IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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CHAD J. ALVARADO,

Plaintiff,

OPINION AND ORDER

v.

99-C-676-C

JON LITSCHER, JANE GAMBLE, B. McCREEDY, HORN, M.D., HELWIG, H. HERMANN,

Defendants.

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This is a civil action for money damages and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Chad Alvarado is a Wisconsin prisoner who suffers from chronic asthma. In November 1999, I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A and determined that he stated a claim upon which relief may be granted that defendants exposed him to environmental tobacco smoke in violation of his Eighth Amendment rights.

The facts as alleged by plaintiff are set forth in the November 9, 1999 order allowing plaintiff to proceed with his complaint and will not be repeated here. In an order entered on May 19, 2000, I denied defendants' motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief may be granted, noting that I had already screened the complaint for failure to state a claim as required by 28 U.S.C. § 1915(a) and (b). Specifically, I concluded that, even though plaintiff was housed with a non-smoking

cell mate on a non-smoking unit, it was conceivable in light of his asthmatic condition that he could prove that the environmental tobacco smoke to which he was exposed presented such a serious risk to his health as to constitute a violation of the Eighth Amendment. See Helling v. McKinney, 509 U.S. 25 (1993); Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996). However, through an oversight, I neglected to address defendants' qualified immunity argument. After a number of procedural twists and turns with which the parties are assumed to be familiar, the case is now before the court for a ruling on the qualified immunity issue.

Because I conclude that it was clearly established at the time period in question that prison officials could violate the Eighth Amendment through deliberate indifference to an inmate's exposure to levels of environmental tobacco smoke that harmed or posed an unreasonable risk of future harm to the inmate's health, I will deny defendants' motion for qualified immunity.

## OPINION

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The court employs a two-part analysis to determine whether governmental officials are protected by qualified immunity. First, the court determines whether the plaintiff's claim states a violation of his constitutional rights. If the first step is

satisfied, the court then determines whether those rights were clearly established at the time the violation occurred. Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 1697 (1999).

I have found previously that plaintiff stated an Eighth Amendment claim when he alleged that he is being exposed to levels of environmental tobacco smoke that are aggravating his asthma and endangering his future health. The question is whether this right was clearly established in 1999, when the alleged violations occurred.

The Supreme Court has warned against defining the right at issue too broadly lest the protection afforded by the qualified immunity doctrine be eroded. See Anderson v. Creighton, 483 U.S. 635, 639 (1987). To invoke a "clearly established" right, explained the Court, a plaintiff must point to something "more particularized" than simply the abstract right guaranteed by the Constitution. Id. at 640. Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. On the other hand, the plaintiff need not point to a case involving the very same factual scenario so long as the unlawfulness of the official action is apparent in the light of pre-existing law. Id.; see also Nabozny v. Podlesny, 92 F.3d 446, 456 (7th Cir. 1996) ("Under the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point").

To conduct this inquiry, the court reviews existing case law, starting with controlling Supreme Court precedent and Seventh Circuit decisions on the issue. See Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000). "In the absence of controlling precedent, we broaden our survey to include all relevant caselaw in order to determine 'whether there was

such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'" Id. (quoting Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989). Although qualified immunity is a defense to a § 1983 suit, plaintiff bears the burden of demonstrating that the defendants violated a constitutional right that was clearly established in October 1999. Perry v. Sheahan, 222 F.3d 309, 315 (7th Cir. 2000). However, a complaint "need not identify a legal theory," and complaints filed by *pro se* plaintiffs are construed liberally. Id.

In Helling, 509 U.S. at 35, the Supreme Court held that a prisoner "states a cause of action under the Eighth Amendment by alleging that [defendants] have, with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health." Thus, the right at issue in this lawsuit has been clearly established since Helling was decided in 1993. Defendants argue that Helling should be limited to its facts–the double-celling of one inmate with another who smoked five packs of cigarettes daily– and should not be held to apply to the failure of prison officials merely "to prevent all inmates from violating no smoking policies at all times." Def's.' Reply Br., dkt. # 20, at 6. However, a court need not have passed on the identical conduct in order for its unlawfulness to be clearly established. See Nabozny, 92 F.3d at 456. When plaintiff's complaint is construed liberally, it alleges fairly that defendants' deliberate failure to enforce smoking rules is resulting in plaintiff's exposure to levels of environmental tobacco smoke that are posing an unreasonable threat to his future health. Although I am skeptical that plaintiff will be able to adduce facts sufficient to show that the levels of environmental tobacco smoke

to which he was exposed were so high as to violate contemporary standards of decency, that is an issue of fact that cannot be resolved on a motion to dismiss. See Omdahl v. Lindholm, 170 F.3d 730, 732-33 (7th Cir. 1999) (whether bean bag rounds constituted deadly force was disputed issue of material fact that precluded finding of qualified immunity for officers who fired rounds).

Moreover, to the extent that plaintiff's complaint can be read to allege that prison officials acted with deliberate indifference to his *existing* health by allowing him to be exposed to environmental tobacco smoke, plaintiff's claim is simply one of deliberate indifference to his existing serious medical needs. See Oliver, 77 F.3d at 160; Weaver v. Clarke, 45 F.3d 1253, 1256 (8th Cir. 1995) (distinguishing claims of deliberate indifference to existing health from Helling claim of deliberate indifference to future health). Such claims were recognized by the Supreme Court nearly 25 years ago in Estelle v. Gamble, 429 U.S. 97 (1976). Accordingly, defendants' motion must be denied.

ORDER

The motion of defendants Jon Litscher, Jane Gamble, B. McCreedy, Horn, Helwig and H. Hermann to dismiss on grounds of qualified immunity is DENIED.

Entered this 13th day of October.

BY THE COURT:

BARBARA B. CRABB
District Judge