

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
KENNETH J. MURPHY
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U.S. DISTRICT COURT
SOUTHERN DISTRICT OHIO
WEST DIV CINCINNATI
ah

RODNEY FUSSELL
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, Ohio 45699

and

GARY ROBERTS
London Correctional Institution
P.O. Box 69
London, Ohio 43140

and

JAMES LOVE
Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

Plaintiffs,

v.

REGINALD WILKINSON
and

KAY NORTHRUP
and

BRUCE MARTIN

Individually and in Their Official
Capacities as Officials
Ohio Department of Rehabilitation
And Correction
1050 Freeway Drive North
Columbus, Ohio 43229

and

PEDRO OBREGON
Individually and in His Official
Capacity as Institution Chief Medical

A. BECKWITH
UNASSISTED

6-1-03-304

Case No

CLASS ACTION COMPLAINT

Officer, :
Southern Ohio Correctional Facility :
P.O. Box 45699 :
Lucasville, Ohio 45699 :

and :

MONA PARKS :
Individually and in Her Official :
Capacity as Health Care :
Administrator, :
Southern Ohio Correctional Facility :
P.O. Box 45699 :
Lucasville, Ohio 45699 :

and :

VICKI WARE :
Individually and in Her Official :
Capacity as Health Care :
Administrator, :
London Correctional Institution :
P.O. Box 56 :
London, Ohio 43140 :

and :

JAMES MCWEENEY :
Individually and in His Official :
Capacity as Institution Chief Medical :
Officer, London Correctional Institution :
and Lebanon Correctional Institution :
P.O. Box 56 :
Lebanon, Ohio 45036 :

and :

CINDY LAWSON :
Individually and in Her Official :
Capacity as Health Care :
Administrator, :
Lebanon Correctional Institution :
P.O. Box 56 :
Lebanon, Ohio 45036 :

Defendants

I. PRELIMINARY STATEMENT

1. This is a civil rights class action for injunctive relief and damages for deprivations of plaintiffs' right to constitutionally required medical care. The plaintiffs are state prisoners confined at institutions under the jurisdiction of the Ohio Department of Rehabilitation and Correction ("ODRC"). Plaintiffs are suffering or have suffered from a variety of serious medical conditions that Defendants have failed to adequately treat due to system-wide deliberate indifference to the serious medical needs of Ohio prisoners. Plaintiffs bring claims under both federal and state law. They seek a preliminary and permanent injunction prohibiting continued unconstitutional practices and conditions of confinement concerning the lack of adequate medical care. The named plaintiffs also seek damages.

II. JURISDICTION

2. Jurisdiction over claims brought under the Civil Rights Act of 1871 is conferred on this Court by 28 U.S.C. §§1331, 1343 (3) and (4).

3. Supplemental jurisdiction over plaintiffs' state law claims may be exercised by this Court pursuant to 28 U.S.C. §1367.

III. PARTIES

A. Plaintiffs

4. Plaintiffs, RODNEY FUSSELL, GARY ROBERTS, and JAMES LOVE are citizens of the United States who are confined in Ohio state prisons. Mr. Fussell is incarcerated at the Southern Ohio Correctional Facility in Lucasville, Ohio. Mr. Roberts is incarcerated at the London Correctional Facility in London, Ohio. Mr. Love is incarcerated at Lebanon Correctional Institution in Lebanon, Ohio.

B. Defendants

5. Defendant WILKINSON is the Director of the Ohio Department of Rehabilitation and Correction (“ODRC”), and is an agent of the State of Ohio. He is sued both in his official capacity and in his individual capacity.

6. Defendant NORTHRUP is employed by ODRC as the Deputy Director, Office of Correctional Health Care, and is an agent of the State of Ohio. She is responsible for managing and supervising the administrative, fiscal and operational concerns of the Office of Correctional Health Care. She is sued both in her official and individual capacity

7. Defendant MARTIN is employed by the Ohio Department of Rehabilitation and Correction as the Medical Director of the Bureau of Medical Services, and is an agent of the State of Ohio. Defendant Martin is responsible for the overall supervision of the clinical services rendered at all institutional medical facilities. He is sued in both his individual and official capacity.

8. Defendant OBREGON is employed by the Ohio Department of Rehabilitation and Correction as the Institution Chief Medical Officer of Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio, and is an agent of the State of Ohio. Defendant Obregon is responsible for the day-to-day medical care of inmates at the institution level. He is sued in both his individual and official capacity.

9. Defendant PARKS is employed by the Ohio Department of Rehabilitation and Correction as the Health Care Administrator of Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio, and is an agent of the State of Ohio. Defendant Parks is responsible for the administration of health care services within Southern Ohio Correctional Facility. She is sued in both her individual and official capacity.

10. Defendant WARE is employed by the Ohio Department of Rehabilitation and Correction as the Health Care Administrator of London Correctional Institution (LoCI) in

London, Ohio, and is an agent of the State of Ohio. Defendant Ware is responsible for the administration of health care services within London Correctional Institution. She is sued in both her individual and official capacity.

11. Defendant MCWEENEY is employed by the Ohio Department of Rehabilitation and Correction as the Institution Chief Medical Officer of Lebanon Correctional Institution (LeCI) in Lebanon, Ohio, and London Correctional Institution (LoCI) in London, Ohio and is an agent of the State of Ohio. Defendant McWeeney is responsible for the day to day medical care of inmates at the institution level. He is sued in both his individual and official capacity.

IV. CLASS ACTION ALLEGATIONS

12. This action is brought, and may be properly maintained, as a class action under the provisions of Rules 23(a) and 23 (b)(2) of the Federal Rules of Civil Procedure. Plaintiffs Fussell, Roberts and Love bring this class action on behalf of themselves and all others similarly situated. The members of the class are as follows:

All inmates, who have been, will be or are incarcerated in prisons operated by or under the jurisdiction of the Ohio Department of Rehabilitation and Correction who, while so incarcerated, have been denied constitutionally required medical care.

13. Additionally, Plaintiffs Roberts and Love bring this action on behalf of themselves and a subclass of similarly situated prisoners. The members of the subclass are defined as follows:

All inmates, who were imprisoned before July 1, 1996, or who were imprisoned on or after July 1, 1996 for offenses committed before July 1, 1996, , who were required to pay a \$3.00 medical co-pay for medical services rendered while incarcerated.

14. The class and subclass are so numerous that joinder of all members is impracticable. While the exact number of class/subclass members are unknown at this time, plaintiff believes that the class and subclass consists of over 40,000 persons.

15. The claims of the named individual and representative plaintiffs are typical of the

claims of the class and subclass. Plaintiffs and all class/subclass members sustained and continue to suffer injury arising from defendants' wrongful conduct as alleged herein.

17. The named individuals and representative plaintiffs will fairly and adequately protect the interests of the members of the class/subclass. Proposed class counsel is experienced in the prosecution of class actions, including cases arising from the deprivation of civil rights in custodial settings and as well as cases involving complex litigation.

18. Defendants have acted, or refused to act, on grounds generally applicable to the class/subclass, thereby making final injunctive and corresponding declaratory relief appropriate with respect to the class.

19. A class action is superior to other available methods for the fair and efficient adjudication of this litigation since individual joinder of all members of the class/subclass is impracticable. Even if any group of class/subclass members themselves could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties and the court systems of resolving controversies surrounding defendants' acts. By contrast, the class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court.

V. FACTS CONCERNING SYSTEMIC FAILURES IN ODRC'S HEALTH CARE SYSTEM

20. There are 33 prisons under the jurisdiction of ODRC, including two institutions that are privately operated. Approximately 44,700 men and women are incarcerated in ODRC's prison system.

21. Most of the medical care offered in ODRC prisons is provided by doctors and medical personnel under contract with ODRC. Such contracts are awarded to medical care providers who submit the lowest approved bid.

22. The Institution Chief Medical Officer is the physician responsible for the day-to-day medical care of inmates at the institutional level. The Institution Health Care Administrator is responsible for the administration of health care services at the institutional level. The Health Care Administrator, a nurse, is responsible for planning and coordinating health care services delivered at the institutional level.

19. Medical protocol is an official guidance issued by the ODRC Medical Director to direct a medical procedure or course of action.

20. Formularies are lists of drugs approved for use by the ODRC Medical Director in treating certain illnesses and conditions. Drugs that do not appear on the formularies may not be prescribed unless approval is obtained from the ODRC Medical Director.

21. The treatment decisions of Institution Chief Medical Officers are limited by medical protocols and formularies established by the ODRC Medical Director.

22. Under ODRC rules, inmates do not have the option to receive a second opinion in medical matters. With the exception of specialty and surgical referrals to doctors employed by the Ohio State University Medical Center, inmates are not allowed to be seen by private physicians or "outside" doctors.

23. Inmates are not allowed to purchase prescriptions from outside sources.

24. Inmates are totally dependent on the defendants for the delivery of all of their medical care.

25. Inmates who suffer from certain chronic illnesses and conditions – hypertension, cardiovascular, seizure disorders, chronic obstructive pulmonary disease, diabetes, tuberculosis, HIV Infection/Disease, and chronic liver disease – are supposed to be followed and treated medically in chronic care clinics that address their particular health problems.

26. Prisoners who have medical needs that cannot be met by Institution Medical Chief Officers are, pursuant to the protocol, supposed to be referred to specialists at the Ohio State University Medical Center.

27. To the extent offered, dental care in ODRC prisons is provided by dentists and dental hygienists under contract with ODRC. Such contracts are awarded to dental care providers who submit the lowest approved bid.

29. Dental protocol is an official guidance issued for the entire prison system to direct a dental procedure or course of action.

30. The treatment decisions of dentists providing services at the institutional level are limited by a system wide dental protocol.

31. Inmates with complaints about the quality of medical/dental care must use the grievance system codified in Ohio Administrative Code §5120-9-31. The prison officials responsible for reviewing and responding to medical/dental grievances are not doctors/dentists and are therefore unqualified to determine whether appropriate care is being provided to individual prisoners.

32. Regardless of their incarceration dates, ODRC routinely charges inmates a \$3.00 copayment fee to receive medical and/or dental care.

33. Health Care Administrators are the health care authorities responsible for the administration of health care within the institution. Health Care Administrators are registered nurses who assess, direct, plan, coordinate, supervise, and evaluate all health care services delivered at the institutional level.

34. Although they are not licensed physicians, health care administrators frequently overrule physicians' orders for referrals to specialists and impose lengthy delays when scheduling of appointments for follow-up care.

35. The overall quality of medical and dental care provided to Ohio inmates is grossly substandard and frequently falls below constitutional standards. Systemic problems include, but are not limited to:

a. Medical staffing shortages. Due to staffing problems, some prisons have gone several months without chief medical officers thus compromising the care provided to inmates. In addition, contract doctors and other staff work too few hours to ensure that prisoners are seen in a timely manner. These staffing problems seriously endanger the lives and well-being of prisoners in need of care.

b. Dental staffing shortages. Due to staffing problems, prisoners wait unreasonably long periods of time – in some cases more than two years – to see a dentist or hygienist for routine care. These long delays cause prisoners to suffer periodontal disease and other problems that seriously impair their health and well-being.

c. Unreasonable delays in health services. Prisoners have suffered unreasonable delays in accessing routine screening examinations and in accessing specialty, and emergency health care.

d. Unreasonable delays in referring prisoners for consultations. Prisoners in need of specialty consultations at Ohio State University Medical Center must be referred by the institution chief medical officer. These consultations are frequently delayed – often times for several months – due to a variety of problems including, but not limited to, long delays in obtaining approval for the consultation from ODRC Central Office, problems arranging transportation for the inmate, and last-minute cancellations by the specialists. These delays seriously endanger the lives and well-being of prisoners in need of specialty care.

e. Unreasonable delays in ordering diagnostic tests and obtaining results. Prisoners routinely encounter lengthy delays in obtaining diagnostic tests for serious illnesses like cancer and hepatitis C. There are also corresponding delays in obtaining the results from diagnostic tests. Overall, these problems seriously endanger the lives and well-being of prisoners.

f. Requiring Institution Chief Medical Officers to adhere to less efficacious treatment protocols and formularies to limit costs. Defendants seriously endanger the lives and well-being of prisoners by requiring Institution Chief Medical Officers to provide less efficacious treatment and medicine as a way to contain costs. As a result, institution doctors are making treatment decisions based not on the best interests of the patient but on ODRC Central Office cost considerations.

g. Failure to provide critically ill prisoners with sufficient emergency care. Defendants fail to provide sufficient emergency care and critically ill prisoners have died after waiting unreasonably long times for ambulances and other emergency services.

h. Refusing to adopt quality control measures necessary to ensure competent medical and dental care. Defendants have seriously endangered the lives and well-being of prisoners by refusing to adopt appropriate quality control measures to ensure adequate patient care. For example, Defendants rejected the recommendation of ODRC consultant Vincent Nathan to have medical grievances reviewed by a panel of outside doctors. In addition, Defendants have failed to ensure that doctors providing services meet all licensing requirements. As a result, patient care has at times been provided by doctors with licensing problems and criminal histories. Defendants have also failed to ensure that prison health care employees do not provide services outside the scope of their expertise.

i. Adopting severely restrictive protocols for treatment of hepatitis C deny needed treatment to inmates The ODRC hepatitis C protocol denies interferon-ribavarin treatment to hepatitis C-positive inmates unless they suffer from advanced liver disease. This protocol is inconsistent with generally accepted community medical standards, which encourage early intervention and treatment with interferon-ribavarin therapy. The effect of the ODRC hepatitis C protocol is to deny treatment to most of the hepatitis C-positive inmates.

j. Inadequate Dental Care. The defendants do not provide annual dental cleanings, a position that is inconsistent with accepted professional standards. Lengthy delays in all dental care cause inmates to suffer unnecessarily from gum disease, infection and other related health problems.

k. The administration of the copayment requirement deters inmates from securing necessary medical and dental care. Although OAC 5120-5-13(A) states that “[n]o inmate shall be denied needed medical treatment because of a lack of ability to pay”, inmates are routinely denied needed medical and dental care despite the fact that they cannot afford the \$3.00 copayment fee.

36. Defendants have known for several years of the existence of these systemic medical care problems, and the fact that these problems put prisoners at substantial risk of death or serious physical harm. Defendants, however, have refused to take appropriate action to address these problems.

38. At all times relevant to this action, defendants have acted with deliberate indifference to the known and recognized serious medical need of the named plaintiffs and the members of the plaintiff class. Defendants have permitted the deprivations to continue, participated in said deprivations, or knowingly acquiesced in said deprivations of rights.

39. As a result of defendants' actions and inactions described above, members of the plaintiff class have suffered and continue to suffer deprivations of basic constitutional rights.

40. Members of the plaintiff class have suffered and are suffering irreparable harm for which they have no adequate remedy at law.

41. Members of the plaintiff class have suffered serious and substantial physical and emotional injury, pain and suffering, and other injuries and damages.

VI. FACTS RELATING TO INDIVIDUAL PLAINTIFFS

A. Rodney Fussell

42. Rodney Fussell is a forty-four year-old inmate who is incarcerated at Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio.

43. Mr. Fussell suffers from hepatitis C, a potentially life threatening disease which if untreated can lead to cirrhosis, liver cancer and death.

44. Hepatitis C is treated with interferon-ribavarin combination therapy. The medicine has a 40 to 50 % cure rate. The chance of a cure depends on several variables including how early in the progression of the disease treatment is begun. In general, the earlier interferon-ribavarin treatment begins, the better the likelihood of obtaining a cure. Conversely, the later treatment begins, the less likely it is that treatment when eventually provided will be successful.

45. Before interferon treatment can begin, the patient must first obtain a liver biopsy. Through a liver biopsy, a physician can stage and grade the liver. "Stage" refers to the amount of scarring or fibrosis that is present in the liver. There are four stages, 1 through 4, with stage 1 representing minimal scarring to stage 4 representing cirrhosis. "Grade" refers to the amount of necrosis or cell death of the liver. There are four grades, 1 through 4, with grade 1 representing minimal necrosis with grade 4 representing the most severe. A liver biopsy is necessary to determine whether to treat the disease with interferon-ribavarin.

46. Although Mr. Fussell's liver enzymes had been elevated since 1997, he was not tested and diagnosed with Hepatitis C until September, 2002.

47. After learning of his diagnosis, Mr. Fussell made two requests in October, 2002 to be referred to the Ohio State University gastroenterology clinic for a consultation. His request for a consultation, however, was rejected.

48. Mr. Fussell has not received a biopsy and as a result is unable to begin treatment for hepatitis C.

49. Defendants OBregon, Parks, Wilkinson, Northrup, and Martin have acted with deliberate indifference to Mr. Fussell's serious medical needs.

B. Gary Roberts

50. Gary Roberts is a fifty-seven year-old inmate who is incarcerated at London Correctional Institution (LoCI) in London, Ohio. Like plaintiff Fussell, Mr. Roberts also suffers from hepatitis C.

51. Although Mr. Roberts has had elevated liver enzyme levels since 1995, he was not tested for and diagnosed with Hepatitis C until 2000.

52. On November 12, 2002, an OSU specialist recommended that Mr. Roberts be given a liver biopsy. To date, Mr. Roberts has not been given either a liver biopsy or interferon treatment.

53. Defendants McWeeney, Ware, Wilkinson, Northrup, and Martin have acted with deliberate indifference to Mr. Roberts' serious medical needs.

C. James Love

54. James Love is a fifty-two year-old inmate who is incarcerated at Lebanon Correctional Institution (LeCI) in Lebanon, Ohio.

55. Mr. Love suffers from periodontal disease, a serious medical condition.

56. Due to inadequate staffing at LCI, Mr. Love was forced to wait twenty-seven (27) months to have his teeth cleaned.

57. After filing an Informal Complaint in July of 2002, Mr. Love was told that it takes "several months to be called for treatment" after requesting it.

58. Because of this delay and inadequate treatment, Mr. Love's front four bottom teeth are extremely loose and it is probable that he will lose them due to the inadequate dental care he has received. Loose teeth increase the risk of infection and increase general health risks to persons with heart conditions such as Mr. Love.

59. Although Mr. Love finally had his teeth cleaned on June 16, 2003, he had to have a second cleaning on August 11, 2003 because so much tartar had accumulated on his teeth. Mr. Love is still waiting to have cavities filled that were identified at the June 2003 cleaning.

60. Because of the more than two-year delay in providing dental care to Mr. Love, he faces ongoing dental and health problems because of his four loose teeth, untreated periodontal disease and unfilled cavities.

61. Defendants McWeeney, Lawson, Wilkinson, Northrup, and Martin have acted with deliberate indifference to Mr. Love's serious medical needs.

D. Exhaustion of Administrative Remedies

62. The named plaintiffs have exhausted their administrative remedies.

63. Proof of exhaustion for Plaintiff Fussell is attached hereto as Exhibit A.

64. Proof of exhaustion for Plaintiff Roberts is attached hereto as Exhibit B.

65. Proof of exhaustion for Plaintiff Love is attached hereto as Exhibit C.

66. As a result of the deliberate indifference of the defendants, the individual plaintiffs have suffered pain and emotional distress and a marked deterioration in their overall health.

VII. FIRST CLAIM - 42 U.S.C. § 1983

67. Defendants have, under color of state law, deprived plaintiffs of rights, privileges and immunities secured by the Eighth and Fourteenth Amendments to the U.S. Constitution including but not limited to the right to adequate medical care and the right to be free of cruel and unusual punishment.

VIII. SECOND CLAIM – VIOLATION OF STATE STATUTORY LAW

68. Defendants have illegally imposed a \$3.00 medical co-pay on members of the plaintiff class who were either imprisoned before July 1, 1996, or who were imprisoned on or after July 1, 1996 for offenses committed prior to July 1, 1996.

69. O.R.C. 5120.021 states that the pre-July 1, 1996 version of Chapter 5120 applies to persons who were imprisoned before July 1, 1996 and to persons who were imprisoned on or after July 1, 1996 for offenses committed prior to July 1, 1996.

70. Plaintiff Roberts has been incarcerated since May 9, 1995. He has routinely been charged the \$3.00 copay in order to receive medical and dental care since July 1, 1996.

71. Plaintiff Love has been incarcerated since June 7, 1996. He has routinely been charged the \$3.00 copay in order to receive medical and dental care since July 1, 1996.

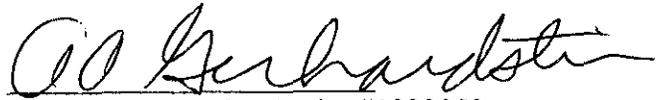
72. The collection of the \$3.00 copayment fee from inmates Robert and Love and from all similarly situated inmates violates O.R.C. 5120.021.

IX. PRAYER FOR RELIEF

Wherefore, plaintiffs request that this court

- A. Certify this case as a class action;
- B. Award to the named plaintiffs only compensatory and punitive damages in an amount to be shown at trial;
- C. Reimburse medical copays to plaintiffs Roberts and Love and to members of the subclass;
- D. Award members of the plaintiff class reasonable attorneys fees and expenses;
- E. Order such further relief as this Court may deem just and proper.

Respectfully Submitted,



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VERIFICATION

I verify that these facts are true to the best of my knowledge and belief.



Alphonse A. Gerhardstein