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United States District Court, S.D. New York.

Louis MILBURN, et al., Plaintiffs,
v.
Thomas A. COUGHLIN, III, et al., Defendants.

No. 79 CIV. 5077(RJW). | March 13, 2002.

Opinion

MEMORANDUM DECISION

WARD, D. J.

BACKGROUND

***1** James West, a member of the plaintiff class, moves for a finding that Defendants are in civil contempt of the *Milburn v. Coughlin* Modified Final Judgment dated September 27, 1991 (the "*Milburn* Judgment" or "Judgment"). According to West, he did not receive proper medical treatment while he was an inmate at the Green Haven Correctional Facility ("Green Haven").

West claims that Defendants violated the following provisions of the *Milburn* Judgment: Paragraph VII, which requires Defendants to provide inmates with adequate and timely access to outside specialists; Paragraph XI, which requires Defendants to review the medical records of new inmates and follow up on outstanding medical problems; and Paragraph XXIII, which requires Defendants to insure patients' privacy by keeping security officers sufficiently distant from the place of health care encounters so that quiet conversation between the patient and health care provider cannot be overheard. West seeks compensatory damages and injunctive relief.

On June 23, 1998, the Court instructed Dr. Robert Cohen, the Medical Auditor appointed under the *Milburn* Judgment, to review West's medical records and report his findings to the Court and counsel for both parties. Citing the complexity of West's medical problems, Dr. Cohen requested the assistance of Dr. Janet Freedman, a board-certified physiatrist. By order dated October 27, 1998, the Court granted Dr. Cohen's request. Dr. Freedman and Dr. Cohen issued their reports on October 8 and November 28, 1999, respectively.

The Court held a hearing on this matter beginning on August 23 and 24, and continuing on December 14 and 18, 2000. On August 29, 2000, following the first two days of the hearing, the Court entered an interim order granting injunctive relief pending a final determination on the merits. The order dictated that (1) West be transferred from the Upstate Correctional Facility to Green Haven; (2) West be examined by the chief of neurology at Albany Medical Center; (3) West be provided with the Everest and Jennings wheelchair which he had previously used at Green Haven; (4) West be provided with hand splints; (5) West's personal property be transferred to Green Haven; and (6) Defendants be prohibited from using "black box" restraints when transferring West. Defendants have complied with the Court's interim order. The following constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed.R.Civ.P.

FINDINGS OF FACT

I. West's Medical History Prior to Entering Green Haven

West suffered an injury to his right leg in 1983 during a basketball game. He had surgery and wore leg braces for some time, but his injury worsened and, as a result, he began using a wheelchair in September or October 1986. *See* Hearing Transcript ("Tr.") at 13.

While incarcerated at Rikers Island in November 1986, West attempted to transfer from his wheelchair to a toilet and fell, re-injuring his right leg. In December of the same year, a metal rod and screws were surgically placed in his right leg. *See* Tr. at 17–19.

***2** In August 1989, West entered the Wende Correctional Facility. *See* Plaintiff's Exhibit ("Pl.Ex.") 1. After a consultation at an orthopedic clinic on October 16 of that year, a clinician recommended physical therapy for West. *See* Pl.Ex. 4.

West was transferred to the Southport Correctional Facility on March 15, 1990. *See* Pl.Ex. 1. Dr. John Simonds, a physical therapist, evaluated West and concluded that he needed an elevated leg rest for his wheelchair, triceps and shoulder strengthening, and a modification of his shower and toilet. He recommended a strengthening program of arm presses and pushups. *See* Pl.Ex. 5. West did not receive any physical therapy while he was housed at Southport. *See* Tr. at 24.

On May 1, 1990, Dr. Simonds wrote a letter concerning West and another inmate to Dr. Mahendra Shah, the medical director at Southport, stating that both inmates were "basically wheelchair bound." Pl.Ex. 6. Dr. Simonds believed that both inmates should be in a facility that provided an exercise program and equipment with which they could work on their upper and lower extremities. Furthermore, he felt that they needed handicap access to showers and toilets which could not be provided at Southport. Accordingly, he recommended a transfer to another facility. *See id.*

Dr. Richard J. Yanessa of the Twin Tiers Rehabilitation Center at St. Joseph's Hospital in Elmira, New York, conducted a physiatric examination of West on May 20, 1990. He suggested physical therapy and an exercise program with the ultimate goal of independence from West's wheelchair. He also recommended adaptive equipment such as a tub transfer bench, bedside commode, long handled reacher and shoe horn. *See* Pl.Ex. 29.

Sometime after Dr. Yanessa's evaluation, Southport prepared an application to transfer West to the Unit for the Physically Disabled ("UPD") at Green Haven because Southport did not have regular physical therapy services. The application indicated that West suffered from "bilateral muscle atrophy both lower extremities" and recommended that West receive "extensive physical therapy and rehab services." Pl.Ex. 9.[1] On November 3, 1990, West was transferred to the UPD at Green Haven so that he could receive physical therapy. *See* Tr. at 27.

II. West's Physical Therapy Treatment at Green Haven

Upon West's admission to Green Haven in November 1990, a physician assessed West's medical condition. He determined that West had stiffness and a tingling sensation in his extremities, left side paresis (partial paralysis) in his upper and lower extremities, possible carpal tunnel syndrome, back pain, and a fracture of the right femur with muscle atrophy in his legs. *See* Pl.Ex. 12.

On February 25, 1991, West was scheduled for a Somatosensory Evoked Potential ("SSEP") examination, a test which records the electrical activity of the central nervous system for the purpose of determining if there is a connection between a muscle and the spinal cord. The test may be useful in diagnosing whether or not a patient has paraplegia. *See* Pl.Ex. 81 at 68.[2] West appeared for the test but the technician was not available and the examination was postponed. *See* Pl.Ex. 17, 32. The test was performed on May 29. *See* Pl.Ex. 32.[3]

***3** After the SSEP test, the "reading physician," Dr. Douglas Nordli concluded: "[n]o reproducible potential were recorded. This is consistent with dysfunction in the peripheral somatosensory pathways. However, this may also be due to technical factors, i.e. poor stimulation and the technologist does not note whether a good motor response was obtained." Pl.Ex. 32. Furthermore, in explaining the results of the examination, the referring physician, Dr. Jonathan Moldover, stated in a letter to the Regional Health Administrator of Green Haven that the test "failed to demonstrate any potentials transmitted from [West's] leg to his brain." Pl.Ex. 18. However, Dr. Moldover also concluded that technical problems occurred during the test which skewed the results. He believed that a complete spinal cord problem was highly unlikely. *See id.* Thus, the test was ultimately inconclusive as to whether West suffered a neurological problem.[4]

West received a physical therapy consultation for an evaluation of his lower extremities on May 25, 1992. *See* Pl.Ex. 39. The purpose of the consultation was to determine whether West was able to stand and walk with the assistance of a KAFO, which is a type of leg brace. *Id.* However, West was not immediately evaluated.

On January 23, 1993, West wrote a letter to Charles Scully, Superintendent of Green Haven, complaining about the lack of physical therapy at Green Haven from 1990 to 1993. *See* Tr. at 51–52. In response, West was told that Green Haven was reorganizing its physical therapy department and there was no physical therapist available to help him. *See id.* at 52. This response reflected a general problem Green Haven experienced with its physical therapy department from 1990 to 1995 due to a lack of staffing. As a result of this problem, the physical therapy department could not adequately provide services to inmates who needed therapy. *See id.* at 152. Thus, even if physical therapy was prescribed for an inmate during this time, he would not likely have received appropriate treatment because no one was available to provide the services. *See id.*

In April 1993, West received a consultation order directing an orthopedic examination by a physician at Green Haven. Approximately one month later, West was examined. In his report, the doctor stated, "Mr. [West] is motivated and wants to be able to stand with KAFOs." Pl.Ex. 49. The doctor also recommended that West be provided with "KAFOs for standing and limited ambulation [on] parallel bars." *Id.*

A physical therapist finally met with West in June 1993. *See id* . The physical therapist concluded that West was not able to stand and was non-ambulatory, meaning he could not walk, and that KAFOs would be impractical. *Id.* Green Haven did not then attempt to provide West with physical therapy.

West filed two "Inmate Grievance Complaint" forms on December 25, 1994, and May 4, 1995, requesting physical therapy. *See* Pl.Ex. 65, 69. In response, the Inmate Grievance Resolution Committee recommended that West be reevaluated by a physiatrist and provided with physical therapy if needed. *See* Pl.Ex. 64. On August 16, 1995, the request for physical therapy was "unanimously accepted in part" by the Green Haven Central Office Review Committee ("CORC"). *Id.* The CORC recognized that physical therapy had been scheduled but not provided, and advised West to "speak to his primary provider to further discuss his concerns." *Id.*[5]

***4** In February 1996, Dr. Sreedharan evaluated West for physical therapy. *See* Tr. at 294–95. Dr. Sreedharan recommended that West receive boots and long leg braces to help him stand and "gait training with KAFOs." Pl.Ex. 111, 112.[6] The boots and leg braces were supposed to straighten West's knees and feet to enable him to walk. *See* Tr. at 294–95.

On February 29, a physical therapist attempted to provide physical therapy to West. *See id.* at 121–22. West was able to stand and walk along parallel bars for approximately one to two minutes with the assistance of leg braces and boots. *See id.* at 121–22, 299–300. However, shortly after West began physical therapy, he developed a condition known as "foot drop" or "ankle contracture"—a shortening of the tendons at the ankle which impairs the ability of the joints to go through the normal range of motion necessary to walk. *See* Tr. at 298. This condition is commonly caused by immobility, or lack of use of one's legs. *See id.;* Pl.Ex. 81 at 26–27; Lava Dep. at 16.

As a result of West's ankle contracture, his physical therapy ended. *See* Tr. at 314–16.[7] Dr. John Bendheim, West's primary care physician at Green Haven from February 1996 through June 1998, was skeptical of the severity of West's ankle contracture. Dr. Bendheim was able to move West's foot when West was not aware that it was being manipulated, but the foot became firmly fixed in a downward position when West knew the doctor was conducting the test. *See* Tr. at 251.

Nevertheless, Dr. Bendheim recommended physical therapy to treat the ankle contracture. *See id.* at 317–18. He also recommended that West be examined by an orthopedic surgeon for a possible bilateral Achilles tendon release, which is a surgical procedure performed to cut the Achilles tendon. The orthopedic surgeon, Dr. Steven Schwartz, examined West on three occasions and recommended the surgery. However, the surgery was never performed. *See* Tr. at 322–23, 331–32.

Dr. Moldover and others advised Dr. Bendheim not to go through with the surgery because "for one thing they thought that Mr. West was faking the illness; and for another thing they thought that they knew the outcome was likely to be catastrophic and ill advised, and they were aware that the outside consultants are frequently unfamiliar with [Green Haven] patients." *Id.* at 335. The surgery could have resulted in a lifetime of disability requiring West to wear a large brace from his leg to above his waist. *See id* . at 253. West did not receive physical therapy after he developed the ankle contracture. *See id.* at 317–18.

III. Lack of Confidentiality at Green Haven

Many of West's medical visits and consultations at Green Haven were not kept confidential from security officers. When West met with health care workers for medical consultations, security officers stood close enough that they could overhear the discussion. *See* Tr. at 55–56. Dr. Cohen routinely viewed "security staff standing equidistant from the prisoner being interviewed by the nurse." *Id.* at 161. Dr. Cohen stated:

> ***5** It is not possible to have a reasonable encounter in this setting, and it cannot be the responsibility of Mr. West to ask for confidentiality. It has to be provided.... And I know that it is the, it is common practice at Green Haven in the UPD for people, for prisoners to not have confidential access to the nursing staff.

Id. at 161–62. Dr. Bendheim also acknowledged that many of the UPD inmates at Green Haven have complained about the lack of patient confidentiality. *See id.* at 270.

IV. West's Refusal of Medical Treatment and Lack of Cooperation With Medical Staff

Although West sought medical attention for a variety of ailments and conditions, he also frequently refused care or did not cooperate with medical personnel. The record amply demonstrates that West was generally a difficult patient who was partially responsible for delays in his treatment. For example, in 1991, West refused a colonoscopy, a physiatry appointment, and a SSEP examination. *See* Def. Ex. E at 13, 14; Tr. at 372–74. In 1992, he refused a pre-operative blood test and an ultrasound of his kidney and bladder. *See* Def. Ex. E at 18, 22. Several times in 1994, West refused treatment for his eye. *See id.* at 31–36. In 1995, he refused treatment for an ear infection. *See id.* at 39, 41–42. From 1994 to 1997, West refused several treatments for his carpal tunnel syndrome. *See id.* at 27, 43–45, 84, 87, 122, and 124–25; Tr. at 379, 396–97. In addition, West refused physical

therapy at an orthopedic clinic on March 19 and April 4, 1996. *See* Def. Ex. E at 54; Tr. at 387. As Dr. Bendheim appropriately stated, "I don't think there was anything [West] didn't refuse, actually, at some point." Tr. at 266.

As a more recent example, when Dr. Lava attempted to conduct a neurological examination in August 2000, he was unable to reach a conclusion because West did not give his full effort in the evaluation. *See* Lava Dep. at 13–15. Dr. Lava attempted to test West's arm strength by having West resist the doctor's efforts to exert pressure on his arms. *See id.* at 14. Instead of resisting with the amount of force he was capable of, West exhibited "give-way weakness," meaning he would "just let go" and not give a full effort. *Id.* However, West was able to move himself around in his wheelchair and could transfer himself from his wheelchair to his bed. An individual who can perform those tasks should have been able to provide the necessary resistance for Dr. Lava's test. *See id.*

Furthermore, when Dr. Lava attempted to test West's legs, West did not give a full effort. West had greater ability and strength in his legs than he demonstrated for Dr. Lava. Dr. Lava observed West use certain muscles when he moved around that he would not use in the examination. Therefore, Dr. Lava was not able to determine whether West had a neurological problem. *See id.* at 23.

CONCLUSIONS OF LAW

I. Whether Defendants Are in Contempt of the *Milburn* Judgment

***6** As discussed above, West claims that Defendants violated Paragraphs VII, XI, and XXIII of the *Milburn* Judgment. Defendants counter that they have made reasonable efforts to treat West and delays in providing medical care were due, in large part, to West's own refusal to be treated.

"A party may be held in contempt only if it is proven by 'clear and convincing' evidence that the party violated a 'clear and unambiguous' order of the court." *City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n,* 170 F.3d 279, 282 (2d Cir.1999) (citations omitted). "The violation need not be willful, but it must be demonstrated that 'the contemnor was not reasonably diligent in attempting to comply." ' *Id.* at 283 (citations omitted). The parties do not dispute whether the *Milburn* Judgment is clear and unambiguous. Thus, the only questions for consideration are whether Defendants violated the Judgment, and if so, whether they were reasonably diligent in attempting to comply.

A. Paragraph VII

Paragraph VII(B)(3) of the *Milburn* Judgment requires Defendants to insure that a patient needing specialist care receive a consultation within forty-five days from the date a specialist consultation is ordered by a Green Haven health care provider. In the present case, Dr. Cohen concluded that a number of specialist consultations for which West was scheduled did not take place within forty-five days. *See* Pl.Ex. 25 at 5; Tr. at 185. He stated that the delays were common during the first several years of his tenure as medical auditor; however, he did not identify any specific violations in his report or his testimony. *See* Tr. at 185.

One example demonstrated by the record is the delay in West's first SSEP test. On February 25, 1991, West was scheduled for a SSEP examination. *See* Pl.Ex. 17. However, since the technician was not available to administer the test, it was postponed and West was not examined until May 29, ninety-three days after the consultation was ordered. *See* Pl.Ex. 32. Thus, West has established that Defendants committed at least one violation of Paragraph VII(B)(3) and may have committed additional violations.

Nevertheless, the Court is not convinced that Defendants were not reasonably diligent in attempting to comply with their obligations under Paragraph VII(B)(3). While Dr. Cohen's conclusion that Defendants did not always comply with Paragraph VII(B)(3) is entitled to significant weight, it is not determinative. First, the doctor did not cite specific violations on which the Court can rely. Second, he noted that violations were more common during the first several years of his tenure, implying that the situation may have improved since then.

With respect to the postponement of the SSEP examination, the Court finds that Defendants were reasonably diligent in attempting to comply with their obligation to conduct the test in a timely manner. Delays may occur in the administration of non-emergency medical care, and while the *Milburn* Judgment does not permit such delays, they are inevitable in any complex medical care system. Defendants will not be held in contempt for one excessive postponement so long as they were reasonably diligent in attempting to comply. The SSEP test was conducted within several months of the date on which it was originally scheduled. Certainly, the test might have been rescheduled more promptly, but Defendants' conduct is not contemptuous. Without additional evidence that Defendants unreasonably disregarded their responsibility to administer the test, the Court finds that they are not in contempt of Paragraph VII(B)(3) of the *Milburn* Judgment.

B. Paragraph XI

***7** Paragraphs XI(A) and (B) provide that Defendants must review arriving inmates' medical records and promptly follow up on and remedy outstanding medical orders, overdue tests or procedures. West was transferred to the UPD at Green Haven for the specific purpose of receiving physical therapy for his legs. *See* Tr. at 23; Pl.Ex. 6. Nevertheless, Defendants did not attempt to give West physical therapy on his lower extremities until February 1996, over five years after he arrived at Green Haven. Although West received a physical therapy consultation on May 25, 1992, *see* Pl.Ex. 39, a physical therapist did not see West to evaluate him until June 1993 and did not actually provide physical therapy until three years later. *See* Tr. at 47.

When West's physical therapy began in February 1996, he was able to stand with the assistance of leg braces while holding onto parallel bars. *See* Tr. at 299. However, shortly after West's physical therapy began, it ended when West developed ankle contracture and a fungal infection. *See id.* at 249, 298, 307, and 314–16. Despite early indications from West's first physical therapy sessions that physical therapy benefitted him, neither condition was treated to the point that physical therapy could resume.

Defendants were not reasonably diligent in attempting to provide West with physical therapy. That is clearly demonstrated by the unexplained five-year delay in West's first physical therapy session. Furthermore, even if Defendants attempted to provide West with physical therapy earlier, their efforts would likely have been in vain as Green Haven did not have a full time physical therapist from 1990 to at least 1995. *See* Pl.Ex. 65; Tr. at 154. Accordingly, the Court finds that Defendants are in contempt of Paragraph XI of the *Milburn* Judgment.

C. Paragraph XXIII

Paragraph XXIII(B) of the Judgment provides that, unless requested by a health care provider, security staff shall remain sufficiently distant from the place of health care encounters so that quiet conversation between the patient and health care provider cannot be overheard. Several times when West met with medical staff at Green Haven, security officers stood close enough that they could overhear the conversation. *See* Tr. at 55–56. This is a clear violation of the *Milburn* Judgment.

Furthermore, Defendants were not reasonably diligent in attempting to respect prisoners' privacy. The problem is not limited to West's encounters, as Dr. Cohen routinely viewed "security staff standing equidistant from the prisoner being interviewed by the nurse." *Id.* at 161. It is not possible to have a reasonable health care encounter if security personnel can infringe on prisoners' privacy. *Id.* at 161–62. Accordingly, the Court finds that Defendants are in contempt of Paragraph XXIII of the *Milburn* Judgment.[8]

II. Remedies

In a civil contempt proceeding, sanctions may be imposed either to coerce the defendant into complying with the court's order or to compensate the victim of defendant's contemptuous conduct. *See EEOC v. Local 638,* 81 F.3d 1162, 1177 (2d Cir.1996). Damages are recoverable in a civil contempt action only if the plaintiff can show that he "suffered actual injury." *Powell v. Ward,* 487 F.Supp. 917, 936 (S.D.N.Y.1980); *see also EEOC* at 1177 (citing *New York State Natl. Org. for Women v. Terry,* 886 F.2d 1339, 1353) (Remedial sanctions are designed to " 'reimburse the injured party for its actual damages." ')

***8** Here, the need for a coercive sanction has been obviated by the Court's January 31, 2002 Order directing that West be conditionally transferred to Five Points Correctional Facility provided he receives physical therapy and treatment for his other outstanding medical problems there. However, because the Court has determined that Defendants are in contempt of Paragraphs XI and XXIII of the *Milburn* Judgment, an award of damages would be justified to compensate West for any injuries suffered as a result of Green Haven's past noncompliance. West seeks compensatory damages in the sum of one million dollars; however, he has not shown actual injury sufficient to support a substantial damage award. Rather than speculate on the amount of damages, the Court finds that West is entitled to a nominal award of $100 to vindicate the deprivation of his rights under the *Milburn Judgment.*[9] *See Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 308 n. 11 (1986) ("nominal damages ... are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.") In addition, the Court directs Defendants to pay West's attorneys the sum of $5000 to cover all out-of-pocket expenses incurred in this litigation.

CONCLUSION

For the foregoing reasons, the Court finds that defendants are in contempt of the *Milburn v. Coughlin* Modified Final Judgment dated September 27, 1991. Damages are awarded in the amount of $100 together with the sum of $5000, payable to plaintiff's attorneys, White & Case, to cover all out-of-pocket expenses.

The Clerk is directed to enter judgment in accordance with this decision.

Footnotes

1 Muscle atrophy refers to a condition in which a muscle is smaller than its usual size due to a lack of use. *See* Tr. at 179.

2 Pl.Ex. 81 is the Deposition of Dr. Janet Freedman.

3 A number of specialist consultations for which West was scheduled did not take place within forty-five days, as required by the *Milburn* Judgment. *See* Pl.Ex. 25 at 5; Tr. at 185. The ninety-three day delay in the administration of the SSEP test is an example of this general problem which the Judgment sought to rectify, namely, excessive delays in the provision of specialist care.

4 On November 9, 2000, in response to a Court order, Dr. Spencer Weig of the Albany Medical Center Hospital performed a SSEP examination on West. Dr. Weig reported: "Abnormal due to delayed cortical responses bilaterally, left more than right. This study demonstrates significant dysfunction in somatosensory pathways arising in both legs, left more than right." Defendants' Exhibit ("Def.Ex.") C. Dr. Weig indicated that "somewhere from the spinal cord on up there is an abnormality in speedal electricity suggesting that there may be a neurological dysfunction of some sort ." Deposition of Dr. Neil Lava ("Lava Dep.") at 34. The test showed a "significant abnormality," "a slowing or defect in the electrical conducting system, in this case somewhere in his spinal cord, brain stem or brain." *Id.* at 77–78.

5 Dr. Cohen believed West's requests for care were not taken as seriously as they should have been. *See* Tr. at 186. He attributed this, in part, to the fact that Dr. Moldover, a Supervising Physiatrist at Green Haven, was testifying against West in another federal lawsuit. *See id.* In a report to this Court, Dr. Cohen wrote:

> The Supervising Physiatrist at Green Haven, Dr. Moldover, testified as a medical expert against Mr. West in a law suit. This occurred while Mr. West was at Green Haven. Dr. Moldover was called upon to make recommendations regarding Mr. West's care at Green Haven. Mr. West was very disturbed that a physician with responsibility for his medical care at Green haven would be testifying against him at the same time he was caring for him. I agree with Mr. West that this was inappropriate, and this conflict in Dr. Moldover's roles helped to a create a climate in which Mr. West's requests for care were not taken as seriously as they should have been.

Pl.Ex. 25 at 5–6.

6 "Gait training" is a method of teaching someone how to walk. *See* Tr. at 249.

7 In addition to the ankle contracture, West developed a fungal infection on both of his feet which caused his feet to swell, making it impossible for him to get his shoes on for gait training. *See* Tr. at 249, 307.

8 While security is the paramount concern in a prison, inmates' medical privacy must also be respected. Indeed, Paragraph XXIII of the *Milburn* Judgment explicitly addresses this aspect of inmate health care. By entering into the Judgment, Defendants must have considered the effect Paragraph XXIII would have on prison security. They cannot now credibly argue that compliance with the Judgment is impossible due to safety concerns. Defendants must balance prison security with inmates' privacy, as required by the Judgment.

9 This award takes into account that West's own refusals to cooperate with his health care providers contributed significantly to his failure to receive adequate medical treatment.