

UNITED STATES OF AMERICA
DISTRICT OF MAINE

SHELIA DENNISON,)
)
 Plaintiff)
)
 v.) Civil No. 00-266-B-S
)
 PRISON HEALTH SERVICES,)
 et al.,)
)
 Defendants)

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT BY
PRISON HEALTH SERVICES, PARTRIDGE, AND HARTLEY**

Shelia Dennison has filed a 42 U.S.C. § 1983 complaint against multiple defendants. (Docket No. 1.) In this order the court addresses a motion by Prison Health Services (PHS), Kim Partridge, and Deborah Hartley seeking summary judgment in their favor. (Docket No. 25.)¹ Dennison alleges that while she was an inmate at the Charleston Correctional Facility (CCF) she was subjected to cruel and unusual punishment in that the defendants were deliberately indifferent to her serious medical conditions and impermissibly retaliated against Dennison when she pressed them for proper treatment. I recommend that the court **GRANT** the defendants' motion for summary judgment.

¹ In an earlier decision I recommended granting co-defendant Scott Chandler's motion for summary judgment. (Docket No. 45.)

I also note that Dennison initially had two additional counts, one seeking recovery on a theory that her due process rights were infringed and, the other, seeking injunctive relief. Dennison has stipulated to dismissal of these two counts (Docket No. 31), so in this order I address the final remaining claim, Count II.

DISCUSSION

A. Summary Judgment Standard and the State of These Pleadings

These defendants are entitled to 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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In evaluating whether a genuine issue is raised I must view all facts in the light most favorable to Dennison and give her the benefit of all reasonable inferences in her favor. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000).

However, pursuant to District of Maine Local Rule of Civil Procedure 56 my consideration of record materials is limited by the parties’ statements of material facts, Dist. Me. Loc. R. Civ. P. 56(e) (“The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of facts.”), and Dennison’s response to this motion does not conform to the requirements of the Local Rule. Dennison has not responded to each of the defendants’ forty-four paragraphs of material facts with a separate paragraph either admitting, denying, or qualifying the assertions. Dist. Me. Loc. R. Civ. P. 56(c). The paragraphs that Dennison has not responded to in her statement of material fact are deemed admitted. With respect to the response to the twenty paragraphs that Dennison has selected to address, she does not, in her responsive statement of material fact (Docket No. 38), support all of these disputations by record citations. Subsection (e) of the Local Rule requires: “An assertion of fact set forth in a statement of material facts shall be followed

by a citation to the specific page or paragraph of identified record material supporting the assertion.” Dist. Me. Loc. R. Civ. P. 56(e) (emphasis added). Instead, Dennison has repeatedly referenced her numbered paragraphs that are contained in the “Factual Narrative” section of her “Consolidated Memorandum” opposing this motion and codefendant Chandler’s summary judgment motion. Where it is possible I have examined the record evidence cited to and considered it to the extent that it properly controverts the defendants’ assertions and there is supporting record evidence.

While I give Dennison some leeway on that score, I cannot do the same with respect to additional factual statements contained in her omnibus “Factual Narrative” that might be material to Dennison’s claims against these defendants. Dennison has not set forth these facts in an additional statement of material facts as required by the Local Rule, Dist. Me. Loc. R. Civ. P. 56(c),(e), and has thereby not given the defendants the opportunity to properly controvert the facts that pertain to their actions (though the defendants address some of the facts in this narrative in a reply statement of facts). I will not address any of the facts contained in the narrative as if they were additional statements of material facts pertaining to this motion.²

² After the court had sifted through the disputed and non-disputed facts as a predicate to this recommended decision, and long after the filing deadlines had passed with respect to this summary judgment process, Dennison filed a motion to resubmit her statement of material fact (Docket No. 46) and a new statement of material fact (Docket No. 47). These proffers, the motion explains, come in response to my recommended decision on Chandler’s motion for summary judgment where I took the same approach as outlined here. In the motion Dennison explains that none of the disputes as to fact have changed but that she has now placed the record citations that were in her factual narrative in their proper place in her statement of disputed material facts. This being the case, I will not address this new pleading. The defendants have not had an opportunity to respond to it and since Dennison states there is nothing new in this reformulation, my approach of accounting for properly supported factual assertions cross-referenced in the factual narrative should moot the need to consider the reformulated offering.

After the recommended decision on the Chandler motion had issued Dennison also filed a pleading described as “Plaintiff Dennison’s Local Rule 56(c) Statement of Additional Material Facts in Opposition to Defendant Chandler’s and Defendants Prison Health Services and Deborah Hartley’s Individual Motions for Summary Judgment.” (Docket No. 49.) This was accompanied by a “Motion to Resubmit Additional Facts” (Docket No. 48) wherein Dennison asserts that she understood her “factual

B. Undisputed Material Facts

During the time relevant to this complaint, August 29, 2000, through September 21, 2000, Dennison was an inmate at the Charleston Correctional Facility (CCF) and PHS was the contract medical provider for CCF.

I. Events at CCF

Dennison entered CCF in the fall of 1998 with pre-existing medical conditions. On August 29, 2000, the medical limitations pertaining to Dennison were: “no repeated bending; no squatting; no prolonged standing greater than one hour without ten minutes’ rest; and no lifting greater than ten pound.”³ The most recent version of the restrictions was dated March 2000.⁴

narrative” approach to the two motions to have been authorized when the court authorized her motion to file a consolidated response to the two motions for summary judgment. Dennison’s letter to the clerk discussed the filing of a consolidated memorandum and did anticipate that the filing a consolidated memorandum would save him from repeating most of the statement of fact. (Docket No. 35.) I could not fairly construe this factual narrative, imbedded in the memorandum, as “a separate section of additional facts” required by the rule as the factual statements were not labeled so and, as the cross-references in the reply statements of facts amply demonstrate, many of these were not additional but were duplicative or responsive to the plaintiffs’ statements of fact. Though the court can readily parse the arguments in the consolidated memorandum as it relates to the different defendants, the Court cannot cull the 116 paragraphs of narrative facts to determine which are additional to the facts asserted by these defendants as well as material to Dennison’s claims against them (as opposed to Chandler). The local rule serves not only to assist the court in identifying the facts that are indeed properly in dispute but also allows the opposing party to fairly respond. These defendants have not had the opportunity to respond to this new statement of additional fact. I do not read the district judge’s April 15, 2002, endorsement as excusing Dennison from complying with the requirements of the local rule with respect to the format of statements of material fact, facts in dispute, and additional facts.

³ In response to this assertion, paragraph 3 of the Defendants’ Statement of Material Fact, Dennison argues that these restrictions were not more current than information gained with respect to Dennison’s condition on August 30, 2000, and then again on September 11, 2000, that put Hartley and PHS on notice that Dennison’s medical condition was worsening. This is by way of argument and does nothing to qualify or dispute the defendants’ assertions about what restrictions were in place on August 29, 2000. Dennison also attempts to challenge the currency of the work restrictions on the grounds that they were established when Dennison first arrived at CCF and were not updated on a regular basis. However, the referenced deposition testimony (Partridge Dep. at 16-18) does not provided record support for this qualification.

Also in response to this paragraph 3 statement of fact by the defendants Dennison claims that she was assigned work as a dorm cleaner and that “the special work assignments at issue in this case were not her regular duties.” (See Dennison Oct. 24, 2002, Dep. at 125-30.) This does not dispute the statement of material fact in paragraph 3 and if it is meant as an additional statement of material fact it should have been so presented. The fact, I note, would not alter my recommendation.

⁴ Dennison cites to the Exhibit 1 of the Partridge deposition for the factual assertion that the most recent restrictions were from March 2000. (See DSMF Ex. F at Ex. A.) The relevant deposition testimony

On Tuesday, August 29, 2000, Dennison submitted to the medical department a slip requesting treatment for pain in her back and neck. As a consequence, Partridge, a registered nurse on the staff of the CCF, saw Dennison the following morning at 9:00 a.m. Partridge provided Dennison with a heating pad and told Dennison that she would be put on the list to see the facility doctor, who visited CCF once a week.

On August 31 Dennison again submitted a medical treatment slip, indicating that she was experiencing severe pain. As a result she was seen on September 2 by a licensed practicing nurse (a non-defendant) who released Dennison, indicating that she should continue to use her heating pad and take Motrin twice a day.

On the same day, September 2, Dennison submitted another medical slip in which she complained of extreme back pain. In response she was seen on September 3 by the nurse who had seen her on September 2. After consulting a physician assistant this nurse placed Dennison on a “medical room restriction” that limited Dennison to her room, save for going to chow and the bathroom.

Dennison was next seen on September 5 by the facility doctor, this being his first visit after Partridge put Dennison on the list to see the doctor after their August 30 meeting. The doctor’s notation stemming from this examination read: “Thoracic range

supports this statement, though Partridge was somewhat equivocal when asked if she remembered filling out the form on March 9, 2000. (Partridge Dep. at 15-17.) I take this as a qualification of this statement of material fact.

In paragraph 4 of the Defendants’ Statement of Material Fact the defendants assert that Dennison was of the opinion that the restrictions were sufficient to provide her adequate protection given her medical conditions. Dennison counters that the Dennison deposition testimony offered as record support for this proposition was taken out of context; Dennison only testified that the restrictions were adequate before the events of late August and early September 2000, at which point Dennison began experiencing a great deal of pain. Though the dispute might be genuine, I fail to see how the defendants’ factual assertion as to Dennison’s litigation characterization (as opposed to characterization at the time of the crucial interactions to the defendants) of her satisfaction or dissatisfaction with the work restriction is material to the defendants’ state of mind under the deliberate indifference standard I must apply below. Dennison testified at her deposition that the restrictions seemed fine to her up until the August 29, 2000, incident. After that date neither party contests that Dennison was discontent with her work assignments in light of her medical conditions.

of motion full. Mild thoracic tenderness. Poor posture.” He assessed thoracic strain, ordered an x-ray, and prescribed Motrin, rest, and no lifting. After this visit Dennison was removed from medical room restriction. The doctor saw Dennison again on September 11. This was a follow-up visit and they discussed x-rays that had been taken of Dennison. The doctor told Dennison that she had osteoporosis.⁵

On September 14 Dennison submitted a medical slip seeking medical treatment for back and shoulder pain. Her slip read: “HURT NECK, BACK + SHOULDER MOPPING GYM FLOOR! HAVING GREAT DEAL OF PAIN. 3:15 p.m.” (Partridge Aff. Ex. F.) On this date Hartley, at about 4:00 p.m., was told that Dennison was complaining of pain and/or a work injury – the parties dispute whether Dennison reported this as an injury or reported pain.⁶ At around 4:10 p.m. Hartley received a call from someone identifying himself as Dennison’s lawyer. He indicated that Dennison had called him, and was crying and complaining of pain. After receiving this call Hartley walked to Dennison’s dorm to talk with the dorm officer. The officer advised Hartley that Dennison had been walking up and down the hallway and that she had not requested to see someone from the medical department.⁷

⁵ Dennison adds the diagnosis of osteoporosis as a qualification of the defendants’ statement concerning the contours of the September 11 doctor’s visit. In their reply to the factual narrative the defendants do not controvert this assertion.

⁶ In response to this paragraph Dennison offers not only the quotation of the request slip but argument as to why a jury could conclude that Hartley’s response to this slip was not according to prison policy that reported work injuries required an immediate examination and Hartley’s nonconformance with this policy reflected her deliberate indifference to Dennison.

⁷ Responding to the defendants’ description of the interchange between Hartley and the dorm officer on duty shortly after 4:10 p.m., Dennison attempts to add what I take as an additional statement of fact about how the dorm officer Hartley spoke to was newly arrived: “The dorm officer whom Harley spoke to at 14:00 [which would be 2:00 p.m. on a twelve hour clock] had only been on duty a short while, and Hartley knew that, since she knew that the shift change occurred around 3:30.” (Plaintiff’s Statement of Disputed Material Facts (Docket No. 38) ¶ 22.) The reason I take this as an additional statement of fact is that there is no statement of fact by the defendants that Hartley arrived at the dorm because of a call from a dorm officer; the defendants have asserted that she received a notification of Dennison’s complaints and cite record support that indicates that she received a call from co-defendant Chandler, the recreation officer

The defendants state that at approximately 5:00 p.m. Hartley was approached by Dennison in the chow hall concerning her need for medical care and Hartley told Dennison that she needed to submit a sick call slip. (Hartley Dep. at 20.) Dennison offers further detail of this interaction. She asserts that she told Hartley that she had hurt herself, had put in a medical slip, and that she was in a lot of pain. (Dennison Dep. at 38.) Hartley indicated in response that Dennison would be seen in the morning when the slips were collected. (Id.) Dennison asked Hartley if her lawyer called and “Hartley just smile facetiously, said, “Did he?, and walked off.” (Pl.’s Mem. Opp’n Summ. J. at 14 ¶ 83; Dennison Dep. at 39.)⁸

At this time in the chow hall the defendants assert that Hartley observed that Dennison was getting up and down with legs crossed and had eaten ninety-percent of her dinner. (Hartley Dep. at 21.) Hartley saw Dennison moving freely. (Id. at 24.) Dennison counters this statement by asserting that Hartley’s observations about Dennison were colored by her earlier formed belief that Dennison was faking her pain because of the phone call from Officer Chandler. Dennison protests that Hartley was in the chow hall to spy on Dennison. In support of this assertion Dennison cites to ¶ 76 of her factual narrative which states only: “Hartley claims now, in this litigation, that she did not take Dennison as asking for medical attention.” (Pl.’s Mem. Opp’n Summ. J. at 13 ¶ 76 (citing Hartley Dep. at 20).) The cited record support is Hartley’s deposition testimony that indicates that Hartley was not absolutely sure what was said but that she did not think that Dennison was asking for medical attention at the time of this chow hall interaction.

overseeing Dennison’s September 14, 2000, work assignment (DSMF ¶¶ 20) and the undisputed call from Dennison’s attorney (DSMF ¶ 21).

⁸ Dennison retorts that there was more to this encounter, cross referencing 13 paragraphs of her factual narrative. The thirteen paragraphs span a gamut of interactions, three, ¶¶ 81-83, pertain to the chow hall interaction.

(Hartley Dep. at 20.) Dennison asserts that she was exhibiting signs of pain as she walked; she would move one leg forward, step on it with pain, and then repeat this with the next leg. (Dennison Dep. at 40.)

At 5:50 p.m. Hartley received a call from a correction officer indicating that Dennison was complaining of pain and wanted to come to the medical department. Hartley told the officer that Dennison had to take Tylenol and Advil and rest with a heating pad. Hartley prescribed this treatment because it was consistent with the treatment of choice indicated by the doctor at the time of the September 11 doctor's visit (three days prior). (Hartley Dep. at 24.)⁹

At 7:50 p.m. Hartley called the dorm officer to make sure there was no increased problem (presumably with respect to Dennison). The officer reported that Dennison was walking around without difficulty and that she had not rested or used the heating pad. Dennison does not contravene this statement but asserts that she was in pain at this time. (Dennison Dep. at 40.)

On September 15, 2000, Dennison went to the medical department and was seen by Hartley. Dennison was complaining of numbness in her neck and left shoulder and stated that she had pain going down her back and across her hips. She reported that she experienced hip pain when she "overdoes it." Her neck pain, she said, was present every hour of every day. She described no numbness or tingling down her legs and was able to "plantar dorsiflex" both feet.

⁹ Dennison replies that Hartley prescribed this treatment because she was hostile towards Dennison, did not take her seriously, did not want to examine her, and did not really care whether or not Dennison was in pain. She points to the diagnosis of osteoporosis and her complaints of a work place injury that should have triggered an immediate examination. (DSMF ¶ 28.) These latter allegations are already part of the factual recital. Dennison's argument about what should be inferred from these facts is not properly embedded in her disputation of the defendants' statements of fact. Furthermore, her record support for this single reply paragraph to a rather discrete factual assertion by the defendants is 21 paragraphs of her factual narrative. (Pl's Mem. Opp'n Summ. J. at 3 ¶¶ 7-9, 12-15 ¶¶ 69-86, 19 ¶ 112.)

The defendants assert that Hartley called the covering physician assistant, non-defendant Doug Morong, with this information and he imposed medical room restriction for pain control and rest for two weeks. He ordered that Dennison not work, partake in recreation, but permitted her to go to medical. Meals were to be taken in the dorm. Dennison counters that Hartley had independent authority to make the medical room restriction decision.¹⁰

On September 19 Dennison was standing in line to receive her medication and Dennison, seeing the doctor, asked Hartley if she could see him, and then called out to the doctor that she wanted to see him. Dennison was told to submit a sick slip. Dennison stated that she had already submitted a slip¹¹ and had not been seen. Hartley smiled in Dennison's face and said the doctor was too busy.¹² On the same day, at approximately 12:30 p.m. Hartley received a telephone call from one of Dennison's attorneys who said that Dennison had been vomiting, was crying and in pain, and wanted to see a doctor. Hartley told the attorney that the doctor was done for the day but that she would notify Dennison's caseworker, which she did.

On September 20 Hartley received a call from the correctional staff indicating that Dennison was refusing to eat. She then received a follow-up call indicating that Dennison had eaten her lunch in a ten minute span. Next, Hartley received a third call

¹⁰ Dennison means to argue that Hartley had an active role in this decision. She asserts that in the call to the physician assistant Hartley reported that Dennison was making false claims for medical treatment and that it was Hartley that ordered, suggested and concurred, or collaboratively decided, that medical room restrictions be imposed to punish Dennison for making false claims and threatening the medical staff that she would report their license. Dennison also suggests that the restrictions were animated by a general dislike for Dennison. However, in support of these contentions Dennison cites to a paragraph in her factual narrative that states merely that Hartley conducted the exam, phoned the physician assistant, had the independent authority to put her on the medical room restrictions, and the restrictions were imposed. (Hartley Dep. at 44-45; Partridge Dep. at 50-54.)

¹¹ There is no slip in the court record between the September 14 slip and the September 19 pill-line interaction.

¹² This rendition of the events of September 19 is in accordance with Dennison's factual narrative. In their reply statement of fact the defendants have not challenged her description.

indicating that Dennison was vomiting (unwitnessed). Hartley confirmed that Dennison was alert, oriented, and taking medications without difficulty. After lunch Hartley gave Dennison her medications and she inquired how Dennison was feeling and, on the basis of this conversation, Hartley was of the opinion that everything was okay.¹³ A correctional officer advised Hartley that Dennison's vomiting was self-induced. Dennison explains, in qualifying these statements, that her eating limitations and vomiting are a consequence of a pre-incarceration surgical procedure.¹⁴

On September 21, Dennison was transferred from CCF to the Maine Correctional Center. The most significant reason for Dennison's transfer was reports that she was suicidal. Hilda Mulherin, Dennison's caseworker at CCF recommended that Dennison be transferred from CCF because Dennison needed more mental health service than available at CCF and Dennison had become a threat to the orderly management of the facility. Mulherin's recommendations were not based on Dennison's demands on the medical department but rather on the demands placed on the caseworker. The decision to transfer Dennison from CCF was made by the Department of Correction Classification Committee and no person from PHS was on the Classification Committee.

2. *Policies and Procedures*

With respect to the policies and procedures in place vis-à-vis an inmate's ability to obtain medical care at CCF, the defendants assert that the method for obtaining care in

¹³ Dennison attempts to qualify this description of the events of September 20. In support she cites to paragraphs of her factual narrative, ¶¶ 109-110. Paragraph 109 states that Dennison was put in an observation cell on a suicide watch (on what date it is not clear). (Dennison Dep. at 59.) As the defendants point out, there is no record support for the assertion that this was in the nature of a suicide watch. As far as it goes, this is an additional fact that would need to be set out in a separate statement of material fact. Treating it as a fact properly in dispute would not alter the outcome of my analysis.

¹⁴ The defendants assert that Dennison's assertions about her eating limitations and gag reflex would not be admissible at trial. (Reply Pl.'s SMF ¶ 110.) I address it herein because Hartley was aware of Dennison's medical history, and the inference that Dennison seeks to elicit is that Hartley's reaction to Dennison's eating woes is one of deliberate indifference.

non-emergency situations¹⁵ was through a medical request slip (Partridge Dep. at 30; 81-82), a policy that would establish a “paper trail” providing proof of when an inmate had asked to be seen (id. at 82). Dennison qualifies this statement by asserting that the filing of a medical slip was not the only trigger for medical care; PHS had a policy of following-up with inmates to check their condition within a reasonable time after they were put on a medical room restriction. (Partridge Dep. at 54.)¹⁶

The facility had a policy providing that personnel would never discuss complaints with inmates in public, a prohibition that covered the “pill line” and the chow hall. This policy was aimed at insuring that inmates were always observed when controlled substances were being transferred and was also aimed at protecting patient confidentiality.¹⁷

As a general matter placement of an inmate on medical room restriction is not punitive, the defendants aver. The purpose of a medical room restriction is to prescribe rest. (Partridge Dep. at 51-52; Partridge Aff. § 14.) In the experience of Partridge if an

¹⁵ The defendants state that Dennison’s complaints were not classifiable as emergency such as she would need to be seen immediately by the facility physician or transferred to the hospital. (DSMF ¶ 35.) However, in an apparent typing error, the dates offered during which Dennison’s complaints were non-emergency are August 14 through August 20, 2000. (Id.) This is one of the paragraphs to which Dennison offered no response. As the timeframes are crucial here I conclude that as plead this statement of fact is immaterial.

¹⁶ Dennison also asserts that when she was seeking medical care four days after being put on medical room restriction she was told to put in a slip. However, neither the factual statement nor the record support in the cross-referenced paragraph in her “Factual Narrative” pertains to this assertion. (Pl.’s Mem. Opp’n to Summ. J. at 17, ¶ 101; Dennison Dep. at 51.) The court also disregards Dennison’s assertion in response to this paragraph about another policy allegedly ignored by PHS concerning responding to work-related injuries as it is certainly the type of assertion that is not a denial or qualification of this paragraph and would need to be set out in a separate statement of material fact.

¹⁷ In response to this assertion Dennison argues that the policy would not have prevented Hartley from telling Dennison to come to Medical on the night of September 14 for an examination and that the fact that it was the patient that was asking in public suggests that the confidentiality concern is a smoke screen. Further, Dennison suggests, Hartley could have spoken to Dennison in private at the dorm that evening when she came and spoke with a dorm officer or could have brought Dennison back to the medical department. Instead she insisted that Dennison submit a medical slip. From these alternatives not taken the jury could conclude that Hartley, who Dennison characterizes as facetious and sarcastic towards her during these interactions, was deliberately indifferent to her medical needs.

inmate who needed rest was not put on medical room restriction the inmate would take the opportunity to do what ever she wanted to do, and not limit herself to rest. (Partridge Dep. at 51.) It is a form of treatment and alerts security that there is a medical reason why the patient needs to be restricted. (Partridge Dep. at 47, 50; Partridge Aff. ¶ 14.) Dennison asserts that in this case Hartley used the restriction as a way of punishing Dennison.

Inmates who become suicidal are transferred out of CCF as a matter of course.

Discussion

First it is necessary to define the confines of this suit as it pertains to the remaining defendants. Dennison describes this count as if it has two distinct grounds for liability: deliberate indifference to Dennison’s serious medical needs and retaliation against Dennison for her exercise of her constitutional right. With respect to this latter ground for recovery, Dennison seems to be arguing that the constitutional right that she was “exercising” was the Eighth and Fourteenth Amendment right of an inmate to not be refused necessary medical care as a form of punishment. (Pl.’s Mem. Opp’n Summ. J. at 23-24.) The defendants also conceive of this claim in this manner. (M. Summ. J. at 8-10.)

The cases cited in support of this theory that there is a claim for retaliation vis-à-vis the Eighth Amendment are by and large First Amendment or related Fourteenth Amendment access to the courts retaliation claims. See Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996) (addressing a claim of ‘retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under § 1983’);

Goff v. Burton, 7 F.3d 734, 735 (8th Cir.1993) (prison officials may not retaliate against an inmate for filing legal actions in the exercise of his constitutional right of access to the courts). And in the case principally relied on by Dennison, the First Circuit was addressing just such a claim when it stated: “Since appellant does have a constitutional right to petition the courts, Bounds v. Smith, 430 U.S. 817, 821-22 (1977); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), and since he alleges that the transfer was ordered in retaliation for his exercise of that right, he properly stated a cause of action.” McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979). I can find no case authority discussing a cognizable claim for retaliation in asserting such negative (as opposed to positive) rights as being free from cruel and unusual punishment under the Eighth Amendment or free from excessive force under the Fourth Amendment. It is important to remember that there is no stand alone constitutional right to medical care. The constitutional obligation arises in the case of the incarcerated individual because the deprivation of medical care must be so serious as to rise to the level of a cruel and unusual punishment. Though Dennison mentions some things about her threats to report the licenses of some of the medical staff, I cannot fairly construe this as a claim that the defendants retaliated against her for the exercise of her First Amendment rights or her Fourteenth Amendment right to petition the courts. Indeed Dennison does not argue that the defendants retaliated against her for exercising any such rights.

A. *The Deliberate Indifference Standard*

The United States Supreme Court has framed the broad outlines of the deliberate indifference inquiry in two cases: Estelle v. Gamble, 429 U.S. 97 (1976) and Farmer v. Brennan, 511 U.S. 825 (1994). The Estelle Court identified in the Eighth Amendment

protection the “government’s obligation to provide medical care for those whom it is punishing by incarceration.” 429 U.S. at 103. It observed: “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Id.* In *Farmer* the Court more precisely articulated the standard a plaintiff must meet to hold a prison official liable under the Eighth Amendment. It identified two prongs. First, the deprivation alleged must be “objectively ‘sufficiently serious.’” 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the defendant must have a culpable state of mind, which means that the defendant was deliberately indifferent to the inmate’s health or safety. *Id.*

1. Hartley

With respect to Hartley, Dennison advances her Eighth Amendment claim on two different grounds. She argues, first, that Hartley exhibited deliberate indifference to her serious medical needs and, second, that Hartley placed Dennison on medical restriction not for medical reasons but to punish her for making too many demands on the medical and correctional staff surrounding her medical needs and limitations.¹⁸

With respect to the first of these claims both parties invite me to assume, (Mot. Summ. J. at 6; Pl.’s Mem. Opp’n Summ. J. at 27-28), that Dennison’s medical condition is sufficiently serious to meet the first *Farmer* prong. 511 U.S. at 834. The question, in the parties’ minds, then becomes whether Hartley had the requisite state of mind: is there

¹⁸ In her motion to resubmit her statement of material fact, Dennison explains that she has cited her entire case for retaliation as record support for her statement that her placement on medical restrictions was punitive. She explains: “Since the purpose of plaintiff’s placement on medical room restriction is the whole case, there seemed to be no other valid way to support that statement, and to controvert the defense statement that the purpose was not punitive.” (Pl.’s Mot. to Resubmit at 2-3 (emphasis added).)

a genuine dispute as to facts that would support an inference that Hartley, subjectively, disregarded Dennison's need for medical care? ¹⁹

The pre-September 14 interactions -- August 29, August 31, September 2, September 5, and September 11 -- do not involve Hartley. Rather, they establish that Dennison's medical record included at least three medical slips being submitted per which Dennison indicated that she had severe or extreme pain in her back and neck; was given a heating pad and prescribed an over-the-counter pain reliever; was put on a medical restriction for three days; and was twice seen by a doctor who ordered an x-ray, prescribed Motrin, rest and no lifting, and diagnosed osteoporosis. For purposes of deciding this motion, this is information that Hartley was aware of when she interacted with Dennison on September 14 and after.

With respect to the post -September 14 conduct of Hartley I conclude that at most Dennison has made a case that supports an inference that Hartley did not believe or like Dennison which could be evidence to support a conclusion that the medical care provided to Dennison was chosen with the intent to punish. However, I do not find enough factual support for a conclusion that the medical care that was provided to Dennison was inadequate. Dennison does not dispute that Hartley as well as other prison officials responded to her complaints for pain and acknowledged that she had a serious medical condition. Compare Thompson v. Gibson, ___ F.3d ___, 2002 WL 982583, *2 (10th Cir. May 14, 2002) (observing that a medical condition is sufficiently serious if a layperson would see that doctor intervention was required). The facts also indicate that steps were taken, including some by Hartley, to remediate Dennison's pain. Compare Morales v.

¹⁹ Dennison and the defendants have provided a very date specific account of Dennison's interactions with the medical staff during the period between August 29 and September 21. Compare Morales v. Mackalm, 278 F.3d 126, 133 (2d Cir. 2002).

Mackalm, 278 F.3d 126, 133 (2d Cir. 2002) (stating that the plaintiff “arguably pleaded facts sufficient to show a serious deprivation by alleging that he suffered constant, unremediated pain”)²⁰; Reed v. McBride, 178 F.3d 849 (7th Cir. 1999) (reversing summary judgment in favor of defendants in a deliberate indifference to serious medical needs case involving denial of food and essential medications); Watson v. Caton, 984 F.2d 537 (1st Cir. 1993) (reversing dismissal of the claims in the complaint that alleged that prisoner was denied any treatment for a pre-incarceration hand injury).

So whatever Hartley’s attitude toward Dennison may have been -- whether or not she believed that Dennison was faking her complaints, sniggered at Dennison for calling her lawyer, thought that Dennison vomited to get attention, spied on Dennison in the chow hall, took Dennison to be reporting just pain and not an injury -- Hartley’s medical responses to Dennison’s complaints were not unreasonable, or in other words, the record does not support a conclusion that there was a deprivation of adequate medical care. Indeed, the treatment Dennison received between August 29 and September 21 for back and neck pain appears to be the sort of treatment a non-incarcerated individual would receive from a family physician: a few office visits, diagnostic tests, pain medication, a directive to apply heat, and a recommendation of bed rest.²¹ The fact that Hartley insisted that Dennison follow the standing policy of putting in medical slips for non-emergency care does not add fuel to Dennison’s argument.

²⁰ The Morales panel wrote: “To state an Eighth Amendment claim for medical indifference, Morales must first allege a sufficiently serious deprivation that is, ‘a condition of urgency, one that may produce death, degeneration, or extreme pain.’” 278 F.3d at 132 (quoting Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir.1994)). I read Farmer to include within this first prong a consideration not only of the extent of illness, injury, or pain but also of how the defendant responded to this condition, viewed objectively – an examination of the acts or omissions alleged to have occurred without addressing motivations.

²¹ Dennison does not describe what a more appropriate course of treatment would look like.

Thus, though Dennison may indeed have had serious medical conditions during this time period, I do not agree with Dennison that Hartley's response to these conditions meets the first of Farmer's prongs. Though Dennison's medical conditions may have caused her serious pain, Hartley's actions or omissions can not be faulted, as the record demonstrates that she did intervene to respond to Dennison's complaints. Hartley's response to Dennison's complaints provided her with "the minimal civilized measure of life necessities." Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Inmates do not have a right to limitless doctor visits or their choice of medications and negligence and medical malpractice are not actionable. Daniels v. Williams, 474 U.S. 327 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights violations and cannot be used to sue correctional officials for negligence). Without a sufficiently serious deprivation of medical care there can be no constitutional violation; a bad attitude by a prison medical provider toward an inmate is not in and of itself actionable.

Dennison's argument with respect to the imposition of the medical room restrictions suffers the same deficiency vis-à-vis the Farmer objectively serious deprivation prong. It is a thin string indeed upon which Dennison relies in suggesting that Hartley made the decision to place Dennison on medical room restrictions as a form of punishment. However even assuming it was Hartley and not the physician assistant, Morong, who made the decision to impose the restrictions, these restrictions lasted no longer than a week and did not deprive Dennison the "minimal civilized measure of life necessities." Wilson, 501 U.S. at 298 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); see also Rhodes v. Chapman, 452 U.S. 337, 346, 348-49 (1981) (double celling,

placing two inmates in a single cell, may cause pain but not Eighth Amendment cognizable pain); compare Delaney v. DeTella, 256 F.3d 679, 683-85 (concluding that a complete denial of all out of cell exercise for six months was sufficient to satisfy the objective prong of Farmer, but noting that short-term denials of exercise may be inevitable “and are not so detrimental as to constitute a constitutional deprivation”). Finally, I note, that if this claim were drawn as a prison conditions Due Process claim, it would also fail under the objective standard of Sandin v. Conner, 515 U.S. 472 (1995): it did not impose an “atypical and significant hardship” on Dennison “in relation to the ordinary incidents of prison life.” Id. at 484.²²

2. Claims against Kim Partridge

Though there is no indication in the record that Dennison has dismissed her claims against Partridge, she has responded to this motion for summary judgment as if this were the case. Dennison’s reply memorandum addresses only the claims against Chandler, PHS, and Hartley. Therefore, Dennison has not controverted by argument any claims pertaining to Partridge.

Furthermore, in responding to the defendants’ statement of material fact, Dennison admits that Partridge saw Dennison on August 30 and Partridge gave Dennison a heating pad, put her on a list to see the doctor, and at the next visit the doctor saw Dennison. The only other material fact concerning Partridge is that she would generally check on a patient put on medical room restriction in a reasonable period of time after the restriction was imposed. There are no allegations that Partridge played a role in imposing

²² I recognize that Dennison is arguing that the medical restrictions were the equivalent to a disciplinary sanction in terms of what she was prohibited from doing. However, the record demonstrates that they were not imposed, as it were, out of the blue for no explicable medical reason; indeed, Dennison admits that she had repeatedly complained of pain and a lack of relief there from.

the restriction or determining when Dennison would be seen thereafter. Therefore, I conclude that Partridge is entitled to summary judgment in her favor.

3. *PHS*

As with Partridge, Dennison does not advance an argument in her opposition with respect to her claims against PHS. It is conceivable that she had in mind Monell v. Department of Social Services, 436 U.S. 658 (1978) and some sort of respondeat superior liability based on PHS policy and custom. See, e.g., Terrance v. Northville Regional Psychiatric Hosp., 286 F.3d 834, 847 (6th Cir. 2002). Based on the undisputed facts concerning PHS policy and custom it is clear that such a claim does not survive this motion for summary judgment.

CONCLUSION

For these reason I recommend that the Court **GRANT** Prison Health Services, Partridge, and Hartley's motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated June 7, 2002

Margaret J. Kravchuk
U.S. Magistrate Judge

TRLIST

PR1983

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 00-CV-266

DENNISON v. PRISON HEALTH SERVIC, et al
12/26/00

Filed:

Assigned to: Judge GEORGE Z. SINGAL
Demand: \$0,000
Lead Docket: None
Question
Dkt# in other court: None
Cause: 42:1983 Prisoner Civil Rights

Jury demand: Both
Nature of Suit: 550
Jurisdiction: Federal

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