAYNE O. JACKSON,)
)
 Plaintiff,)
)
 V.) Civ. No. 03-1031-SLR
)
 FIRST CORRECTIONAL MEDICAL)
 SERVICES a/k/a First)
 Correctional, WARDEN THOMAS)
 CARROLL, and COMMISSIONER)
 STANLEY TAYLOR,)
)
 Defendants.)

Romayne O. Jackson, Delaware Correctional Center, Smyrna,
Delaware. Plaintiff Pro Se.

Susan D. Mack, Deputy Attorney General, Wilmington, Delaware.
Counsel for State Defendants.

Daniel L. McKentry, Esquire, Wilmington, Delaware. Counsel for
Defendant First Correctional.

MEMORANDUM OPINION

Dated: July 28, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Romaine O. Jackson, presently incarcerated at Delaware Correctional Center ("DCC") in Smyrna, Delaware, filed this action on November 12, 2003, against First Correctional Medical Services ("FCM"), Warden Thomas Carroll, and Delaware Department of Correction Commissioner Stanley Taylor. (D.I. 2) Plaintiff alleges constitutional violations arising from defendants' alleged failure to provide adequate medical care for his chronic ear problems, pursuant to 42 U.S.C. § 1983. (Id.) The court has jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331. Currently before the court is defendants Carroll and Taylor's ("State defendants") motion to dismiss for failure to state a claim upon which relief can be granted. (D.I. 20) Also before the court is plaintiff's motion for appointment of counsel. (D.I. 6) For the reasons that follow, State defendants' motion to dismiss is granted in part and denied in part and plaintiff's motion for appointment of counsel is granted.

II. BACKGROUND

On October 26, 2001, plaintiff was incarcerated at the Sussex Correctional Institution ("SCI") in Georgetown, Delaware. When examined by the receiving nurse, plaintiff complained of ringing in his ears. (D.I. 2 at 5) The nurse scheduled plaintiff to see a doctor. (Id.) On October 29, plaintiff was

seen by Dr. Burns and diagnosed with ruptured ear drums. Dr. Burns issued plaintiff earplugs, medication and a memo stating that plaintiff be permitted to wear the earplugs in the shower. (D.I. 2 at 10)

On November 8, 2001, plaintiff filed a grievance alleging his medication was improperly administered. Plaintiff alleges the nurse gave him the wrong medication, because the color of the pill was not the usual color and he awoke with a loud "humming" sound in his ears. (Id. at 12) The grievance was resolved and stated that plaintiff should not take medication that is "unusual." (Id. at 11) At a followup examination, Dr. Burns stated that the infection had cleared up despite plaintiff's complaints that he was still experiencing discharge, pain, ringing, and dizziness. No other medication was prescribed. (Id. at 5)

Plaintiff alleges that from December 3, 2001 through July 2002, he filed numerous sick calls and grievances but received no treatment for his ears. (Id.) Plaintiff was transferred to DCC on July 8, 2002 where, upon intake, plaintiff's earplugs were confiscated despite plaintiff's production of the memo from Dr. Burns. (Id.) In August 2002, plaintiff submitted another sick call slip and was seen by the medical department. Plaintiff alleges that no examination was conducted and he was told that earplugs were unavailable. (Id. at 6) Plaintiff alleges that

from August 2002 through December 2002, he continued to complain about his ear problems, but never received a proper medical examination. (Id.)

In January 2003, plaintiff was taken to a doctor outside the prison, Dr. Berg. (Id.) Dr. Berg ordered a C.A.T. scan and scheduled a followup visit to discuss the results. (Id.) Plaintiff received the C.A.T. scan in February of 2003. (Id.)

Plaintiff was transferred to SCI on April 11, 2003, where he informed the receiving room nurse that his symptoms had worsened and that he was supposed to see Dr. Berg for a followup examination. (Id.) Plaintiff was then seen by Dr. Burns at SCI where he informed Dr. Burns that he needed to see Dr. Berg again. (Id. at 7) A week later, plaintiff received a special needs memo from Dr. Burns stating that plaintiff was to be given earplugs and must wear them in the shower. (Id. at 16) On April 29, plaintiff was again seen by Dr. Burns who verified his loss of hearing. (Id. at 7)

On May 20, 2003, plaintiff was transferred to DCC where his earplugs were again confiscated. (Id.) On June 10, 2003, plaintiff was seen by Dr. Armburo and was allegedly told there was "nothing wrong with his ears." (Id.) On August 27, plaintiff submitted another sick call slip complaining of pain. (Id.) On August 30, plaintiff received a response to his grievance, which stated plaintiff had been scheduled to see

medical personnel. (Id. at 18)

In September 2003, plaintiff was seen by numerous nurses but alleges nothing was done about his grievances or his followup appointment with Dr. Berg. (Id. at 8) Plaintiff was seen by Dr. Tatagari on October 31, 2003 and given antibiotics, which he received on November 3, 2003. (Id.) Plaintiff was seen by Dr. Traveti on November 11, 2003, who prescribed earplugs which plaintiff never received. (Id.)

Twelve months after his initial visit, plaintiff was permitted a followup examination with Dr. Berg on December 12, 2003. At this appointment, Dr. Berg was unable to conduct the examination because prison officials failed to send the films and results of the January 2003 C.A.T. scan. (Id.) On December 30, 2003, plaintiff was informed that Dr. Alie refused to permit him to have the earplugs prescribed by Dr. Traveti. (Id. at 29)

Plaintiff was seen on January 12, 2004 by Dr. Howard. Dr. Howard diagnosed plaintiff with an ear infection, recommended the use of earplugs, and prescribed nasal spray and eardrops. A followup appointment was recommended. (D.I. 12 at 2) Between January 13, 2004 and January 16, 2004, plaintiff alleges he was not given medication as prescribed by Dr. Howard. (Id.) Plaintiff also alleges that on January 17, 2004, he learned that Dr. Alie altered Dr. Howard's orders, substituting oral medication for nose spray, contrary to Dr. Howard's express

guidance. (Id.) Despite a medication call on January 17, plaintiff did not receive the prescribed eardrops until January 23, and did not receive earplugs or nose spray. (Id. at 3) On January 25, plaintiff reported that discharge was no longer present, but he still experienced pain and ringing. (Id. at 4)

Plaintiff experienced increased amounts of pain in his ears and, as a result, was housed at First Correctional Medical hospital from February 6, 2004 through February 18, 2004. At the hospital, he was seen by doctors, given antibiotics, nasal spray, and eardrops. (D.I. 16 at 1) On February 18, 2004, plaintiff was transferred to the Security Housing Unit and alleges he did not receive eardrops until February 25, 2004. (Id. at 2) Plaintiff was informed that he had not been given nasal spray because the prescribed brand was not available.

Plaintiff had a follow-up appointment with Dr. Howard on March 1, 2004. Dr. Howard allegedly stated that nasal spray should be administered more often, and that earplugs were a necessity. (D.I. 22 at 2) Dr. Howard also allegedly stated that he had scheduled plaintiff for a hearing test which plaintiff failed to attend. Plaintiff alleges he was unaware of a scheduled hearing test. Finally, the C.A.T. scan results needed for a complete examination were not made available for Dr. Howard. (Id.) Plaintiff continued to receive regular treatment of eardrops, nasal spray, and Motrin throughout the month of

March. (Id. at 3)

On April 12, 2004, plaintiff was informed that he was awaiting approval for earplugs and a hearing test, and was given cotton balls in the meantime. (D.I. 25 at 1) At this hearing, plaintiff received no response to his grievance concerning the C.A.T. scan films which were never delivered to Dr. Berg or Dr. Howard. (Id.) On April 25, 2004, plaintiff sent in a sick call slip complaining about discharge and pain but was not called for an examination. (Id. at 2)

On May 4, 2004, plaintiff was seen by Dr. Brown who prescribed the same eardrops that Dr. Howard had previously prescribed because the infection had returned. (D.I. 30 at 1) Dr. Brown was not sure why the earplugs had not been approved, and plaintiff alleges she stated that the infection may not have returned if plaintiff had used earplugs while showering. (Id.) Plaintiff received earplugs later that day. (Id.) On May 10, 2004, plaintiff alleges a nurse gave him the wrong eardrops because they caused burning and, therefore, could not be the same drops prescribed by Dr. Howard. (Id.) Later on May 10, plaintiff received different eardrops and experienced no discomfort. (Id. at 2)

From June 1, 2004 through June 18, 2004, plaintiff received Sudafed and nasal spray, although he alleges there were days when the nasal spray was not given to him. (D.I. 31 at 1) On June

18, plaintiff was seen by Dr. Brown who stated that the infection in his ears had returned, causing sinus headaches. (Id.) Dr. Brown prescribed eardrops and told plaintiff that he had been approved for a hearing test. (Id.) On June 23, plaintiff was taken to Dr. Howard's office where he was given a hearing test. To date, plaintiff is unaware of any recommendation by Dr. Howard following the test. (Id.) Plaintiff continued to receive nasal spray, eardrops, and antibiotics throughout the month of June, although he alleges there were days when the eardrops or nasal spray were not available. (Id.) Plaintiff alleges that he has sustained permanent loss of hearing which could have been avoided had he received proper medical attention. (D.I. 2 at 9)

III. STANDARD OF REVIEW

Because the parties have referred to matters outside the pleadings, defendant's motion to dismiss shall be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6). A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986).

"Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Plaintiff's Eighth Amendment Claim

State defendants contend that plaintiff has failed to produce any evidence to support his claim of an Eighth Amendment violation. To state a violation of the Eighth Amendment right to adequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990). Plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendant was aware of this need and was deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

The seriousness of a medical need may be demonstrated by showing that the need is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent

loss, the medical need is considered serious." Id.

As to the second requirement, an official's denial of an inmate's reasonable requests for medical treatment constitutes deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. However, an official's conduct does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the official was subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See Estelle,

429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White, 897 F.2d at 110 ("[C]ertainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness."). The proper forum for a medical malpractice claim is in state court under the applicable tort law. See Estelle, 429 U.S. at 107.

In the case at bar, the court finds that there are genuine issues of material fact as to whether plaintiff's Eighth Amendment right has been violated. There is evidence that prison officials ignored plaintiff's need for earplugs, despite memoranda from physicians stating that earplugs were a necessity. In addition, there is evidence that medical treatment was delayed for non-medical reasons, a policy that fails to address the immediate needs of inmates with serious medical conditions. Natale v. Camden County Corr. Facility, 318 F.3d 575, 583 (3d Cir. 2003). A policy or custom may exist where "the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government 'is so obvious, and the inadequacy of the existing practice so likely to result in the violation of constitutional rights, that the

policymaker can reasonably be said to have been deliberately indifferent to the need.’” Id. at 584 (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 309 (1989)). Plaintiff’s allegations suggest the absence of basic policies to insure that the medical orders of treating physicians are reasonably followed and that the medical orders of physicians are reasonably transmitted. The absence of such policies creates a genuine issue of fact as to whether treating physicians are able to exercise informed professional judgment. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979). As plaintiff alleges the presence of permanent hearing loss, a major life function, plaintiff’s medical need is serious. Saunders v. Horn, 959 F. Supp. 689, 694 (E.D.P.A. 1996). Therefore, State defendants’ motion for summary judgment for failure to state a claim is denied.

B. Eleventh Amendment Immunity

State defendants contend that they cannot be held liable in their official capacities under the Eleventh Amendment. “[I]n the absence of consent, a suit [in federal court] in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). This preclusion from suit includes state officials when “the state is the real, substantial party in interest.” Id. at 101 (quoting

Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)).

"Relief sought nominally against an [official] is in fact against the sovereign if the decree would operate against the latter."

Id. (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963)). A State, however, may waive its immunity under the Eleventh Amendment.

Such waiver must be in the form of an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Ospina v. Dep't of Corrs., 749 F.Supp. 572, 578 (D. Del. 1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985)).

The State of Delaware has not consented to plaintiff's suit or waived its immunity under the Eleventh Amendment. To the extent plaintiff alleges claims against State defendants in their official capacities, state defendants are entitled to summary judgment. The Eleventh Amendment, however, does not bar an action for injunctive relief in which a state official is the named party. Ex Parte Young, 209 U.S. 123 (1908). Consequently, to the extent plaintiff seeks injunctive relief against State defendants, or seeks damages against State defendants in their individual capacities, the motion to dismiss will be denied.

V. Representation by Counsel

Plaintiff, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to representation by counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981).

It is within the court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting . . . from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." See Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984). Having reviewed plaintiff's complaint, the court finds that plaintiff's allegations are of such a complex nature that representation by counsel is warranted.

VI. CONCLUSION

For the reasons stated, the court shall grant in part and deny in part State defendants' motion for summary judgment, and grant plaintiff's motion for representation by counsel. An appropriate order shall issue.