

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MITCHELL WALL,)
)
Plaintiff)
)
v.) Civil No. 02-189-P-C
)
MARK DION, et al.,)
)
Defendants)

**RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT
AND ORDER GRANTING MOTION TO AMEND AND DENYING MOTION
FOR APPOINTMENT OF COUNSEL**

Mitchell Wall has filed a 42 U.S.C. § 1983 complaint alleging, principally, that the defendants violated his constitutional rights when they denied him proper dental treatment during his incarceration at the Cumberland County Jail. (Docket No.1.)¹ Summary judgment motions have been filed by three sets of defendants, Prime Care Medical, Inc. (Docket Nos. 43&56), Correctional Medical Services, Inc. (Docket No. 33),² and Sheriff Mark Dion (Docket No. 39). Wall has responded to the three motions with one responsive motion and a statement of material fact (Docket Nos. 62 & 63), but has not filed a reply statement of material fact in response to the three statements of material facts filed by the defendants. Wall did file a “motion to amend for opposition of summary for Local Rule 56(e)” that is, in essence, an effort to identify record support for many of his paragraphs of material fact. (Docket No. 80.) The objections to this

¹ Wall lodged the complaint in state court but the defendants removed the action to this court.

² Richard Intiso, D.D.S. and Diane North are also defendants in this action. They have been granted leave to file dispositive motions up to ten days after the resolution of the current motions, because they had originally been named only as John and Jane Doe defendants and Wall did not learn their names until after the close of discovery. I gave him leave to amend his complaint to name them and I granted Intiso and North the opportunity to file their own summary judgment motions after the original deadlines for filing such motions had passed. (Docket No. 72.)

pleading by PrimeCare Medical, Inc. (Docket No. 81) and Correctional Medical Services, Inc. (Docket No. 82) notwithstanding, I **GRANT** Wall's motion to amend. Wall has also filed a motion for appointment of counsel (Docket No. 83) which I **DENY**. And for the reasons set forth below, I recommend that the Court **GRANT** the three motions for summary judgment.

Discussion

The 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 the defendants are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I review the record in the light most favorable to Wall and I indulge all reasonable inferences in his favor. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir.2000).

However, the reality that Wall has failed to place a single one of the defendants' facts in dispute means that I deem the properly supported facts as admitted. See Faas v. Washington County, 260 F.Supp.2d 198, 201 (D. Me. 2003). And, although I sympathize with his plight, Wall's pro se status does not relieve him of his duty to respond in accordance with the rules, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y.2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), and the Court is obligated to fairly apply the rules

governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56. That said, in view of Wall's pro se status, I do grant his motion to amend and have considered the record support proffered by Wall vis-à-vis his own statement of material facts.

Before proceeding to set forth the facts it is necessary to clarify the legal parameters of Wall's suit, parameters that have to date been somewhat amorphous as a consequence of Wall's prodigious and somewhat chaotic pro se pleadings. As indicated in my recommended decision on the medical defendants' motions to dismiss, the overriding claim is that Wall's constitutional right to be free from cruel and unusual punishment was violated because the defendants were deliberately indifferent to his serious medical needs. Wall v. Dion, 257 F. Supp. 2d 316, 318 (D. Me. 2003). Closely associated with this Eighth and/or Fourteenth Amendment claim is Wall's assertion that there is a policy or custom at the jail that is the animating force behind the denial of appropriate dental treatment.³ As I also indicated in that earlier memorandum, Wall has pleaded claims under the Americans with Disabilities Act and the Equal Protection Clause of the United States Constitution. Id. at 319 n.3. However, I indicated at that juncture that a contract theory of liability appeared on its face to have no merit, id., and nothing generated in this summary judgment phase of litigation has resuscitated such a claim.⁴ Finally, I agree with Correctional Medical Services, Inc (CMS) that no further "constructive amendments" of Wall's complaint can be countenanced at this late date and

³ Wall's earlier observation that a failure to train can lead to supervisory liability has remained purely theoretical and he has neither argued such a theory nor propounded facts that could underpin such a claim. Likewise, any suggestion of state law tort claims I deem abandoned.

⁴ Wall states that there was a contractual obligation for the medical defendants to provide medical/dental services to the inmates. (Wall SMF ¶ 19.) However, his record support for this proposition (id. Exs. D-1, D-2) does not substantiate the factual assertion, let alone a claim that there was a contractual duty owed Wall.

I will not read Wall's response to the summary judgment motions as putting into play a count under the Rehabilitation Act. (See CMS Reply Mem. at 1-3, Docket No. 78.)

Four Varieties of Facts

PrimeCare Medical, Inc. Statement of Material Fact

Up until October 31, 2001, of Wall's incarceration at the jail, PrimeCare Medical, Inc. (PCM) contracted with the Cumberland County to provide medical care, including medically necessary dental care, to inmates at the jail. (Id. ¶ 2.) PCM contracted with Doctor Richard Intiso, a licensed dentist, to provide the medically necessary dental care. (Id. ¶ 3.) PCM engaged Intiso as an independent contractor, rather than as a regular employee, from May 2, 2001, until the October 31, 2001, termination of the PCM's contract with the jail. (Id. ¶ 4.) Neither PCM nor Intiso had any policy or practice of refusing dental treatment to inmates with blood-borne infections such as HIV or Hepatitis C. (Id. ¶¶ 5,6.)

Intiso saw Wall four times between August 20, 2001, and March 18, 2002. (Id. ¶ 7.) On August 20, 2001, Intiso saw Wall for a small ulceration behind a front tooth. (Id. ¶ 8.) Intiso discovered a cavity and a reversible pulpitis. (Id.) Wall's only complaint at this visit was recorded as a "fleeting sensitivity to cold." (Id.) At the time of this visit Wall did not require an emergency filling but Intiso arranged for Wall to return for a temporary filling if needed. (Id.) The medical and dental records reflect no further complaints about this tooth. (Id.) Although Intiso provided other dental care to Wall, this care occurred after PCM's contract with Cumberland County had been terminated. (Id. ¶ 9.)

Correctional Medical Services, Inc. Statement of Material Fact

Wall was a pretrial detainee at the Cumberland County Jail during the time relevant to this dispute, (CMS SMF ¶ 1) although he is no longer incarcerated at the jail (id. ¶ 16). On November 1, 2001, CMS assumed responsibility for providing health care services at the Jail. (Id. ¶ 2.) Richard Intiso, a Maine licensed dentist, has provided dental care for the jail's inmates on behalf of CMS as of that date. (Id. ¶ 3.)

Intiso saw Wall on three occasions, the latter two were while Intiso was providing services under a contract with CMS. (Id. ¶ 4.) On November 26, 2001, Intiso saw Wall for a gum infection and ordered an antibiotic, an appropriate treatment that typically controls such an infection within two to four days and relieves the corresponding pain. (Id. ¶ 5.) In the aftermath of this treatment Wall did not complain further and, in Intiso's view, this was because Wall's pain was relieved. (Id. ¶ 6; Intiso Aff. ¶ 6.)

On March 6, 2002, Intiso saw Wall again, this time for an abscess in a tooth and another gum infection. (CMS SMF ¶ 7.) Intiso prescribed an antibiotic and ordered that Wall be put on a list to return for an x-ray and an extraction. (Id.) In Intiso's opinion it was appropriate to attempt to control the infection with antibiotic therapy before performing an extraction. (Id.) The planned extraction was not an emergent problem as Wall's condition in March 2002 neither had nor threatened to have serious impact on Wall's physical health. (Id. ¶ 10.) In Intiso's view, Wall could not have experienced complication from any delay in performing the extraction. (Id.)

Intiso did not delay or deny treatment of Wall because of any concern on Intiso's part about Wall's Hepatitis C. (Id. ¶ 8.) Intiso has performed extractions for numerous patients who are infected with Hepatitis C, HIV, and other serious, communicable

diseases, within and outside the correctional environment. (Id. ¶ 9.) On each occasion that he was called to see Wall, Intiso provided what he considered to be professionally appropriate and competent dental care. (Id. ¶ 11.)

At no time since November 1, 2001, has it been the policy of CMS, in providing health care services to inmates at the Cumberland County Jail, to deny or limit the delivery of such services, including dental services, on account of any inmate's infection with the Hepatitis virus (id. ¶ 12) nor has CMS ever authorized, approved, endorsed, or ratified the denial or limitation of medical care, including dental care, at the Cumberland County Jail on account of an inmate's infection with the Hepatitis virus (id. ¶ 13).

Diane North, the Health Services Administrator for CMS at the jail, has never been made aware that any physician or dentist acting on behalf of CMS at the jail has denied or limited medical or dental care on account of an inmate's infection with the Hepatitis virus. (Id. ¶ 14.) If such a thing had come to the attention of North she would have taken action to correct the situation. (Id.) North has never been made aware of any facts which would cause her to believe that Intiso has ever denied or limited dental care for any inmate on account of his or her infection with the Hepatitis virus. (Id. ¶ 15.)

Wall did not serve CMS with a notice of claim or engage in a pre-litigation screening process pursuant to the Maine Health Security Act. (Id. ¶ 18; North Aff. ¶ 16.) Wall has not designated experts to testify on any issue in the case. (CMS SMF ¶ 20; Taintor Aff. ¶ 2.)

Sheriff Dion's Statement of Material Facts

Wall was arrested and brought to the Cumberland County Jail on August 17, 2000. (Dion SMF ¶ 1.) All inmates that are processed in the jail are provided with a copy of the

inmate handbook. (Id. ¶ 2.) Section VI of the inmate handbook identifies for the inmate that the jail maintains a qualified staff of medical professionals within the facility twenty-four hours a day and indicates that emergency dental treatment will be provided as needed with limited dental treatment available to all inmates, to be requested through the medical staff. (Id. ¶¶ 3, 4.)

Section VI also identifies the relevant grievance process, which is commenced with a verbal request and, if that is unsuccessful, followed with the submission of a grievance form. (Id. ¶ 5.) Upon receipt of such a form a staff member is assigned by the jail administrator to investigate the grievance and make a recommendation to the reviewing authority. (Id. ¶ 6.) If the inmate is dissatisfied with the recommendation he or she can request an inmate grievance appeal form in order to appeal to the sheriff. (Id. ¶¶ 6-7.) If the inmate is still not satisfied the inmate can address the concerns to the Maine Department of Corrections. (Id. ¶ 7.)

The jail had no records in Wall's inmate medical file indicating that Wall requested medical and/or dental treatment for his teeth from August 17, 2000, through September 18, 2000, nor did he fill out any inmate request forms, medical request forms, or inmate grievance forms pertaining to his teeth or dental care. (Id. ¶¶ 8,9.) After September 18, 2000, Wall was housed in the Maine Correctional Center where he claims he received no dental treatment. (Id. ¶ 10.) In January 2001, Wall was transferred to the Maine State Prison Supermax where he was seen for his teeth and reports that he was prescribed antibiotics. (Id.)

Wall returned to the Cumberland County Jail on March 8, 2001. (Id. ¶ 11.) On March 12 and March 18 Wall submitted requests to the jail's medical provider for

treatment of his teeth. (Id. ¶ 12.) Wall claims that at this time he saw a dentist at the jail and that the dentist prescribed antibiotics and took x-rays. (Id. ¶ 13.) Wall claims that the antibiotics did not defeat the infection in his tooth. (Id.)

The jail has no record of Wall filing a grievance pertaining to dental treatment in the time period extending from March 8 through April 11 or making any other type of request or complaint pertaining to his dental care which would have been addressed to or received by correctional staff. (Id. ¶ 14.) Wall left the custody of the jail on April 11, 2001, and, according to Wall, was sent to FCI Petersburg. (Id. ¶¶ 15, 16.)

Wall returned to the Cumberland County Jail on June 2001, where he remained until March 26, 2002. (Id. 17.) During this time period Wall filed a number of grievances and even proceeded to the grievance appeals process on one occasion. (Id. ¶ 18.) Of the fifteen grievances Wall filed only a grievance filed on February 19, 2002, referenced a medical issue and that grievance was not grieving a failure to provide him with medical/dental care, but identified a guard's interference with Wall's attempts to communicate with a nurse. (Id. ¶¶ 18, 19.) Wall did not submit any written request to correctional staff seeking dental treatment, complaining about dental treatment, or in any way raising the issue of dental treatment. (Id. ¶ 20.)

Wall's inmate medical file does contain documents demonstrating that Wall filed sick call requests pertaining to his teeth with PCM on March 12, 2001, and August 12, 2001, (id. ¶ 21) and with CMS on December 5, 2001, February 15, 2002, and March 16, 2002, (id. ¶ 22). All these medical requests were directed to medical staff and would not have been directed to correctional staff. (Id. ¶ 23.)

The Cumberland County Jail is the only correctional facility in the State of Maine that is accredited with the American Correctional Association (ACA). (Id. ¶ 24.) As part of the accreditation process all policies and procedures are reviewed by the ACA to assure they meet ACA standards. (Id. ¶ 25.) The ACA standards meet or exceed the requirements of the Maine Department of Corrections' Standards for Jails. (Id. ¶ 26.)

Policy F-310 sets forth that the Jail's medical services include – at a minimum – non-emergency medical services, non-emergency dental services, mental health services, emergency services, and twenty-four-hour, seven-days-a-week coverage by nurse staffing on site, with a physician, physician's assistant, or nurse practitioner on call. (Id. ¶ 27.) This policy further sets forth that a jail dentist will be responsible for overseeing dental care provided to inmates and that the dentist will ensure that the policies and procedures of the jail pertaining to dental services comply with the laws of the State of Maine and State detention standards. (Id.) Policy F-310 provides, further, that all medical and dental matters involving medical judgment are the sole province of the responsible physician and dentist, respectively. (Id. ¶ 28.) Policy F-134 requires inmate emergency dental care for all inmates that shall be available at all times and shall be provided when the health of the inmate, during confinement, would otherwise be adversely affected without intervention (this intervention not being limited to extractions). (Id. ¶ 29.) Under the policy, medical staff members are to arrange for emergency dental care based on priority. (Id.)

Sheriff Dion has no knowledge of any inmate in the Cumberland County Jail ever being refused medical or dental treatment on the basis that the inmate had Hepatitis C. (Id. ¶ 30.) At no time in the period extending between August 17, 2000, and March 26,

2002, did Dion have knowledge that Wall was not receiving medical or dental attention while housed in the jail. (Id. ¶ 31.) Even if Dion would have had information that Wall was requesting dental care, if the requested treatment involved a determination over the proper manner to treat the dental condition, it would not be one which the Sheriff was qualified to make. (Id. ¶ 32.) Pursuant to Policy F-310, the sheriff defers to the jail's medical/dental provider on the decisions involving medical/dental judgment. (Id. ¶ 33.)

Mitchell Wall's Statement of Facts

Wall's March 11, 2001, medical history and physical exam report by the dentist indicates that Wall had problems with and pain in his left molar. (Wall SMF ¶ 11.) Wall put in request slips indicating pain in his tooth on March 12, 2001, March 18, 2001, March 23, 2001, August 12, 2001, December 5, 2001, February 25, 2002, February 27, 2002, March 6, 2002, and March 16, 2002. (Id. ¶ 12; Exs. B-1 – B-9.) On August 20, 2001, February 22, 2002, February 27, 2002, March 6, 2002, and March 18, 2002, Wall was seen and merely put on antibiotics and pain medication. (Wall SMF ¶ 13.) On March 8, 2001, March 21, 2001, and June 20, 2001, Wall had medical screenings in which he explained his problems with his teeth. (Id. ¶ 18.)

All in all, Wall was prescribed only antibiotics and pain medications for his tooth, as demonstrated by the jail's medical records. (Wall SMF ¶¶ 1, 10; Exs. A-1-A-24.) No "work" was done on Wall's teeth from April 17, 2000, through March 2002, although Wall saw the dentist three or four times. (Wall SMF ¶¶ 2, 4.) The defendants did not, on their own initiative, make appointments to see Wall for his tooth. (Id. ¶ 3.) When Wall was examined he clearly had an infection. (Id. ¶ 7.) Wall experienced pain that he

describes as debilitating and which he ascribes to the failure of the defendants to provide him with a root canal. (Id. ¶ 6.)

With respect to his notification efforts, Wall submits two letters, one of which is addressed to “To Whom it May Concern,” dated March 12, 2001, and the other to Sheriff Dion, dated January 10, 2002. (Id. ¶ 8; Ex. 1; Exhibit Ex.).⁵ Also his former wife, Linda Bieleski, called the jail two times to speak to medical personnel and a “jail official” to inform them of Wall’s condition and problems. (Wall SMF ¶ 25; Bieleski Aff., Docket No. 65.) Wall states that he had a track record of grieving complaints and that he filed two grievances over dental care but he got no response (Wall SMF ¶ 21; Breton Aff. Exs. 6A- 6R), however, the cited exhibits support the former but not the latter assertion.⁶

Regarding decision making authority vis-à-vis Wall’s treatment, Wall avers that the defendants admit that the dentist had sole discretion to make the final judgment about Wall’s treatment. (Id. ¶ 9.)

According to Wall, at the Maine State Prison Wall was placed on antibiotics and pain medication until he could see a dentist, then the dentist worked on his tooth on June 24, 2002, July 9, 2002, and August 19, 2002. (Id. ¶¶ 16, 17; Ex. A-24.)⁷ Wall still had

⁵ Wall submits only a small fragment of a lengthy “To Whom it May Concern” letter. Therein there is a paragraph specifying that Wall anticipated losing a tooth if he did not get a root canal at the jail (Wall SMF Exhibit Ex. at 2.) Viewing the March 12, 2001, letter in its entirety, (Dion Reply SMF Ex. 1) this concern about his dental care could be described as a needle in a haystack; the bulk of the twenty-page letter being Wall’s discontent with the response to his psychological woes and an explanation of his troubled past.

With respect to the January 10, 2002, letter addressed to Sheriff Dion, Dion is skeptical of its authenticity in that he purports to have no copy of the missive.

⁶ In March or April of 2002 Wall was transferred to the Maine State Prison and Wall asserts he could not, thereafter, exhaust his administrative remedies at the Cumberland County Jail. (Id. ¶ 14.) The non-exhaustion of administrative remedies for purposes of 42 U.S.C. § 1997e(a) has not been raised by the defendants. However, the awareness of the defendants’ vis-à-vis Wall’s dental condition at the time of his incarceration is relevant to the supervisory liability/Eighth Amendment deliberate indifference inquiry. See Rogan v. Menino, 175 F.3d 75, 78 (1st Cir. 1999).

⁷ Wall asserts that a dentist at the Maine State Prison worked on his tooth in preparation for a root canal and to remove gangrene (Wall SMF ¶¶ 5, 16, 17) but the cited Department of Corrections records

continuous complaints about the medical care of this tooth because the pain increased over time after his transfer. (Id. ¶ 20; Exs. E-1-E-9.)⁸

Recommended Disposition

Deliberate Indifference/Policy and Custom Claims

As I stated in the earlier memorandum on the motions to dismiss:

Deliberate indifference liability attaches only when a state actor "knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). The state actor "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. at 837. The First Circuit has explained that "under the second requirement of Farmer, plaintiffs must show: (1) the defendant knew of (2) a substantial risk (3) of serious harm and (4) disregarded that risk." Calderon-Ortiz [v. Laboy-Alvarado], 300 F.3d [60,]64 [(1st Cir. 2002)].

Wall, 257 F.Supp.2d at 320-21. While at the jail Wall was entitled to "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)), and the denial of necessary medical care can rise to the level of an Eighth Amendment violation, see generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).

However, 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).

(Wall Amend. SMF ¶ 16, 17; Wall SMF Exs. A-10-22, 24) are not medical records for those dates nor can I identify the nature of the treatment that Wall received at the prison without the explication of an affidavit from a competent medical professional.

⁸ I disregard two of Wall's factual paragraphs. In paragraph 21 Wall delineates other violations of non-medical related policies by defendants. This is not probative of the question at hand. In paragraph 22 he refers to a magazine article entitled "Sick on the Inside." CMS objects to this proffer as inadmissible hearsay and suggests that it is an attempt to incorporate an entire magazine article as factual fodder (which would require an exhaustive, point-by-point refutation). (CMS Reply SMF ¶ 22.) I agree that the court cannot draw on this article in ruling on the motion for summary judgment.

Wall's theory of recovery vis-à-vis PCM and CMS is that they are responsible, as would be a municipal entity,⁹ for promulgating a policy or custom that lead to the violation of his rights. Accordingly, Wall's claims against these defendants are subject to a two-step inquiry. See Collins v. Harker Heights, 503 U.S. 115, 120 (1992). I must first determine whether there is a predicate constitutional violation. Id. If so, I must determine whether the complaint states a claim that a custom or policy of the defendants caused the violation. Id.; see also Wall, 257 F.Supp.2d at 319 (“[E]ven if there is no blanket policy or custom vis-à-vis treating inmates with Hepatitis C infection, [if] Wall can demonstrate that an employee of these defendants was a final ‘policy maker’ with respect to treating his condition and decided not to treat the condition pursuant to a ‘custom or policy’ promulgated by the defendants in contravention of the United States Constitution, then these defendants could be held liable under 42 U.S.C. § 1983.”).

Before proceeding to a discussion of each defendant's liability under this standard, I make note of one crucial shortcoming in Wall's response to these motions. Wall seems to have premised his complaint on an assertion that his care was constitutionally inadequate because Intiso did not want to contend with the risks associated with treating a patient with Hepatitis C. Wall identifies Intiso as the final policy maker on this score vis-à-vis PCM and CMS. (Wall SMF ¶ 19.) However, Wall has failed to place in dispute any of the defendants' statements of facts material to (and refuting) the existence of discriminatory intent. Furthermore, not one of his statements of material fact suggests the existent of this discriminatory motivation; rather they simply set forth Wall's attempts to get dental treatment beyond what Intiso was providing.

⁹ In treating the motions to dismiss, I concluded that private entities such as PCM and CMS that contract with a county to provide jail inmates with medical services perform a function municipal in nature and were functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits. Id. at 319.

While I did locate in one of his two affidavits Wall's representation that the first two times he saw Intiso he told Wall that he did not have the equipment to work on Wall's tooth "with protection" (Wall Aff. ¶ 7, Docket No. 66; see also id. ¶¶ 14, 15), Wall does not even reference this portion of his affidavit in his statement of material fact, see Faas, 260 F. Supp. 2d at 201 (granting defendants' motion to strike portions of affidavits not referred to in the plaintiff's statement of contested material facts), let alone use it to support a material fact that I could rely on as evidence at this stage of a discriminatory intent. When the defendant-officials have made a properly supported motion, as they have in this case, "the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." Crawford-El v. Britton, 523 U.S. 574, 600 (1998).

PrimeCare Medical Inc.

The facts relevant to PCM's liability on the deliberate indifference claim are that Wall put in request slips indicating pain in his tooth on March 12, 2001, March 18, 2001, March 23, 2001, and August 12, 2001. On August 20, 2001, Intiso saw Wall for a small ulceration behind a front tooth. Intiso discovered a cavity and a reversible pulpitis. Wall's only complaint at this visit was recorded as a "fleeting sensitivity to cold." Wall did not require an emergency filling although he would have been provided with a temporary filling if needed. There is no further record of complaints about this tooth. The other care Intiso provided to Wall occurred after PCM's contract with Cumberland County had been terminated.

The personnel of PCM did not, on their own initiative, make appointments to see Wall for his tooth. Wall put in request slips indicating pain in his tooth on March 12, 2001, March 18, 2001, March 23, 2001, and August 12, 2001. During his visits, Wall informed the medical personnel that he was experiencing serious pain.

Drawing all reasonable inferences in Wall's favor (albeit from a record almost entirely of PCM's devising) it cannot be said that "the defendant knew of ... a substantial risk ... of serious harm and ... disregarded that risk." Calderon-Ortiz, 300 F.3d at 64. The most that can be said on this record is that Wall was not satisfied with the course of treatment Intiso identified and would have had Intiso be more proactive about his dental care. See Daniels, 474 U.S. 327. Without an underlying constitutional violation of Wall's rights, there can be no recovery for Wall on a theory that PCM's policy or custom was the animating force behind a constitutional violation during the time period that PCM was responsible for Wall's care under its contract with the jail. See Brown v. Pennsylvania, 318 F.3d 473, 482-83 (3rd Cir. 2003).

Correctional Medical Services

With respect to CMS, the material facts are that on November 1, 2001, CMS assumed responsibility for providing health care services at the Jail. Intiso has provided dental care of the jail's inmates on behalf of CMS as of that date. Intiso saw Wall on two occasions during the period Intiso was providing services under a contract with CMS.

On November 26, 2001, Intiso saw Wall for a gum infection and ordered an antibiotic, an appropriate treatment that typically controls such an infection within two to four days and relieves the corresponding pain. In the aftermath of this treatment Wall did not complain further and, in Intiso's view, this was because Wall's pain was relieved.

On March 6, 2002, Intiso saw Wall again for an abscess in a tooth and another gum infection. Intiso prescribed an antibiotic and ordered that Wall be put on a list to return for an x-ray and a non-emergency extraction. In Intiso's opinion it was appropriate to attempt to control the infection with antibiotic therapy before performing an extraction. Intiso believes that Wall could not have experienced complications from any delay in performing the extraction.

Intiso did not delay or deny treatment of Wall because of any concern on Intiso's part about Wall's Hepatitis C. Intiso has performed extractions for numerous patients who are infected with Hepatitis C, HIV, and other serious, communicable diseases, within and outside the correctional environment. On each occasion that he was called to see Wall, Intiso believes he provided professionally appropriate and competent dental care.

The personnel of PCM did not, on their own initiative, make appointments to see Wall for his tooth. Wall put in request slips indicating pain in his tooth on December 5, 2001, February 25, 2002, February 27, 2002, March 6, 2002, and March 16, 2002. During his visits Wall informed the medical staff that he was experiencing serious pain.

Once again, drawing all reasonable inferences in Wall's favor (albeit from a record almost entirely of CMS's devising) it cannot be said that "the defendant knew of ... a substantial risk ... of serious harm and ... disregarded that risk." Calderon-Ortiz, 300 F.3d at 64. The most that can be said on this record is that Wall was not satisfied with the course of treatment Intiso identified and would have had Intiso be more proactive about his dental care. See Daniels, 474 U.S. 327. As with the record pertaining to PCM, without evidence of an underlying constitutional violation of Wall's rights, there can be

no recovery for Wall on a theory that CMS's policy or custom was the animating force behind a constitutional violation during the time period that CMS was responsible for Wall's care under its contract with the jail. Brown, 318 F.3d at 482-83.

Liability of Sheriff Dion

Dion has not submitted material facts that attempt to demonstrate that there was no underlying constitutional violation with respect to the dental treatment provided Wall. Rather, he aims to demonstrate that he is entitled to judgment as a matter of law because, one, he played no part in setting the policy or custom vis-à-vis the dental care and, two, he, in his position of sheriff, did not have supervisory responsibility over Intiso and was never alerted to the possibility that Wall's dental care was constitutionally inadequate.

With respect to the official capacity policy or custom claim -- and assuming the facts would support a determination that the dental treatment of Walls amounted to deliberate indifference to his health -- Wall concedes, and the undisputed material facts bear out, that neither Dion nor Cumberland County were responsible for promulgating the policy or custom Wall contends was responsible for the cruel and unusual punishment. If there was deliberate indifference to Wall's medical needs it was not pursuant to policies or customs of Cumberland County and such a claim against Dion in his official capacity fails.

That leaves the possibility of Dion's individual liability as a supervisor. I will assume, for purposes of this discussion only, that Dion could be held liable on this theory vis-à-vis Intiso, a PCM/CMS employee, on a theory that he is generally responsible for assuring that the constitutional rights of the inmates in the jail are protected. And, again, I will assume the existence of an underlying constitutional violation, a prerequisite to the

liability of a supervisor, see, e.g., Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989).

However, “supervisors are not automatically liable for the misconduct of those under their command.” Carmona v. Toledo 215 F.3d 124, 132 (1st Cir. 2000). Wall “must show an ‘affirmative link’ between the subordinate officer and the supervisor, ‘whether through direct participation or through conduct that amounts to condonation or tacit authorization.’” Id. (quoting Camilo-Robles v. Zapata, 175 F.3d 41, 43-44 (1st Cir.1999)); see also Miller v. Kennebec County, 219 F.3d 8, 13 (1st Cir. 2000) (supervisory liability plaintiff must establish that the supervisor’s “conduct or inaction amounts to ‘reckless or callous indifference’ of [the plaintiff]’s constitutional rights and that an ‘affirmative link’ existed between the constitutional violation and [the supervisor]’s acts or omissions”) (quoting Gutiérrez-Rodríguez, 882 F.2d at 562).

Dion’s undisputed facts are as follows. After some shifting to and fro between other facilities and the jail, Wall returned to the Cumberland County Jail on March 8, 2001. On March 12 and March 18 Wall submitted requests to the jail’s medical provider for treatment of his teeth. Wall claims that at this time he saw a dentist at the jail and that the dentist prescribed antibiotics and took x-rays but that the antibiotics did not defeat the infection in his tooth. The jail has no record of Wall filing a grievance pertaining to dental treatment in the time period extending from March 8 through April 11 or making any other type of request or complaint pertaining to his dental care which would have been addressed to or received by correctional staff.

Wall left the custody of the jail on April 11, 2001, and, according to Wall, was sent to FCI Petersburg. Wall returned to the Cumberland County Jail on June 2001, where he

remained until March 26, 2002. During this time period Wall filed a number of grievances and even proceeded to the grievance appeals process on one occasion. Of the fifteen grievances Wall filed not one pertained to dental treatment. Wall did not submit any written request to correctional staff seeking dental treatment, complaining about dental treatment, or in any way raising the issue of dental treatment. Wall's inmate medical file does contain documents demonstrating that Wall filed sick call requests pertaining to his teeth with PCM on March 12, 2001 and August 12, 2001, and with CMS on December 5, 2001, February 15, 2002, and March 16, 2002. All these medical requests were directed to medical staff and would not have been directed to correctional staff.

With respect to Wall's own facts, he provides the two letters as evidence that Dion was alerted to his plight. The March 12, 2001, missive, addressed "To Whom it May Concern," states that Wall feels like he might lose a tooth any day and he is not able to get a root canal finished even though he had insurance. This is one paragraph in a twenty-one-page letter describing Wall's social, medical, and psychological history. The January 10, 2002, letter directed to Dion (which Dion had indicated is nowhere in the jail's files) informs Dion that Wall needs his tooth fixed and that the dentist will not fix it. It complains that the medical department will not send Wall out for treatment by another dentist. He states that his tooth has been infected a few times, the infection will not go away, and Wall is experiencing a lot of pain. Wall reports that he has even put in grievances about this and has had no luck with them. He asks for Dion's help. Finally, Wall has provided the affidavit of his former wife, Linda Bielski. (Docket No. 65.) Bielski avers that she made several calls to the medical department and even Sheriff

Dion's office, however, she does not recall who she actually spoke with. She reports that she relayed Wall's distress and the fact that Wall had dental insurance that could cover treatment. She was promised that the situation would be looked into, that someone would get back to her, but she received no return calls.

Given Dion's attenuated relationship to Intiso's medical decisions, I conclude that the above notification efforts were not sufficient to demonstrate that Dion's "conduct or inaction amounted to a reckless or callous indifference" to Wall's constitutional rights. Gutierrez-Rodriguez, 882 F.2d at 562. Dion has set forth the relevant jail policies and the grievance procedures available to Wall. There were no formal grievances initiated regarding Wall's dental needs, even though Wall had the proven capacity to persistently pursue his grievance remedies. There is no record evidence for Wall's assertion that he did grieve the dental issue and in a complaint of this nature, a bald assertion is not enough. The requests for treatment concerning Wall's teeth were addressed to the medical department and not Dion's correctional staff. We do not have any evidence that Bielski spoke to Dion or anyone under his command.

While all reasonable inferences must be drawn in Wall's favor, "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990); accord Rosenfeld v. Egy, 346 F.3d 11, 17, (1st Cir. 2003); National Amusements, Inc. v. Dedham, 43 F.3d 731, 734-44 (1st Cir. 1995). Given "the tenuous nature of [Wall's] evidence and the stronger competing evidence" I conclude that the inferences Wall would need me to draw concerning Dion's supervisory involvement

in Wall's dental care are improbable. Rosenfeld, 346 F.3d at 17. On this record no "affirmative link" has been shown between Intiso and Dion "whether through direct participation or through conduct that amounts to condonation or tacit authorization." Carmona, 215 F.3d at 132 (quoting Camilo-Robles, 175 F.3d at 44).

Americans with Disabilities Act Claim

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Pursuant to the plain language of Title II, a plaintiff must establish: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." Parker v. Universidad de Puerto Rico, 225 F.3d 1, 5 (1st Cir. 2000). Title II of the ADA applies to inmates in correctional facilities. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 213 (1998).

CMS and PCM claim they are not susceptible for suit under Title II because they are private entities. (CMS Mot. Summ. J. at 11-12; PCM Supp. Mot. Summ. J. at 1-2.)¹⁰ I decline to enter the mostly unplowed legal terrain respecting whether private entities contracted to perform the "services, programs, or activities of a public entity" can escape

¹⁰ Instead, they argue that Wall could only reach them under Title III but that he cannot pursue relief there because the only relief available under Title III is injunctive relief and Wall has been sentenced by a federal judge to imprisonment for the remainder of his natural life (followed by six-years of supervised release). (See Crim. Nos. 00-077; 00-078.) Accordingly, I agree with the defendants that the possibility of Wall returning to the jail is far too remote to confer standing upon him to seek such relief. Grenier v. Kennebec County, 748 F.Supp. 908 (D. Me. 1990).

liability under Title II of the ADA. Rather, based on my determination on the summary judgment record framed by the three defendants, (and assuming that Wall is a qualified individual with a disability), not one of the three defendants is responsible for denying Wall dental care because of a disability.

Equal Protection Claim

Any claim that might be ciphered from Wall's pleadings under the Equal Protection clause cannot withstand these motions for summary judgment for reasons closely associated with the deliberate indifference and ADA claims analysis. As an Equal Protection plaintiff Wall must prove that the defendants acted with discriminatory intent. Rivera v. Puerto Rico Aqueduct & Sewers Auth., 331 F.3d 183, 192 (1st Cir. 2003). Despite his best efforts, Wall has not produced affirmative evidence that creates a dispute of fact with respect to the assertions made by the defendants that there was no discriminatory intent vis-à-vis the dental treatment provided Wall at the Cumberland County Jail. See Crawford-El, 523 U.S. at 600.

Motion for Appointment of Counsel

It should come as no surprise that, in light of my recommendation vis-à-vis these three motions, I do not believe that Wall has demonstrated that his situation as a pro se plaintiff is such that I should appoint counsel for him. See DesRosiers v. Moran, 949 F.2d 15, 23 (1st Cir.1991) (plaintiff must demonstrate that he was indigent and that exceptional circumstances were present such that a denial of counsel was likely to result in fundamental unfairness impinging on his due process rights).

CONCLUSION

And so, I **GRANT** Wall's motion to supplement his statement of material facts (Docket No. 80) and **DENY** Wall's current motion for appointment of counsel (Docket No. 83). Based upon the above discussion, I recommend that the Court **GRANT** the motions for summary judgment filed by PrimeCare Medical, Inc. (Docket Nos. 43&56), Correctional Medical Services, Inc. (Docket No. 33), and Sheriff Mark Dion (Docket No. 39). The remaining defendants, Diane North and Richard Intiso, will have ten (10) days from the issuance of this decision to file dispositive motions as indicated in my prior order on their motion to file dispositive motions after the expiration of the filing deadline (Dockets Nos. 72 & 73.)

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) (1988) 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.

January 30, 2004

/s/ Margaret J. Kravchuk
United States Magistrate Judge

WALL v. SHERIFF, CUMBERLAND, et al
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Date Filed: 09/17/02
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights:

Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: CumbCtySupCt, PORSC-CV-02-00339
Cause: 42:1983 Prisoner Civil Rights

Other
Jurisdiction: Federal Question

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