NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 16, 2018*
Decided March 23, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 17-1662

FIRAS M. AYOUBI,
Plaintiff-Appellant,

v.

THOMAS DART, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14 C 4306

Charles R. Norgle,
Judge.

O R D E R

Firas Ayoubi, a pretrial detainee at the time he filed this lawsuit, sues under 42 U.S.C. § 1983 alleging that a physician's assistant at the Cook County Department of Corrections was deliberately indifferent to his gynecomastia, a condition that causes a man to grow excessive breast tissue due to an imbalance of hormones. He also sues the Cook County Sheriff and the Chair of the Department of Corrections' health services in their official capacities, alleging that they lack appropriate policies on when to provide

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* We agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

inmates with pain medication. The district judge entered summary judgment for the defendants and Ayoubi appeals. Because there are genuine disputes of material fact, we vacate the district court's judgment in favor of the physician's assistant and remand for further proceedings. In all other aspects, we affirm.

We recount the facts in the light most favorable to Ayoubi, the nonmovant. *Lewis v. McLean*, 864 F.3d 556, 558 (7th Cir. 2017). Ayoubi first noticed a lump developing on his left areola in August 2013. When he sought treatment for another medical problem in January 2014, he did not mention the lump, but his medical record from that date states that Ayoubi had a point tender to palpation to the left of his breastbone.

The lump started to grow in size and cause pain, so he completed a health services request on February 1, 2014. He wrote that the pain was exacerbated by contact (like when he put on a shirt or when he lay down to sleep), that "it appears to be swollen," and "it hurts a lot." The lump was growing larger and becoming more painful. Ayoubi saw a nurse two days later; her report reflects that she instructed him on pain management but did not give him pain medication. She scheduled a follow-up appointment for February 26.

But Ayoubi could not wait; less than two weeks later, he submitted another request form that stated: "I am in a lot of pain, my left areola on left chest is hurting," "there is a lump," "it's very painful," and "I still haven't got pain meds" or "seen a doctor." The nurse gave him twelve 200-milligram tablets of ibuprofen. The medication lasted less than two days, and the lump continued to cause serious and near-constant pain. Without a medical order, Ayoubi was limited to buying eight tablets of low-strength ibuprofen each week from the commissary.

Ayoubi saw Altez, a physician's assistant, four times during the period relevant to his complaint. Before seeing a patient, Altez reviews his patients' health services requests and medical health records. During an 11-minute appointment on February 26, 2014, Altez examined each of Ayoubi's breasts, including the lump, and posited that it could be gynecomastia. But he also thought it could be an abscess and prescribed preventive antibiotics "in case he develops an abscess while he has the blood tests and ultrasound," which Altez ordered Ayoubi to undergo. The antibiotic had no pain-relieving properties, and Altez did not prescribe any pain medication because, he says, Ayoubi never complained of pain. Ayoubi disputes this. During the appointment, Ayoubi says Altez asked him if he was lactating and then laughed to himself.

Altez next saw Ayoubi on March 19 for a seven-minute follow-up appointment. He reexamined Ayoubi and reviewed the results of his blood tests and ultrasound, which revealed no abnormalities. Altez concluded that the lump was not an infected abscess; the tests confirmed the gynecomastia diagnosis. Altez told Ayoubi not to touch the gynecomastia because it could cause the tissue to further grow. He also teased Ayoubi some more. Altez "began to laugh"; stated that the jail was not "University of Chicago Hospital"; said, "You're a big boy. You can handle it"; and "You're going home soon anyway, right?" Altez did not give Ayoubi any pain medication; he says that Ayoubi did not report any pain during the appointment, although he did not ask Ayoubi if he was in pain. He explained: "I always give pain medicine to whoever needs it," and "you can tell the patient is in pain, you can see the face, you can see the signs of pain." Altez admitted that while less common in adults than in adolescents, a patient can have severe pain from gynecomastia.

In April 2013 Ayoubi submitted another health services request in which he stated, "I'm having severe pain, no one gives me pain meds, all the doc says is 'don't play with it' and 'I can only give you pain meds for a week.'" And he wrote: "The pain is 24 hours a day/ 7 days a week." At an April 10 appointment with a nurse, Ayoubi did not receive any pain medication, but he received ibuprofen on April 30 for an unrelated ailment. After a June 2014 appointment, another provider noted that Ayoubi "states discomfort with nipple rubbing on shirt" and prescribed him 400 milligrams of ibuprofen. Another provider increased his dosage to 600 milligrams the next week. Ayoubi filed this lawsuit on June 9, 2014.

Sometime before October 23, 2015 (the date of his deposition), Ayoubi had a consultation with a plastic surgeon. When he was asked during his deposition whether he would have plastic surgery, he said: "I have to take the advice of the plastic surgeon under serious advisement that it could rupture vessels and become worse or some other condition can come from it. I have to take this very seriously." Ayoubi was also concerned about scarring.

Based on these facts, the defendants moved for summary judgment. They argued that gynecomastia is not a serious condition and that, at most, it caused Ayoubi "discomfort," and further that Altez had provided "thorough" medical care. The district judge agreed with the defendants, concluding that Ayoubi's condition was not serious and that he simply disagreed with Altez's course of action. And because the district judge concluded that no constitutional violation occurred, the claims against the sheriff and the chair of health services necessarily failed.

On appeal Ayoubi argues that the district judge erred in granting the defendants' motion for summary judgment because gynecomastia and pain are objectively serious medical conditions and Altez offered no treatment after ruling out life-threatening illnesses, despite his awareness that Ayoubi was suffering. He also argues that the judge improperly weighed evidence, drew inferences in favor of the appellees, and relied on inadmissible hearsay by citing material from the Internet.

We address first Ayoubi's contention that the district judge improperly made credibility determinations, weighed evidence, and drew inferences from the evidence in favor of the defendants. *See Payne v. Pauley*, 337 F.3d 767, 778 (7th Cir. 2003) ("It is the job of the jury, and not the district court judge at summary judgment, to determine which party's evidence to credit."). We agree with him. Ayoubi both submitted a declaration and gave deposition testimony to support his claim, so he did not rely on his unsworn pleadings to make his case. On the way to concluding that Ayoubi did not have a serious condition, however, the district judge discredited Ayoubi's reports of severe pain by picking out purportedly inconsistent statements. The judge noted that "at different times, [p]laintiff complained of consistent chest pain and intermittent chest pain," and "on some occasions that the pain manifested itself in a prickling and burning feeling" while at other times "[p]laintiff referred to the pain as discomfort." However, the district judge overlooked Ayoubi's other reports of severe and constant pain and did not credit Ayoubi's assertion that his pain got worse over time. Indeed, the judge dismissed Ayoubi's sworn testimony about "worsening pain" as an "anecdotal statement." rather than the competent evidence that it is. *See id.* at 771. The judge further undermined Ayoubi's complaints of pain by finding that "[i]t never in any way interfered with his daily activities as an inmate," although Ayoubi averred that it hurt even to lie in bed or put on his shirt.

Beyond discrediting Ayoubi's testimony, the judge also viewed the record in a light unfavorable to Ayoubi. For example, he found that Ayoubi had "rejected" the surgical option, a "reasonable course of treatment," because of a "preference for pain medication." But Ayoubi had given two reasons for delaying surgery that had nothing to do with wanting medication; further, the "preference" for medication he had expressed related to medicines that can be used to treat the gynecomastia itself, not pain medicine. This was not the only instance in which the district judge all but accused Ayoubi of drug-seeking behavior with no record evidence for that assessment. The only pain medicines discussed at all in the record are nonnarcotic NSAIDs like ibuprofen and aspirin. And in any case, determining whether a prisoner is malingering or "trying

to get high with [a] narcotic painkiller" is a question for a jury. *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002).

We also agree with Ayoubi that the district judge improperly used Internet research to discredit Ayoubi's own sworn testimony about how painful his condition was. While we would not object to the judge using posts from the Mayo Clinic's or Merck's websites to provide background information about a condition that might be new to the reader, the judge took the research one step further. He used that material, which he referred to as the "medical literature," as grounds for concluding that *Ayoubi's* particular symptoms were not objectively serious: "Plaintiff's symptoms, as explained in the medical literature *infra,* do not rise to the objective level of seriousness needed." Even that statement relied on cherry-picking from the "medical literature," which also states, for example, that gynecomastia "can be tough to cope with" because of "pain and embarrassment." The judge's reliance on Internet research is all the more puzzling because he discredited Ayoubi's testimony that he had read articles "which stated that gynecomastia was a serious, painful condition" in part because Ayoubi could not show they were from a "reliable source" such as a "medical professional or anyone with a background in science."

Of course, our review is de novo, and we are not bound by the district judge's reasoning. And although we cannot say Ayoubi's is a particularly compelling case, the record when appropriately viewed in the light most favorable to him reveals sufficient factual disputes to preclude the entry of summary judgment.

As a pretrial detainee, Ayoubi's constitutional rights are derived from the Fourteenth Amendment's due-process clause rather than the Eighth Amendment, which applies to convicted inmates. *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015). But the standards are virtually indistinguishable. A detainee must have a medical condition "objectively serious enough to amount to a constitutional deprivation," and "the defendant prison official must possess a sufficiently culpable state of mind." *Id.*

We turn first to the question whether Ayoubi had sufficient evidence from which a jury could find that he had a "serious" condition. A medical condition is objectively serious if failing to treat the condition "could result in further significant injury or the unnecessary and wanton infliction of pain." *Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008) (internal quotation marks and citation omitted). Moreover, when a prisoner has "a medical condition that significantly affects [his] daily activities" or has "chronic and substantial pain," the condition is objectively serious. *Id.* (quotation marks omitted).

As we view things, the pertinent question is not, as the defendants suggest, whether gynecomastia in itself is a serious condition, but whether there is evidence that it caused Ayoubi sufficient pain to require treatment. A medical condition that causes pain can be serious without being life-threatening. *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011); *see, e.g.*, *Lewis*, 864 F.3d at 563 (muscle spasms and accompanying back pain objectively serious).

There is enough evidence in the record to support a conclusion that Ayoubi's pain was severe and chronic enough to be considered serious. In his health-services requests, deposition, and declaration, Ayoubi describes his gynecomastia as "being pricked with a needle from the inside out" and "very painful"; he complained of being "in a lot of pain." His statements are corroborated by his repeated complaints about the pain he was experiencing through health-services forms and at in-person appointments. He frequently sought treatment and the fact that prison medical providers other than Altez prescribed ibuprofen is some evidence that Ayoubi's pain was serious enough to require treatment. *See Withers v. Wexford Health Sources, Inc.*, 710 F.3d 688, 689 (7th Cir. 2013) (noting that ibuprofen prescription was evidence that back pain was real).

The district judge also said that Ayoubi "sets forth no more than his own subjective opinion." But "there is no requirement that a prisoner provide 'objective' evidence of pain and suffering." *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005). And it is unclear what more Ayoubi could do to support his claim of severe pain. It is up to a factfinder to believe him or not.

Ayoubi has presented sufficient evidence that Altez possessed a sufficiently culpable state of mind when he did not treat Ayoubi's pain. A prisoner can establish deliberate indifference by providing evidence that medical providers let him suffer pain unnecessarily, particularly when, as here, the medical provider could "readily and inexpensively" have relieved the pain. *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999); *see also Rivera v. Gupta*, 836 F.3d 839, 840–41 (7th Cir. 2016) (reversing entry of summary judgment for doctor who was aware of numbness and pain complaints from second-degree burns, even as healthcare unit monitored burn for infection, cleaned wound, and changed dressing); *Arnett*, 658 F.3d at 753–54 (concluding that medical provider's refusal to prescribe any anti-inflammatory medication in place of inmate's previously prescribed medication for rheumatoid arthritis could amount to deliberate indifference); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 830 (7th Cir. 2009) (allowing significant pain from misinsertion of IV needle to go unremedied could be

deliberate indifference); *Gutierrez v. Peters*, 111 F.3d 1364, 1373–74 (7th Cir. 1997) (concluding that cyst with pain and at times a fever was clearly serious).

Altez was on notice that Ayoubi was in pain. Even if it were true that Ayoubi never complained directly to Altez about pain, Altez admitted that he reviewed his patients' health-services requests and medical records before appointments; Ayoubi's record was replete with complaints of pain. Altez also admitted that gynecomastia can cause severe pain. In any event, Ayoubi disputes the assertion that he did not complain to Altez about pain, and we cannot credit Altez's story over Ayoubi's. *See Rivera*, 836 F.3d at 841 ("Conflicting factual allegations, both plausible, can be resolved only by a trial."). As for Altez's ability to "tell the patient is in pain" because "you can see the face, you can see the signs of pain," we have said that no such manifestation is needed to verify a subjective complaint. *Greeno*, 414 F.3d at 655.

And the receipt of some treatment does not defeat a claim of deliberate indifference, *Cesal v. Moats*, 851 F.3d 714, 723 (7th Cir. 2017), especially when the treatment does not address the chief complaint: pain. The pain persisted for many months, but he was limited to eight tablets of low-strength ibuprofen per week from the commissary, for which he had to pay. When a nurse did "prescribe" twelve 200-milligram ibuprofen tablets in February (i.e., authorize him to receive the over-the-counter medication free of charge), they lasted him two days.

Likewise Altez's unprofessional and callous comments could allow a juror to infer that he did not take Ayoubi's condition and the pain associated with it seriously. *See Gil v. Reed*, 381 F.3d 649, 660–61 (7th Cir. 2004) (discussing medical provider's demeanor as possible evidence of malice). Altez jokingly asked Ayoubi if he was lactating, told him he was not in the University of Chicago's hospital, laughed at him, and told him that he was a "big boy" who could "handle it." These are not remarks that shock the conscience, but they could reasonably be viewed as evidence of a dismissive or casual attitude toward Ayoubi's pain.

One final note: the appellees urge us to consider Ayoubi's arguments waived because his brief "is bereft of any legal authority to support his claims and fails to comply with FED. R. APP. P. 28(a)(8)(a)." To the contrary, Ayoubi's cogent brief cites relevant caselaw from this circuit in support of his arguments. The appellees' critique is baffling; we see many briefs that flout Rule 28, and Ayoubi's is not among them. And because the Rule 28(a) complaint was raised only in a footnote, it is underdeveloped and thus waived. *See Eichwedel v. Chandler*, 696 F.3d 660, 669 (7th Cir. 2012).

We express no opinion about the merit of Ayoubi's claim, but he presented sufficient evidence from which a jury could conclude that by not treating Ayoubi's pain, Altez displayed deliberate indifference to a serious medical need. Therefore, we VACATE the judgment in favor of Altez and REMAND for further proceedings consistent with this order. In light of the foregoing, Ayoubi's motion for oral argument is DENIED.