

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ERIK MARTINEZ, :
Plaintiff, :
 :
v. : C.A. No. 14-537L
 :
MAX DR. BLANCHETTE, R.I. DOC :
DR. VOHR, MAX NURSE “DAVE,” and :
CONN. DOC C.C.S. OSDEN, :
Defendants. :

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge

Plaintiff Erik Martinez, a prisoner at the Adult Correctional Institutions (“ACI”), brought this civil rights action *pro se* under 42 U.S.C. § 1983 alleging that his Eighth Amendment right to adequate medical care has been violated by two ACI physicians, an ACI nurse and an official of the Connecticut Department of Corrections.¹ One of the four defendants, Nurse David Piccirillo – named in the complaint as “Nurse Dave” – has filed a motion to dismiss (ECF No. 14) pursuant to Fed. R. Civ. P. 12(b)(6).² Based on my review of the operative complaint, I find that it fails to state a claim against Nurse Piccirillo upon which relief may be granted. I recommend that Plaintiff be granted leave to file an amended complaint within thirty days of the Court’s adoption of this recommendation that states an actionable claim against Nurse Piccirillo (if he has one). Such an amended complaint must overcome the deficits identified in this report

¹ Plaintiff is a Connecticut inmate but is currently in the custody of the Rhode Island Department of Corrections.

² On March 24, 2015, the District Court screened Plaintiff’s complaint as required under 28 U.S.C. §§ 1915 and 1915A and found that Plaintiff “[had] stated sufficient factual material, at this initial stage, to meet the plausibility standard and to allow him to proceed with his Complaint.” ECF No. 6 at 5. This general finding of facial plausibility as to the overall complaint does not foreclose an individual defendant from moving to dismiss the action against him for failure to state a cognizable claim as to himself. *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007) (“[A] defendant’s right to bring a motion to dismiss is not foreclosed by the issuance of a sua sponte screening providing that the prisoner has stated a claim . . .”).

and recommendation; if an amended complaint is not timely filed, or if the amended complaint still fails to state a claim against this defendant, Nurse Piccirillo should be dismissed from this action.

I. BACKGROUND

Plaintiff's claim arises from his alleged inability to get constitutionally adequate medical treatment for various ailments between February 2012 through the end of September 2014. Proceeding under § 1983, he alleges that ACI medical staff were deliberately indifferent to his medical needs in violation of the Eighth and Fourteenth Amendments of the United States Constitution. His complaint contains a detailed recital of many medical appointments, as well as written communications begging for medical treatment, principally with Dr. Blanchette but some with Dr. Vohr, both of whom are named as defendants. In each instance, Plaintiff claims that these ACI physicians, acting with deliberate indifference to his serious medical needs, provided inadequate treatment, refused to provide treatment, or ignored his complaints altogether. The allegations against Dr. Blanchette and Dr. Vohr are detailed and specific. By contrast, the complaint contains almost nothing to support Plaintiff's claim against Nurse Piccirillo; he appears in connection with just two incidents.

First, in Paragraphs 13-14, Plaintiff alleges he complained to Nurse Piccirillo about an itchy and painful rash on his forearms on November 29, 2013, and Nurse Piccirillo administered Benadryl, which helped Plaintiff to sleep and took away some of the itch, but "did not take away the original issue."³ The next reference to this rash states that Plaintiff saw the doctor for an

³ The pleading alleging the forearm rash incident is fully set out as follows:

13. After the above eighth visit at about the beginning of Nov. I broke out in an extremely itchy and painfull rash on my forearms. I wrote to see the doctor and was seen on 11-15-13 which would be my next visit. When I went in it was two nurses from I dont know where but my medical records say Kimberly Selsyman N.P. they gave me Hydrocortisone and sent me on my way.

array of other complaints, including the “weird rash,” but by the following appointment, Plaintiff claims that the rash “was going away,” apparently without the need for further medical treatment. ECF No. 1 at 11-12, ¶¶ 15-17 (“I was at the end of the rash on my arms . . .”).

The second incident was almost a year later, on September 4, 2014, when Plaintiff alleges he saw Nurse Piccirillo about chest pain that had begun the day before, but that Nurse Piccirillo said he was fine but also gave him a medical slip to see the doctor.⁴ ECF No. 1 at 14, ¶ 19. In his objection to this motion,⁵ Plaintiff clarified that his chest pain was “significant” and that Nurse Piccirillo did only a quick visual observation of him, relying on “personal opinion” in sending Plaintiff back to his cell without performing any diagnostic tests. ECF No. 18 at 1. Plaintiff alleges that the operative conduct constituting deliberate indifference is Nurse Piccirillo’s failure to take his blood pressure. The objection asserts that he still suffers from chest pain, implying that the pain has been untreated. Inconsistently, the complaint continues the story of Plaintiff’s quest for satisfactory treatment for chest pain; within two weeks of the interaction with Nurse Piccirillo (presumably based on the medical slip Nurse Piccirillo had provided), Plaintiff was evaluated by a male medical staff member who did check his blood pressure, conferred with the physician and then sent Plaintiff back to his cell. ECF No. 1 at 14, ¶

14. Two weeks later I see nurse Dave about the rash and he gives me Benadryl which helps me sleep and takes some of the itch away but did not take away the original issue. This was 11-29-13.

ECF No. 1 at 11, ¶¶ 13-14.

⁴ The pleading alleging the chest pain incident is fully set out as follows:

Sometime mid-day Sept. 4th my chest began to hurt. The next day I went to see Dave the nurse who said I was fine and gave me a medical slip. I wrote to see the Dr. for my chest pain.

ECF No. 1 at 14, ¶ 19.

⁵ In the interest of efficiency, I have treated the factual assertions in Plaintiff’s objection as if already incorporated into the complaint. As noted in the text, I find the complaint against Nurse Piccirillo insufficient as pled and still insufficient if amended to add these additional facts.

20. Two days later, Plaintiff saw Dr. Vohr (another defendant) about his complaint of chest pain. Dr. Vohr performed a chest examination with a stethoscope and ordered a chest x-ray. ECF No. 1 at 15, ¶¶ 21-22. The complaint is entirely silent regarding whether these diagnostic efforts resulted in the conclusion that the symptom of chest pain reflected a potentially serious diagnosis; in particular, it does not allege that Plaintiff suffered from high blood pressure or any other cardiac or lung condition.

II. STANDARD OF REVIEW

A. Motion to Dismiss

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Determining facial plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 679 (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).

B. Deliberate Indifference to Serious Medical Needs

The Eighth Amendment of the United States Constitution, which prohibits “cruel and unusual punishments,” is the source of long-settled principles governing entitlement to constitutionally adequate medical treatment. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). Where “society takes from prisoners the means to provide for their own needs,” the failure to provide such care “may actually produce physical torture or a lingering death.” Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (internal quotation marks omitted). Undue suffering, unrelated to any legitimate penological purpose, is considered a form of punishment proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103-05 (1976); Kosilek v. Spencer, 774 F.3d 63,

82 (1st Cir. 2014) (en banc), cert. denied, Kosilek v. O'Brien, 135 S. Ct. 2059 (2015). To prove an Eighth Amendment violation, the prisoner must satisfy both of two prongs: (1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison officials' deliberate indifference to that need. See Estelle, 429 U.S. at 106 (holding that inadequate treatment must be "sufficiently harmful to evidence deliberate indifference to serious medical needs"); Sires v. Berman, 834 F.2d 9, 12 (1st Cir. 1987) ("A plaintiff must satisfy two elements to present a viable [Eighth Amendment] claim: he must show a serious medical need, and he must prove the defendant's purposeful indifference thereto.").

The objective "seriousness" prong requires that the medical need be "one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990); see Palermo v. Van Wickler, No. 12-CV-86-SM, 2012 WL 2415556, at *3 (D.N.H. June 13, 2012) (complaint alleging no treatment for chest pain suffered by inmate with high blood pressure and Hepatitis C survives screening). The Constitution only proscribes care that is "so inadequate as to shock the conscience." Torraco v. Maloney, 923 F.2d 231, 235 (1st Cir. 1991) (quoting Sires, 834 F.2d at 13); see Estelle, 429 U.S. at 102-06 (denial of care must be so unconscionable as to fall below society's minimum standards of decency). The Constitution also does not impose a duty to provide care that is ideal, or of the prisoner's choosing. See Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980) ("[A]llegations [that] simply reflect a disagreement on the appropriate course of treatment . . . fall[] short of alleging a constitutional violation.").

The subjective prong provides that the Eighth Amendment is not violated unless prison officials exhibit deliberate indifference to the prisoner's needs. Estelle, 429 U.S. at 105-06.

Thus, mere negligence in the provision of medical care does not amount to a constitutional violation; rather, “[i]n order to state a cognizable [Eighth Amendment] claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Id. at 106; see Perry v. Roy, 782 F.3d 73, 78 (1st Cir. 2015). Deliberate indifference “defines a narrow band of conduct,” Feeney v. Corr. Med. Servs., Inc., 464 F.3d 158, 162 (1st Cir. 2006), and requires evidence that the failure in treatment was purposeful. See Estelle, 429 U.S. at 105 (“inadvertent failure to provide adequate medical care” is not a constitutional violation); id. at 106 (“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”); Watson v. Caton, 984 F.2d 537, 540 (1st Cir. 1993) (“The courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner’s medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment.”). Although deliberate intent to harm is not required, deliberate indifference requires a showing of reckless disregard of a substantial risk of imminent, serious harm from the intentional denial or delay of treatment. Coscia v. Town of Pembroke, 659 F.3d 37, 39 (1st Cir. 2011); Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011); see Gaudreault, 923 F.2d at 208-09 (affirming dismissal of claim at summary judgment phase based on complete lack of evidence that injuries were exacerbated “in the slightest” by delay in providing treatment).

III. ANALYSIS

Plaintiff’s complaint fails to allege plausible facts pertaining to Nurse Piccirillo sufficient colorably to plead either of the Estelle prongs. 429 U.S. at 106. With respect to the first prong, the complaint lacks any allegation that either the rash or the chest pain amounted to symptoms arising from an obviously serious medical need at the times that Nurse Piccirillo interacted with

Plaintiff (or at any other time). Moreover, the complaint nowhere alleges that Nurse Piccirillo denied Plaintiff care that had been prescribed by qualified medical providers.

With respect to the second prong, the complaint does not even purport to allege that Nurse Piccirillo's decision to treat the rash with Benadryl somehow amounts to deliberate indifference – to the contrary, Plaintiff pleads that this treatment was appropriate and successful in addressing some of his symptoms and that the rash resolved on its own without further treatment.⁶ ECF No. 1 at 11-13, ¶¶ 14, 16-17. More significantly, the complaint is devoid of any allegation permitting the plausible inference that Nurse Piccirillo's decision to refer Plaintiff's complaint of chest pain to a physician, while failing to take a blood pressure measurement, constitutes anything more than potential negligence. See Perry, 782 F.3d at 81 (showing of mere negligence insufficient to state a claim of deliberate indifference to medical needs); Niemic v. UMass Corr. Health, 89 F. Supp. 3d 193, 206-07 (D. Mass. 2015) (nurse not deliberately indifferent to inmate's medical needs where nurse refused aspirin but assisted inmate in getting sick slip for chest pain). Any inference that Nurse Piccirillo's treatment of the chest pain by a referral to a physician amounts to a delay or denial of care so unconscionable as to fall below society's minimum standards of decency, Estelle, 429 U.S. at 102-06, is rendered utterly implausible in light of Plaintiff's receipt of the precise diagnostic procedure (blood pressure measurement) within two weeks of seeing Nurse Piccirillo. ECF No. 1 at 14, ¶¶ 20-21. Finally, the complaint lacks any facts permitting the inference that Plaintiff was exposed to a substantial risk of serious harm as a result of the two-week delay or that the two-week delay somehow constituted an act of deliberate indifference. See Coscia, 659 F.3d at 39; Guitard v. N.H. Dep't of Corrs., Civil No. 11-cv-194-PB, 2011 WL 6337642, at *7 (D.N.H. Nov. 4, 2011) (Eighth

⁶ Plaintiff's objection appears to concede that the rash incident is insufficient to form the basis for a claim of deliberate indifference against Nurse Piccirillo. ECF No. 18 at 1.

Amendment claim against nurse viable where delay of treatment for complaint of stomach pain led to colon perforation six weeks later).

With a pleading that palpably fails to state a claim pursuant to 42 U.S.C. § 1983 against Nurse Piccirillo, I recommend that this Court dismiss him from the case. Nevertheless, mindful of Plaintiff's *pro se* status, I cannot conclude at this stage that Plaintiff cannot marshal facts sufficient to cure the deficiencies in his pleading against Nurse Piccirillo. Brown v. Rhode Island, 511 F. App'x 4, 5 (1st Cir. 2013) (unless complaint is "patently meritless and beyond all hope of redemption," leave to amend should be granted). Accordingly, I also recommend that this Court grant Plaintiff leave to amend within thirty days of the adoption of this report and recommendation. Nevertheless, Plaintiff is cautioned that an amendment that does no more than add the facts set forth in his objection is unlikely to pass muster.

IV. CONCLUSION

Based on the foregoing, I recommend that this Court GRANT Nurse Piccirillo's Motion to Dismiss (ECF No. 14) for failure to state a claim upon which relief can be granted. I further recommend that Plaintiff be ordered to file an amended complaint within thirty days of the Court's adoption of this recommendation. If an amended complaint is not timely filed, or if the amended complaint still fails to state a claim against Nurse Piccirillo, I recommend that he be dismissed from the case with prejudice.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to

appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008);
Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
October 29, 2015