

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

DANA E. LOPES,)

Plaintiff,)

v.)

MPCH, et. al.,)

Defendants.)

CIVIL ACTION NO. 1:14-cv-10679-NMG

**DEFENDANT BARBARA BERG, LPN'S
CONCISE STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 56.1, Defendant Barbara Berg (“*Defendant*”) offers the following statement of material facts in support of her *Motion for Summary Judgment*:

1. Pursuant to Fed. R. Civ. P. 10(c), Defendant Berg hereby adopts and incorporates by reference *Defendants, Dyana Nickl and Geraldine Riendeau, Statement of Undisputed Facts in Support of their Motion for Summary Judgment* (Doc. 100) in its entirety, as if each numbered paragraph was restated here.
2. Pursuant to Fed. R. Civ. P. 10(c), Defendant Berg hereby adopts and incorporates by reference *Defendants Paul Caratazzola, Patricia Davenport-Mello, and Massachusetts Partnership for Correctional Healthcare's Concise Statement of Material Facts* (Doc. 139) in its entirety, as if each numbered paragraph was restated here.
3. Pursuant to Fed. R. Civ. P. 10(c), Defendant Berg hereby adopts and incorporates by reference *Defendants, Dyana Nickl and Geraldine Riendeau, Statement of Undisputed Facts in Support of their Renewed Motion for Summary Judgment* (Doc. 149) in its entirety, as if each numbered paragraph was restated here.

Plaintiff

4. Plaintiff Dana Lopes (“*Plaintiff*”) is inmate presently incarcerated with the Massachusetts Department of Correction (“*DOC*”) at MCI-Shirley. (Doc. 139, ¶1). At the time of the filing of his *Complaint*, Plaintiff was incarcerated by the DOC at Old Colony Correctional Center (“*OCCC*”) in Bridgewater, MA. (Doc. 139, ¶1).
5. Plaintiff has a history of Hepatitis C, dating back more than 35 years, and also suffers from cirrhosis of the liver and end-stage liver disease. (Doc. 100, ¶13; Doc. 120, pgs.24-25).

UMCH Co-Defendants

6. Defendant University of Massachusetts Correctional Health (“***UMCH***”) provided medical services to DOC inmates, incarcerated at OCCC, from 2003 to June 30, 2013. (**Exhibit A**, Affidavit of Barbara Berg, LPN, ¶¶4-9; Doc. 27-1, ¶4). In 2003, the DOC had contracted the University of Massachusetts Medical School (“***UMMS***”), a publicly owned university, to become the new medical provider at DOC operated facilities. (Exh. A, ¶4; Doc. 27-1, ¶¶2-9). UMMS provided medical services to DOC inmates through UMCH, which was a department within the UMMS. (Exh. A, ¶¶4-5; Doc. 27-1, ¶¶3-4).
7. Defendant Geraldine Riendeau, RN was formerly the Health Service Administrator (“***HSA***”) at OCCC, and worked for UMCH at all times relevant to the *Complaint*. (Doc. 149, ¶2). Defendant Riendeau was a public employee, subject to the direction and control of UMCH. (*See* Doc. 149, ¶¶13-20).
8. Defendant Dyana Nickl was UMCH’s Senior Director of Operations, and served as UMCH’s Grievance and Appeals Coordinator at all relevant times to Plaintiff’s *Complaint*. (Doc. 149, ¶¶3,21). Defendant Nickl was a public employee, subject to the direction and control of UMCH. (*See* Doc. 149, ¶¶21-25).

MPCH Co-Defendants

9. Defendant Massachusetts Partnership for Correctional Healthcare, LLC (“***MPCH***”) is a privately owned company, affiliated with MHM Services, Inc. (“***MHM***”), which has been the contracted medical provider for the DOC since July 1, 2013. (Exh. A, ¶¶7-9; Doc. 139, ¶¶2-6).
10. On July 1, 2013, Defendant Paul Caratazzola, LICSW was hired by MPCH to become the HSA at OCCC, and worked for MPCH/MHM at all times relevant to the *Complaint*. (Doc. 139, ¶¶5-7, 11). Defendant Caratazzola was a private employee, subject to the direction and control of MPCH. (Doc. 139, ¶¶5-7, 11).
11. On July 1, 2013, Defendant Patricia Davenport-Mello, RN was hired by MPCH to become the Director of Nursing at OCCC, and worked for MPCH/MHM at all times relevant to the *Complaint*. (Doc. 139, ¶¶9-11).

Defendant Barbara Berg, LPN

12. In 2003, Defendant Barbara Berg, LPN was hired by UMCH as a LPN at OCCC. (Exh. A, ¶6).
13. While employed by UMCH, Defendant Berg reported to and was directly supervised by UMCH’s HSA and Director of Nursing. (Exh. A, ¶¶12, 16). Additionally, UMCH management staff set her hours, determined what unit she worked on during any given shift, and determined which patients she would treat. (Exh. A, ¶13).

14. During her employment with UMCH, Defendant Berg's salary was paid by UMMS and was not dependent on the number of inmates she treated. (Exh. A, ¶13). As an employee of UMCH, a publicly owned entity, Defendant Berg was able to participate in benefits programs only offered to Commonwealth of Massachusetts' employees, such as the state's retirement program. (Exh. A, ¶¶4, 14).
15. As an employee of UMCH, Defendant Berg was bound by the policies and procedures UMCH had developed concerning the care provided to patients at OCCC. (Exh. A, ¶15). During her employment with UMCH, the care and treatment Defendant Berg provided to the Plaintiff was done so in accordance with these policies and procedures. (Exh. A, ¶15).
16. On July 1, 2013, Defendant Berg became an employee of MPCH when MPCH became the contracted medical provider at OCCC. (Exh. A, ¶¶7, 9; Doc. 139, ¶12). At this time, Defendant Berg continued her job as a LPN at OCCC. (Exh. A, ¶¶7, 9).
17. Since becoming an employee of MPCH on July 1, 2013, Defendant Berg's salary has been paid by MHM, and is still not dependent upon the number of inmates she treats. (Exh. A, ¶¶9, 17). As MHM is privately owned, Defendant Berg is no longer able to participate in the Massachusetts state retirement program nor any other benefit programs only offered to state employees. (Exh. A, ¶¶8,17).
18. During her employment with MPCH as a LPN at OCCC, Defendant Berg was directly supervised by MPCH's Director of Nursing at OCCC. (Exh. A, ¶18). Additionally, MPCH management staff set her hours, determined what unit she would work on during any given shift, and determined which patients she would treat. (Exh. A, ¶18).
19. As an employee of MPCH, Defendant Berg was bound by the policies and procedures MPCH had developed concerning the care provided to patients at OCCC. (Exh. A, ¶19). During her employment with MPCH, the care and treatment Defendant Berg provided to the Plaintiff was done so in accordance with these policies and procedures. (Exh. A, ¶19).
20. During her employment as an LPN at OCCC, with both UMCH and MPCH, Defendant Berg worked as a medication nurse. (Exh. A, ¶11). In this role, she was responsible for administering medication to multiple patients, takin off provider orders, conducting KOP audits, proofreading Medication Administration Records, maintaining medications or all patients, providing patient treatments, and conducting other various duties as assigned. (Exh. A, ¶11). Defendant Berg was not responsible for prescribing medications, diagnosing illnesses, or ordering specific medical treatment. (Exh. A, ¶11).
21. Defendant Berg has never been employed by the DOC, nor has she ever been supervised by or collected a salary from the DOC. (Exh. A, ¶21).

Medical Treatment Provided by UMCH

22. From November 2003 to May 2004, UMCH medical staff treated Plaintiff's Hepatitis C with "Peg-Intron" and "Ribavirin." (Doc. 100, ¶33; Doc. 120, pg.25). However, this drug regiment ended because Plaintiff developed anemia and vision changes with cotton wool-spots seen on his eye exam. (Doc. 100, ¶33; Doc. 120, pg.25). Plaintiff was further unable to restart treatment with these medications because of issues with ascites. (Doc. 100, ¶33).
23. In August 2005 and April 2006, Plaintiff was treated at Tufts-New England Medical Center ("**Tufts**"). (Doc. 120, pg.25). The Tufts physician noted that Plaintiff was not a candidate for a liver transplant. (Doc. 120, pgs.25-26). Specifically, the physician noted that Plaintiff's "risk of dying from the liver transplant would be higher than the risk of dying from his liver disease." (Doc. 120, pg.26).
24. In 2006, following Plaintiff's evaluation at Tufts, Philip Tavares, MD ("**Dr. Tavares**") of UMCH examined Plaintiff and assessed his end-stage liver disease as stable. (Doc. 120, pg.26). Dr. Tavares' adopted Tufts findings that Plaintiff should be put on a weight loss program and discontinued from narcotics, so that the risks associated with a liver transplant could potentially be reduced. (Doc. 120, pg.26).
25. In another 2006 visit, Dr. Tavares planned to check the date of Plaintiff's last liver ultrasound and order another ultrasound or CT scan "as indicated." (Doc. 120, pg.26).
26. Throughout 2006, Plaintiff was seen several additional times by UMCH in the prison infirmary, and his condition was described as stable. (Doc. 120, pg.26).
27. From 2008 to 2012, UMCH staff continuously monitored Plaintiff's liver disease with CT scans and outside medical consults. (Doc. 100, ¶¶33-50; Doc. 120, pgs. 28-29).
28. In 2011, the Food and Drug Administration ("**FDA**") approved two new medications to treat Hepatitis C, namely, "Boceprevir" and "Telaprevir." (Doc. 120, pg.27). However, both of these medications required that they be taken in combination with peginterferon alfa ribavirin. (Doc. 120, pgs.27-28).
29. In March 2012, the Plaintiff was evaluated by Richard J. Rohrer, M.D. ("**Dr. Rohrer**") at Tufts, who again concluded that Plaintiff could not tolerate interferon therapy. (Doc. 120, pg.28). Dr. Rohrer further stated that Plaintiff did not qualify for a liver transplant because the lesion on his liver was too small, but recommended that UMCH continue to observe it. (Doc. 120, pg.29).
30. On April 24, 2012, Plaintiff was evaluated by Angela S. Dantonio, N.P. ("**Dantonio**") at UMass Memorial Medical Center in Worcester, MA (Doc. 120, pg.29). Dantonio concluded that a four-phase CT scan was needed to determine if Plaintiff could potentially be a liver transplant candidate. (Doc. 120, pg.29).

31. Per Dantonio's recommendation, UMCH staff performed a four-phase CT scan of Plaintiff's pelvis and abdomen and returned him to UMass Memorial Medical Center to be re-evaluated by multiple-providers for his chronic hepatitis C, cirrhosis and liver mass on May 17, 2012 (Doc. 120, pg.30).
32. On May 17, 2012, three radiologists at UMass Memorial Medical Center reviewed Plaintiff's four-phase CT scan and decided that an MRI needed to be obtained before considering a liver biopsy. (Doc. 120, pg.31). In June 2012, Plaintiff agreed to undergo this MRI. (Doc. 120, pg.31).
33. In August 2012, Plaintiff had the MRI. (Doc. 120, pg.32). In November 2012, he underwent a fine needle aspiration biopsy and a radio frequency ablation of the lesion on his liver. (Doc. 120, pg.32). In December 2012, Plaintiff had a three-phase CT scan of his abdomen and pelvis. (Doc. 120, pg.32).
34. On January 31, 2013, Plaintiff was seen again at UMass Memorial Medical Center, where the multidisciplinary team decided to continue surveillance of Plaintiff's condition with imaging three months after the December 2012 CT scan. (Doc. 120, pgs.32-33).
35. On or about February 2013, Plaintiff was found to be non-compliant with his Keep on Person ("**KOP**") medication, and UMCH staff began requiring Plaintiff to retrieve his daily medication from the Medication line to prevent overdosing. (Doc. 101-5, pgs.2-11).
36. In March 2013, Plaintiff was admitted to Lemuel Shattuck Hospital ("**LSH**") for a "self-induced low nutritional intake." (Doc. 120, pg.33). Medical staff at LSH recommended continued management on an outpatient basis of Plaintiff's liver disease and continued dosing of diuretic medication. (Doc. 120, pg.34).
37. In July 2013, MPCH began providing medical services to OCCC inmates, including the Plaintiff, which were previously provided by UMCH. (Doc. 120, pg.34).

Medical Treatment Provided by MPCH

38. When MPCH began providing care to Plaintiff, in July 2013, Mr. Lopes was suffering from Chronic Hepatitis C with cirrhosis. (Doc. 139, ¶13).
39. In an April 14, 2014 letter, the Director of Clinical Services of DOC Health Services Division advised the Plaintiff that MPCH did not "have an alternative treatment plan that does not include the Peg Intron at this time" and MPCH was "working on obtaining newer treatments." (Doc. 120, pg.34). The letter also explained to the Plaintiff that his prior development of "cotton wool spots" caused by the "Peg Intron treatment" could result in blindness if such treatment was given per Plaintiff's request. (Doc. 120, pg.34).
40. Plaintiff has a specific viral mutation, which predicts resistance to protease inhibitors ("**PI**") *Boceprevir* and *Telaprevir*. (Doc. 139, ¶14). On July 23, 2014, Mr. Lopes underwent testing at Boston Medical Center, where an attending physician in the

Gastroenterology Department repeated the ongoing recommendation that Mr. Lopes avoid PIs in regards to treatment of his Hepatitis C Virus (“*HCV*”). (Doc. 139, ¶14).

41. Since MPCH began caring for the Plaintiff on July 1, 2013, Plaintiff’s condition has been monitored with multiple lab tests, diagnostic procedures, and chronic disease consultations with medical professionals outside of MPCH, while MPCH medical staff waited for the U.S. Food and Drug Administration (“*FDA*”) to approve a new form of treatment. (Doc. 139, ¶15).
42. An August 20, 2014 letter to the Plaintiff from the Assistant Deputy Commissioner of the DOC Health Services Division reiterated to the Plaintiff that “Boceprevir and Telaprevir medication have to be given with the Peg Interferon” and Plaintiff could not have them because of his prior negative side effects to Peg Interferon. (Doc. 120, pg.34).
43. In October of 2014, the FDA approved the use of Harvoni to treat HCV. (Doc. 139, ¶16). Harvoni provided the first FDA approved interferon-free and ribavirin-free regimen to treat Hepatitis C. (Doc. 120, pg.35).
44. On January 21, 2015, Plaintiff was seen at the Lemuel Shattuck Hospital’s (“*LSH*”) GI Clinic, for new treatment options, where it was recommended that Plaintiff be started on a twelve week trial of Harvoni. (Doc. 139, ¶17).
45. Per the recommendation of the LSH GI Clinic, MPCH medical staff approved Plaintiff to begin treatment with Harvoni. (Doc. 139, ¶18). As a result, Plaintiff was placed on a twelve week trial of Harvoni, which began on March 2, 2015 and ended on May 24, 2015. (Doc. 139, ¶18).
46. The Harvoni treatment was successful, as subsequent lab tests confirmed that the HCV was no longer present in Plaintiff’s blood. (Doc. 139, ¶19).
47. Since Plaintiff’s successful Harvoni treatment, MPCH staff have continued to monitor Plaintiff for any signs of the HCV returning. (Doc. 139, ¶20). MPCH has also continued to provide the Plaintiff with care for additional medical conditions unrelated to the HCV. (Doc. 139, ¶20).
48. On May 4, 2016, Plaintiff informed MPCH that he was refusing to undergo any further gastrointestinal evaluations and follow-up appointments for liver disease. (Doc. 139, ¶21). On this same date, Plaintiff signed a *Release of Responsibility* form acknowledging that he understood the risks associated with refusing such treatment. (Doc. 139, ¶21).
49. Plaintiff’s present Primary Care Clinician, Maria Angeles, MD, will continue to offer and provide Plaintiff with appropriate medical treatment and monitoring for liver disease, if and when Plaintiff permits MPCH medical staff to do so. (Doc. 139, ¶22).

Grievances

50. While UMCH was the contracted medical provider at OCCC, inmates were required to follow UMCH's grievance process if they had a complaint about the medical care they were receiving. (Doc. 101, pg.14; Doc. 101-5, pgs.2-15). Plaintiff exhausted his administrative remedies in regards to his complaints of harassment by Defendant Reiendeau and his complaint about not being permitted to keep his skin cream in his cell. (Doc. 101, pg.14; Doc. 101-5, pgs.2-15). However, Plaintiff did not exhaust his administrative remedies as to his request for a biopsy, liver transplant, and alternative Hepatitis C treatment. (Doc. 101, pg.14; Doc. 101-5, pgs.2-15).
51. Since MPCH became the contracted medical provider at OCCC in July 2013, inmates have been required to follow MPCH's grievance process if they have a complaint about the medical care they are receiving. (Doc. 139, ¶23). Prior to filing this instant lawsuit, the Plaintiff failed to exhaust his administrative remedies as to his request for a biopsy, liver transplant, and request for alternative Hepatitis C treatment. (Doc. 67, pgs.1-2; Doc. 139, ¶¶24-27).

Respectfully submitted,

Defendant Barbara Berg, LPN,

By her attorney,

Dated: July 27, 2016

/s/ George J. Puddister IV
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CERTIFICATE OF SERVICE

I, George J. Puddister IV, certify that on this 27th day of July, 2016, a copy of the above pleading was filed with the ECF System and sent electronically to the registered participants as identified on the Notice of Electronic Filing, with paper copies being sent to those indicated as non-registered participants.

/s/ George J. Puddister IV
George J. Puddister IV



UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

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CIVIL ACTION NO. 1:14-cv-10679-NMG

AFFIDAVIT OF BARBARA BERG, LPN

I, Barbara Berg, LPN, depose and state the following:

1. I am presently employed by Massachusetts Partnership for Correctional Healthcare (“MPCH”) as a Medical Continuous Quality Improvement (“CQI”) Specialist at MPCH’s regional headquarters in Westborough, MA.
2. In September 2002 I was hired by Correctional Medical Services (“CMS”) as a Licensed Practical Nurse (“LPN”) at Old Colony Correctional Center (“OCCC”) in Bridgewater, MA.
3. In September 2002, CMS, a privately owned company, was operating as the contracted medical provider for the Massachusetts Department of Correction (“DOC”) at OCCC.
4. Sometime in 2003, the DOC contracted the University of Massachusetts Medical School (“UMMS”), a publicly owned university, to become the new medical provider at DOC operated facilities, including OCCC.
5. UMMS provided medical services to DOC inmates through University of Massachusetts Correctional Health (“UMCH”). UMCH was the business named used by Commonwealth Medicine, which was a department within the UMMS.
6. In 2003, when UMCH assumed the contract from CMS, UMCH hired me to continue my employment as a LPN at OCCC.
7. In July 2013, the DOC contracted MPCH, a privately owned company, to become the new medical provider at DOC operated facilities, including OCCC.
8. MPCH is affiliated with MHM Services, Inc. (“MHM”), which is also a privately owned company.
9. On July 1, 2013, when MPCH assumed the contract from UMCH, MPCH hired me to continue my employment as a LPN at OCCC.

10. I continued to work as a LPN at OCCC until January 2015, when I assumed my new role with MPCH as a Medical CQI Specialist.
11. During my employment as a LPN at OCCC (with CMS, UMCH, and MPCH), I worked as a medication nurse. As a medication nurse, I was tasked with administering medication to multiple patients, taking off provider orders, conducting KOP audits, proofreading Medication Administration Records, maintaining medications for all patients, providing patient treatments, and conducting other various duties as assigned. I was not responsible for prescribing medications, diagnosing illnesses, or ordering specific medical treatment.
12. While employed by UMCH, I was directly supervised by the UMCH's Health Service Administrator and Director of Nursing at OCCC.
13. During my employment with UMCH, my salary was paid by UMMS and was not dependent on the number of inmates I treated. Additionally, during this same period of time, UMCH management staff set my hours, determined what unit I worked on during any given shift, and determined which patients I would treat.
14. As an employee of UMCH, I was able to participate in benefits programs only offered to Commonwealth of Massachusetts' employees, such as the state's retirement program.
15. As an employee of UMCH, I was also bound by the policies and procedures UMCH had developed concerning the care provided to patients at OCCC. During the period of time UMCH was the contracted medical provider at OCCC, the care and treatment I provided to all inmates was done so in accordance with these policies and procedures.
16. During the period of time UMCH was the contracted medical provider at OCCC, my treatment of all inmates subject to oversight by UMCH supervising nursing staff.
17. Since becoming an employee of MPCH in July 2013, my salary has been paid by MHM, and is still not dependent upon the number of inmates I treat. As MHM is privately owned, I am no longer able to participate in Massachusetts' state retirement program, or other benefit programs only offered to state employees.
18. During my employment with MPCH as a LPN at OCCC, I was directly supervised by MPCH's Director of Nursing at OCCC. During this same period of time, MPCH management staff set my hours, determined what unit I worked on during any given shift, and determined which patients I would treat.
19. During my employment with MPCH as a LPN at OCCC, I was bound by the policies and procedures MPCH had developed concerning the care provided to patients at OCCC. During this same period of time, the care and treatment I provided to all inmates was done in accordance with these policies and procedures.

20. During my employment with MPCH as a LPN at OCCC, my treatment of all inmates was subject to oversight by MPCH supervising nursing staff.
21. I have never been employed by the DOC, nor have I ever been supervised by or collected a salary from the DOC.

Signed under the penalties of perjury this 21st day of July, 2016.


Barbara Berg, LPN

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