IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 21, 2018
Lyle W. Cayce
Clerk

No. 17-30614
Summary Calendar

D.C. Docket No. 2:16-CV-15594

STEVEN ANTHONY WALCOTT, JR.,

Plaintiff - Appellant

v.

TERREBONNE PARISH JAIL MEDICAL DEPARTMENT; RICHARD NEAL, incorrectly identified in the original complaint as Peedie Neal; NURSE PAT; NURSE KIM; NURSE DOMINIC,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:16-CV-15594

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:*

Steven Anthony Walcott, Jr. (Terrebonne Parish # 51734/Louisiana prisoner # 344820), appeals the district court's conclusion that his 42 U.S.C. § 1983 complaint in which he alleged that the defendants were deliberately indifferent to his serious medical needs was frivolous and failed to state a claim

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

for which relief may be granted. We review the district court's dismissal de novo. *See Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005).

Walcott maintains that members of the medical staff at the Terrebone Parish Jail Medical Department did not correctly identify his medical issues or prescribe effective treatments; he asserts that the staff, on multiple instances, recommended treatments that did not address his symptoms and, on occasion, caused his condition to worsen. Walcott further contends that the staff did not promptly provide him with pain medication and, moreover, delayed his medical care by pursuing unsuccessful treatments instead of referring him to a doctor. He asserts that the staff did not follow professional standards or protocols and mistreated him in order to inflict pain. Because he has not asserted a claim on appeal as to the Terrebone Parish Jail Medical Center, he has abandoned any challenge to the dismissal of his claims as to that defendant. *See Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

The record does not reflect that the medical staff was aware that Walcott faced a substantial risk of serious harm because of his medical issues, ignored that risk, and intended for him to be harmed. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Reeves v. Collins*, 27 F.3d 174, 176-77 (5th Cir. 1994); *Tamez v. Manthey*, 589 F.3d 764, 770 (5th Cir. 2009). Rather, the staff attempted to diagnose, treat, and monitor Walcott's medical issues and reacted to concerns about the efficacy of their suggested treatments by repeatedly changing their recommendations. The staff made ongoing efforts to alleviate Walcott's pain and symptoms by, inter alia, prescribing various medications (e.g., antibiotics, anti-inflammatories, pain medicine). Their alleged failures to offer an accurate diagnosis, prescribe effective treatments, and make perfect decisions as to the management of Walcott's conditions and pain do not establish their deliberate indifference. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006); *Domino*

v. Tex. Dep't of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001); *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993). While Walcott disapproved of his treatment, and the staff, at worst, was negligent, he cannot establish a claim of deliberate indifference on those bases. *See Gobert*, 463 F.3d at 346; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Any failure of the staff to follow professional standards or protocols is irrelevant. *See Gobert*, 463 F.3d at 346, 349; *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986). Thus, Walcott's deliberate-indifference claim is unavailing.

Walcott also questions the merits of the defendants' motion to dismiss for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5), challenges the dismissal of his complaint in light of that motion, and contests the district court's sua sponte dismissal of his complaint. However, the district court did not dismiss Walcott's complaint based on the defendants' motion; the district court sua sponte dismissed the complaint as frivolous and for failure to state a claim and dismissed the motion to dismiss as moot. Thus, Walcott's claims as to the motion to dismiss are inapposite. The district court's sua sponte dismissal otherwise was proper because the record establishes that Walcott had the opportunity to plead his best case. *See Jacquez v. Procunier*, 801 F.2d 789, 792-93 (5th Cir. 1986).

The district court's dismissal of Walcott's complaint counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Walcott is cautioned that if he accumulates three strikes, he will not be able to proceed in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

AFFIRMED; SANCTION WARNING ISSUED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 21, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 17-30614 Steven Walcott, Jr. v. Terrebonne Prsh Jail Med Dept, et al
USDC No. 2:16-CV-15594

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Carl E. Hellmers III
Mr. Allen J. Krouse III
Mr. Brian John Marceaux
Ms. Heather Ann McArthur
Mr. Steven Anthony Walcott Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN ANTHONY WALCOTT, JR.	**CIVIL ACTION**
VERSUS	**NO. 16-15594**
TERREBONNE PARISH JAIL MEDICAL DEPARTMENT, ET AL.	**SECTION "B"(4)**

JUDGMENT

Pursuant to this Court's Order and Reasons adopting the Magistrate Judge's Report and Recommendation to dismiss plaintiff's claims with prejudice,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that there be final judgment in favor of defendants, dismissing all of plaintiff's claims.

New Orleans, Louisiana, this 14th day of July, 2017.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN ANTHONY WALCOTT, JR.	**CIVIL ACTION**
VERSUS	**NO. 16-15594**
TERREBONNE PARISH JAIL MEDICAL DEPARTMENT, ET AL.	**SECTION "B"(4)**

ORDER AND REASONS

Before the Court is plaintiff Steven Anthony Walcott Jr.'s ("Plaintiff") timely objections (Rec. Doc. 20) to the Magistrate Judge's Report and Recommendation ("Report," Rec. Doc. 16). Plaintiff seeks review of the Magistrate Judge's recommendation to dismiss with prejudice his claims against the Terrebonne Parish Jail Medical Department, Nurses Pat Naquin ("Nurse Pat"), Kimberly Ann Boudreaux ("Nurse Kim"), Domonique Angelle Baio ("Nurse Dominic"), and Doctor/Nurse Richard Neal pursuant to 28 U.S.C. §§ 1915(e), 1915A, and 42 U.S.C. § 1997e. (Rec. Doc. 16 at 9). In addition, plaintiff filed motions to perfect service and seeking discovery and publication of electronic surveillance for an evidentiary hearing. (Rec. Docs. 21 at 1, 22 at 1).

For the reasons outlined below,

IT IS ORDERED that the Magistrate Judge's Report (Rec. Doc. 16) is **ADOPTED, OVERRULING** plaintiff's objections (Rec. Doc. 20);

IT IS FURTHER ORDERED that plaintiff's claims are **DISMISSED WITH PREJUDICE;**

IT IS FURTHER ORDERED that plaintiff's motions for discovery and perfection of service, etc. (Rec. Docs. 21, 22) are **DISMISSED AS MOOT; and**

IT IS FURTHER ORDERED that defendants' Motion to Dismiss (Rec. Doc. 12) is **DISMISSED AS MOOT.**

I. FACTS AND PROCEDURAL HISTORY

Plaintiff filed the instant complaint seeking relief pursuant to 42 U.S.C. § 1983. (Rec. Doc. 1 at 8). The matter was referred to United States Magistrate Judge Karen Wells Roby. (Rec. Doc. 10). A *Spears* hearing was held on October 31, 2016 via telephone.[1] [Rec. Doc. 11; *see also Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).] On December 12, 2016, Judge Roby recommended dismissal of the complaint. (Rec. Doc. 16 at 9). Plaintiff timely filed objections to that recommendation. (Rec. Doc. 20 at 2).

During the *Spears* hearing, plaintiff stated he notified a nurse in the medical department of various skin and other physical ailments on July 8, 2016. (Rec. Doc. 16). The nurse ordered foot

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[1] Rec. Doc. 16. Magistrate Judge Roby thoroughly considered plaintiff's allegations and wrote factual findings. Plaintiff did not dispute any of the facts. A *Spears* hearing allows the court to determine whether *in forma pauperis* status should be granted or dismissed under 28 U.S.C. § 1915(d). *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991).

powder, antifungal cream, Naproxen,[2] and Keflex[3] to treat a bacterial infection. (Rec. Doc. 16 at 4). On July 12, 2016, plaintiff suffered an allergic reaction to a medication dispensed to him the day before, resulting in whelps on his back, thighs, legs, arms, and chest. *Id.* He was informed the wrong medication was given; as a result, the nurses worked to treat those conditions instead of referring him to a doctor. *Id.* at 3. Three weeks later, Dr. Haydel Jr. prescribed antibiotics, "but it did not help and in fact made it worse." *Id.* On July 16, 2016, plaintiff returned to the medical department complaining of a boil popping and the nurses referred him to a doctor. *Id.* at 4. On July 19, 2016, he was evaluated at Chabert Medical Center, an Ochsner facility, and diagnosed with herpes. *Id.* at 5. Plaintiff was prescribed medications to treat the herpes, pain and itching caused by cuts, burns, and poison ivy. *Id.* There is no further reference in plaintiff's medical records to his skin boils or accompanying outbreaks. *Id.* "[Plaintiff] further testified that he sued the nurses because they administered the wrong medication and failed to timely refer him to a doctor." *Id.* at 3.

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[2] A nonsteroidal anti-inflammatory drug used to treat pain caused by gout and arthritis.Drugs.com, https://drugs.com/naproxen.html (last visited June 5, 2017).

[3] "Keflex is a cephalosporin antibiotic. It is used to treat infections caused by bacteria."Drugs.com, https://www.drugs.com/keflex.htm (last visited June 5, 2017).

II. REPORT AND OBJECTIONS

Magistrate Judge Roby found that the complaint against the Terrebonne Parish Jail Medical Department, Nurses Pat, Kim, Dominic and Doctor/Nurse Neal was frivolous and failed to state a claim for which relief could be granted. (Rec. Doc. 16 at 9). Specifically, Plaintiff did not provide sufficient evidence to prove a constitutional violation. *Id.* at 7. Plaintiff alleged untimely medical treatment, but the medical records show continuous treatment and eventual resolution of ailments within a reasonable time period, without any indication of intentional or grossly indifferent failure to provide medical care. *Id.* at 8.

Plaintiff specifically objects that the Magistrate Judge erred in finding that the nurses' actions were not willful, wanton and reckless activities. (Rec. Doc. 20 at 5).

III. LAW AND ANALYSIS

Courts are authorized to dismiss *sua sponte* an *in forma pauperis* ("IFP") complaint as frivolous if "the plaintiff cannot make any rational argument in law or fact that would entitle him or her to relief" under 28 U.S.C § 1915(e)(2)(B).[4] *Neitzke v.*

[4] This statute provides that, in pauper cases, "the same remedies shall be available as are provided for by law in other cases." 28 U.S.C. § 1915(e)(2)((B).

Williams, 490 U.S. 319, 327-28 (1989) (quoting *Williams v. Faulkner*, 837 F.2d 304, 307 (7th Cir. 1988)). It is difficult to determine if a claim is frivolous when reviewing only the prisoner's complaints. *Cay v. Estelle*, 789 F.2d 318, 323 (5th Cir. 1986), *overruled on other grounds by Booker v. Koonce*, 2 F.3d 114, 116 (5th Cir. 1993)(recognizing that the *Cay* Court established three grounds for dismissing an IFP complaint but that only two of those grounds survived under subsequent precedent).

"Under 28 U.S.C. § 1915(e)(2)(B), the district court shall dismiss an IFP complaint at any time if it determines that the complaint is frivolous or malicious or fails to state a claim upon which relief may be granted." *Rogers v. Boatwright*, 709 F.3d 403, 407 (5th Cir. 2013) (citing *Jones v. Bock*, 549 U.S. 199, 202 (2007))[5]. "A complaint is frivolous if it lacks an arguable basis in law or fact." *Rogers*, 709 F.3d. at 405; *see also Marcias v. Raul*, 23 F.3d 94, 97 (5th Cir. 1994). "A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Berry v. Brandy*, 192 F.3d 504, 507 (5th Cir. 1999).

[5] This statute provides that "Notwithstanding any filing fee, or any production thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that" "the action is frivolous or malicious [or] fails

to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(i)(ii).

Here, plaintiff believes the nurses were deliberately indifferent to serious medical needs and delayed in referring him to a doctor. (Rec. Doc. 20 at 2 and 8).

In order to prove medical care violated the Eighth Amendment, prisoners must allege that prison officials were deliberately indifferent to their serious medical needs. *Norton v. Dimazana*, 122 F.3d 286, 288 (5th Cir. 1997). "Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 98 (1976). *see also Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (a minor delay in treatment was not deliberate indifference); *Shapely v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) ("Mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference").

Mere failure to correctly diagnose a prisoner is not enough to meet the high standard of deliberate indifference. *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d 752, 753 (5th Cir. 2001). "Further, disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs." *Norton*,

122 F.3d at 292. The prisoner must prove the medical professionals intentionally failed to treat him or "ignored his complaints." *Id.*

In this case, there is insufficient evidence to show an Eighth Amendment violation. The medical records show the nurses were not deliberately indifferent to plaintiff's medical needs. He was first treated with foot powder and antifungal cream. When it was discovered that he suffered an allergic reaction to a treatment, the nurses promptly adjusted his medication. As soon as the nurses discovered that the medication was not working, they timely referred him to a physician. The nurses adequately and professionally responded to plaintiff's medical issues.

Plaintiff's "disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical need." *Norton,* 122 F.3d at 292. Further, "the mere delay alone in receiving medical treatment is usually not sufficient to state a claim under § 1983." *Mendoza,* 989 F.2d at 1056. Here, plaintiff saw a physician within three days after the nurses realized that the treatment was not working and this short delay without more does not amount to deliberate indifference. *Fear v. Diboll Corr. Ctr.*, 582 F. Supp. 2d. 841, 846 (E.D. Tex. 2008) (it took a year for the prisoner to receive the correct diagnosis and treatment; the doctor was not deliberately indifferent just because the original treatment was not successful); *see also Stewart v. Murphy,*

174 F.3d 530, 532 (5th Cir. 1999) (the doctors took four months to consult and agree on a course of treatment. The doctors' action was, at most, negligence, not deliberate indifference); *Boutte v. Bowers,* No. 01-1084 2001 WL 1041761, at *3 (N.D. Tex. July 19, 2001) (the prisoner received consistent treatment for 11 months; the original treatment did not work and there was a delay in changing the prisoner's blood pressure medication, but that did not amount to a constitutional violation); *but see Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003) (waiting two hours to call an ambulance after prisoner was rendered unconscious by dehydration is deliberate indifference) (emphasis added).

The records show it took a little over a month to figure out plaintiff had herpes. He received timely medical attention before and after that diagnosis. Therefore, this court agrees with the Magistrate Judge's finding "that the deliberate indifference claim arising out of the medical care [plaintiff] received [from] the nurses and the on-staff doctor nurse is frivolous or fails to state a claim for which relief may be granted, pursuant to §§ 1915 (e)(2)(B)(I) and 1915(b)(1)." (Rec. Doc. 16 at 8). 42 U.S.C. § 1983 is not the proper vehicle to bring negligence based actions.

Further, plaintiff's claim against the Terrebonne Parish Jail's Medical Department cannot stand because a jail's medical department is not a "legal entity capable of being sued under §

1983." *Smith v. St. Tammany Par. Sheriff's Office*, No. 07-3525, 2008 WL 347801, at *2 (E.D. La. Feb. 6, 2008); *Dale v. Bridges*, No. 76-9023, 1997 WL 810033, at *1 (N.D. Tex. Dec. 22, 1997) (St. Tammany Parish Jail dismissed from case because it is not an entity that is capable of being a party in a lawsuit); *Brewin v. St. Tammany Par. Corr. Ctr.*, No. 08-0639 2009 WL 1491179, at *2 (W.D. La. May 26, 2009) (§ 1983 action against the prison medical department dismissed because the department is not an independent entity capable of being a party to a lawsuit); *Jones v. St. Tammany Par. Jail*, 4 F. Supp. 2d 606, 613 (E.D. La. 1998) ("A parish jail is not [a suable] entity, but a building"); *Jiles v. Orleans Par. Prison Med. Clinic*, No. 09-8426, 2010 WL 3584059, at *2 (E.D. La. 2010) ("[a] jail's medical department simply is not a juridical entity capable of being sued").

IV. CONCLUSION

For the reasons discussed above,

IT IS ORDERED that the Report (Rec. Doc. 16) is **ADOPTED, OVERRULING** plaintiff's objections (Rec. Doc. 20);

IT IS FURTHER ORDERED that plaintiff's claims are **DISMISSED WITH PREJUDICE;**

IT IS FURTHER ORDERED that plaintiff's motions for discovery and perfection of service, etc. (Rec. Doc. 22) are **DISMISSED AS**

MOOT. The nurses appeared, retained counsel, and filed a motion to dismiss, and the surveillance tapes of the nurse's station during the month of July would not change the outcome of the case. The medical records and *Spears* hearing adequately established the relevant facts; **and**

IT IS FURTHER ORDERED that defendants' Motion to Dismiss (Rec. Doc. 12) is **DISMISSED AS MOOT.**

New Orleans, Louisiana, this 14th day of July, 2017.

SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN ANTHONY WALCOTT, JR	**CIVIL ACTION**
VERSUS	**NO. 16-15594**
TERREBONNE PARISH JAIL MEDICAL DEPARTMENT, ET. AL	**SECTION "B"(4)**

REPORT AND RECOMMENDATION

The case and the motion were referred to a United States Magistrate Judge to conduct a hearing, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to **28 U.S.C. § 636(b)(1)(B) and (C) § 1915e(2), and § 1915A**, and as applicable, **42 U.S.C. § 1997e(c)(1) and (2)**. On October 31, 2016, the Court conducted a hearing pursuant to *Spears v. McCotter*,[1] and its progeny, with the plaintiff participating by telephone conference call.[2]

Defendants Peedie Neal, Nurse Pat, Nurse Kim, Nurse Dominic, and Terrebonne Parish Jail Medical have also filed a **Motion to Dismiss (R. Doc. 12).**

I. Factual Background

A. Original Complaint

Steven Anthony Walcott, Jr, (hereinafter referred to as "Walcott") an inmate housed at Terrebonne Parish Criminal Justice Complex in Houma, Louisiana, filed this *pro se* and *in forma pauperis* complaint pursuant to 42 U.S.C. § 1983 against the defendants, the Terrebonne Parish Jail Medical Department, Nurse Pat, Nurse Kim, Nurse Dominic and Doctor/Nurse Peedie Neal.

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[1]766 F.2d 179 (5th Cir. 1985). The purpose of the *Spears* Hearing is to ascertain what it is the prisoner alleges to have occurred and the legal basis for the claims. The information elicited at the hearing is in the nature of an amended complaint or a more definite statement under Fed. R. Civ. P. 12(e). *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991).

[2]Rec. Doc. No. 11. The plaintiff was sworn prior to testifying. The hearing was digitally recorded.

R. Doc. 1, p. 7. Walcott alleges that on about July 8 or 9, 2016, he was called to the nurse's station for the treatment of open wounds on his feet and irritated skin. *Id.* at p. 9.

Walcott alleges that he was asked to take a seat on the exam table where Nurse's Kim and Dominic took notice of his redness, whelps, skin peeling and bleeding from the loss of skin from the upper inner thighs on both legs including his genitalia. *Id.* He was administered a shot with sulfur after which the next morning he had an open blister wound on the right side of his neck and a large oval size sore spot on his stomach that turned into a boil. *Id.* He also alleges that his genitals became bloody raw and the head of his penis was bloody blistered also. *Id.*

Walcott alleges that thereafter he returned to the nurse's station after showing the nurse that the boil had opened and was leaking and had gotten worse. *Id.* at p. 10. The nurse examined his body and concluded that he was "whelped up" and red which indicated that he was given the wrong medicine and that he was allergic to sulfur. He was thereafter given another shot in his left arm which did not decrease the excruciating pain. *Id.* He was then placed on antibiotics which were supposed to be stronger but did not improve his condition and the blisters worsened.

He alleges that on July 14, 2016 he did not see a doctor and his skin continued to be inflamed which resulted in him walking with a limp to where he could no longer touch himself. He alleges that he could not shower because of the inflammation. *Id.* He finally saw a doctor on July 19, 2016 who immediately after looking at the blisters on his body identified the condition that he had along with the medication he should have been given to reverse it. *Id.*

Walcott alleges that the nurses intentionally administered the wrong medication and denied him proper medical care. *Id.* at p. 11. He complains that as a result he experienced excruciating and unbearable pain, extreme discomfort, sleepless nights and days, emotional distress and mental anguish. *Id.* He therefore seeks to have the nurses disciplined with a pay

reduction and 180 day suspension. He alternatively seeks to have them fired, his prison account reimbursed for the $60 deducted and damages in the amount of $250,000.

B. *Spears* Hearing

Walcott testified to the following:

He is currently a pretrial detainee charged with second degree attempted murder and he was arrested on May 29, 2016. He testified that on July 8, 2016, he went into a cell and notified the nurse that he was having a breakout. He testified she gave him a shot which caused him to break out more. The nurse told him that he was given the wrong medication. They gave him another shot which made it worse. Instead of referring him to a doctor, they kept trying to figure out how to treat it. After three weeks he was seen by Dr. Haydel, the son of another doctor by the same name, who prescribed antibiotics but it did not help and it in fact made it worse. He further testified that the second Dr. Haydel, who was an older gentlemen knew what to do.

He testified that the nurses denied him adequate medical care and caused him to experience significant pain. He had a rash over his whole body. He filed the complaint against the nurses because they did not go to someone who knew how to fix the rash which resulted in him experiencing great pain.

He testified that Nurse Pat told him there was nothing else they could do for him. Nurses Kim and Dominque administered the wrong medication. He further testified that he sued Nurse Peddie because he is the head nurse who failed to refer him to a doctor and that one of the nurses told him that he is allergic to sulfur.

He testified that he finally saw the doctor sometime in August and his condition cleared up in a week. He testified that as a result of their alleged inadequate medical care, he seeks a reduction in their pay, compensatory and punitive damages.

C. Medical Records

At the conclusion of the *Spears* Hearing the Court requested that counsel for the defendants provide both copies of the medical records concerning the claim to the undersigned and Mr. Walcott for *in camera* review. The request was complied with on November 7, 2016.

The medical records show that on June 8, 2016, Walcott, a diabetic, was seen by a nurse in the medical department for treatment concerning open wounds between his toes. Foot powder, antifungal cream were prescribed and reportedly he completed Keflex, which is used to treat skin infections caused by bacteria. He was thereafter prescribed Naproxen a nonsteroidal anti-inflammatory drug used to treat pain caused by gout and arthritis.[3]

On July 12, 2016, Walcott was seen by another nurse during the 4:00 P.M. med-pass and he complained of red bumps all over his body including both of his arms and thighs. He was started on Bactrum the day before and received two dosages which he said he had never taken before. As a result, he was sent to the medical department and a half an hour later he was seen by the medical department and the nurse noted that he had whelps to his back, thighs, legs, arms, chest, and face. He also complained of itching on his genital area and open sores were observed on the right side of his neck and right scrotum. The nurse believed that he had an allergic reaction to Bactrum which was discontinued and changed to Clindamycin and Benadryl. He was advised that if he continued to have problems to contact them.

On July 16, 2016, he returned to the medical department at 2:15 P.M. with a complaint of a boil popping and the nurse noted the presence of drainage from the right side of his stomach. It was further noted that he was on antibiotics and the nurse thereafter referred him for examination by a doctor.

[3] https://www.drugs.com/naproxen.html

On July 19, 2016, he was seen again by the medical department and prescribed Valtrex, which is used to treat herpes infection, shingles, cold sores and genital herpes. On that same day Walcott was evaluated at Chabert Medical Center an Ochsner facility where he was diagnosed with Herpes Simplex 1 & 2. The records show that he was also prescribed diphenhydramine for a pain and itching caused by cuts burns and poison ivy. Thereafter the records are void of any reference to the skin boils and out-break.

II. Standards of Review-Frivolousness

Title 28 U.S.C. §§ 1915A and Title 42 U.S.C. §§ 1997e (c) require the Court to *sua sponte* dismiss cases filed by prisoners proceeding *in forma pauperis* upon a determination that they are frivolous. The Court has broad discretion in determining the frivolous nature of the complaint. *See Cay v. Estelle*, 789 F.2d 318 (5th Cir. 1986), *modified on other grounds*, *Booker v. Koonce*, 2 F.3d 114 (5th Cir. 1993). However, the Court may not *sua sponte* dismiss an action merely because of questionable legal theories or unlikely factual allegations in the complaint.

Under this statute, a claim is frivolous only when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). A claim lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist. *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir. 1999). It lacks an arguable factual basis only if the facts alleged are "clearly baseless," a category encompassing fanciful, fantastic, and delusional allegations. *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992); *Neitzke*, 490 U.S. at 327-28. Therefore, the Court must determine whether the plaintiff's claims are based on an indisputably meritless legal theory or clearly baseless factual allegations. *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994); *see Jackson v. Vannoy*, 49 F.3d 175, 176-77 (5th Cir. 1995); *Moore v. Mabus*, 976 F.2d 268, 269 (5th Cir. 1992).

III. Analysis

A. Claim against Nurse Pat, Nurse Kim, Nurse Dominic and Dr. Peedie Neal

Walcott complains that Nurse Pat, Nurse Kim, Nurse Dominic and Doctor/Nurse Peedie Neal should be held liable because they were each allegedly deliberately indifferent to his serious medical need which occurred when he presented to them for treatment of open wounds on his feet. He contends that he was given Bactrum to treat a bacterial infection and that his condition worsened and spread over all his body. He contends that they delayed referring him to a doctor which made his condition worse. He further contends that when he finally saw a doctor he immediately knew how to treat the condition, prescribed the right medicine and his condition improved.

The standard of conduct imposed on defendants with respect to medical care of inmates was clearly established by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). In *Estelle*, the Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* at 104 (citation omitted). This is true where the indifference is manifested by prison doctors in their response to the prisoner's needs. It is also true where the indifference is manifested by prison officials in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. *Id.* at 104-05.

In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment. *Id.* at 106. Further, "[d]isagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs." *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997). Therefore, inadequate medical treatment of inmates may, at a certain point, rise to the level of a constitutional violation, while malpractice or negligent care does

not. *Mendoza v. Lynaugh*, 989 F.2d 191, 193 (5th Cir. 1993) ("It is clear that negligent medical treatment is not a cognizable basis upon which to predicate a section 1983 action"); *Williams v. Treen*, 671 F.2d 892, 901 (5th Cir. 1982) ("mere negligence in giving or failing to supply medical treatment would not support an action under Section 1983"). *See Jackson v. Cain*, 864 F.2d 1235, 1246 (5th Cir. 1989) ("Mere negligence would not establish a claim.").

In addition, the mere delay alone in receiving medical treatment is usually not sufficient to state a claim under § 1983. *Mendoza*, 989 F.2d at 195; *see Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990). *Cf. Simmons v. Clemons*, 752 F.2d 1053, 1056 (5th Cir. 1985). Regardless of the length of the delay, the plaintiff at a minimum must show deliberate indifference to a serious medical need to rise to the level of a constitutional violation. *Wilson v. Seiter*, 501 U.S. 294, 302-4 (1991); *see also Estelle,* 429 U.S. at 104-05.

In the case at bar, Walcott does not allege facts sufficient to rise to the level of a constitutional violation. Accepting his allegations as true, Walcott alleges that he received responsive treatment but that the medication prescribed was wrong, did not improve his condition and should have resulted in an earlier doctor's appointment. The medical records show that the first complaint occurred on June 8, 2016 and the medical staff believed that he had a bacterial infection. However, neither the anti-inflammatory, antibiotic or pain medication improved his condition. While the nurse thought that the worsening of his condition was due to an allergic reaction from the Bactrum even after it was discontinue he continue to suffer with open sores. After realizing that his condition was worsening or nonresponsive, he was referred to Chabert Medical at which point it was determined that he had Herpes Simplex 1 & 2. He was prescribed by the nurses and the on-staff doctor medication to treat herpes and his condition improved and the boils and skin outbursts no longer exist as he stopped complaining about this condition after the July 19, 2016 visit.

While Walcott is entitled to adequate medical care, he is not entitled to the treatment of his choice. Further the evidence shows that on the day of his complaint sometimes within minutes he was seen by a nurse in the medical department, evaluated and then prescribed medication. The delay in seeing a doctor was only three days after his condition failed to improve.

The records show that it took a little over one month to figure out that his medical problem was not a simple bacterial infection but Herpes Simplex 1 & 2. Once it was determined, the proper medication was prescribed. Therefore, the Court finds that the deliberate indifference claim arising out of the medical care Walcott received by the nurses and the on-staff doctor nurse is frivolous or fails to state a claim for which relief may be granted, pursuant to 28 U.S.C. § 1915 (e)(2)(B)(I) and §1915(b)(1).

B. Medical Department

Walcott also named the Terrebonne Parish Jails' Medical Department. However, a jail medical department is not a distinct, juridical entity capable of being sued. *Smith v. St. Tammany Parish Sheriff's Office,* No. 07–3525, 2008 WL 347801, at *2 (E.D. La. Feb. 6, 2008) ("A prison medical department is not an independent entity capable of being sued under 42 U.S.C. § 1983."); *accord Jiles v. Orleans Parish Prison Medical Clinic,* No. 09–8426, 2010 WL 3584059, at *2 (E.D. La. Sept. 7, 2010) ("A jail's medical department simply is not a juridical entity capable of being sued."); *Brewin v. St. Tammany Parish Correctional Center,* No. 08–0639, 2009 WL 1491179, at *2 (W.D. La. May 26, 2009) ("[A] 'department' within a prison facility is not a 'person' under § 1983."); *Martinez v. Larpenter,* 05–874, 2005 WL 3549524, at *5 (E.D. La. Nov. 1, 2005) (order adopting report)(citing *Oladipupo v. Austin,* 104 F.Supp.2d 626, 641–42 (W.D. La. 2000)). Therefore, the claim against the Terrebonne Jail Medical Department is frivolous and should be dismissed.

IV. Recommendation

IT IS RECOMMENDED that Steven Anthony Walcott, Jr.'s § 1983 claims against Terrebonne Parish Jail Medical Department, Nurse Pat, Nurse Kim, Nurse Dominic and Peedie Neal be **DISMISSED WITH PREJUDICE** as frivolous and for failure to state a claim for which relief can be granted pursuant to 28 U.S.C. § 1915(e), § 1915A, and 42 U.S.C. § 1997e.

IT IS FURTHER RECOMMENDED that **Motion to Dismiss (R. Doc. 12)** be **DENIED AS MOOT.**

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation **within fourteen (14) days** after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).[4]

New Orleans, Louisiana, this 12th day of December 2016.

KAREN WELLS ROBY
UNITED STATES MAGISTRATE JUDGE

[4]*Douglass* referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend the period to fourteen days.

Additional material from this filing is available in the Clerk's Office.