IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HAKIM NASEER,

OPINION AND ORDER

Plaintiff,

11-cv-004-bbc

v.

ICE KELLY TRUMM, TIM HAINES,
HSU Supervisor MARY MILLER, WARDEN
HUIBREGTSE, CHRISTINE BEERKIRCHER
and UNKNOWN MAINTENANCE
DEPARTMENT PERSONNEL,

Defendants.

- -

In this civil action, plaintiff Hakim Naseer is proceeding on claims under the Eighth Amendment concerning his conditions of confinement and claims under the First Amendment alleging that prison officials have retaliated against him by putting hazardous chemicals in his cell's water supply and refusing to investigate the problem. Now before the court is defendants' motion for summary judgment and their motion to stay pretrial deadlines and the trial date pending resolution of their summary judgment motion.

As an initial matter, I must consider whether plaintiff may continue to proceed against the "Unknown Maintenance Department Personnel" John Doe defendants who contaminated his water. In the court's September 7, 2011 order, dkt. #42, I set out a schedule for identifying these Doe defendants. I extended the time line for this process in

the court's December 30, 2011 order, dkt. #48. It was plaintiff's responsibility to send discovery requests regarding the identities of these defendants and then, after receiving discovery responses, to amend his complaint to name each Doe defendant. Plaintiff has failed to provide the court with an amended complaint despite being given repeated opportunities to do so. Accordingly, I will dismiss the John Doe defendants from the case.

After considering the remaining defendants' motion for summary judgment, I conclude that these defendants are entitled to judgment. Accordingly, I will grant the motion for summary judgment and deny the motion for a stay of further proceedings as moot.

From the parties' proposed findings of fact and supporting evidence, I find that the following facts are undisputed and material.

UNDISPUTED FACTS

Plaintiff Hakim Naseer is an inmate housed at the Green Bay Correctional Institution at this time. At all times relevant to this action, he was incarcerated at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. At all relevant times, all defendants were employed at the Wisconsin Secure Program Facility. Defendant Kelly Trumm was an institution complaint examiner, defendant Tim Haines was a deputy warden, defendant Huibregtse was the warden, defendant Christine Beerkircher was a program assistant-confidential who coordinated and provided program assistance to the institution complaint examiner and defendant Mary Miller was the health services manager.

On October 16, 2010, plaintiff filed a health service request in which he said that his drinking water smelled and tasted like "toxic waste" after maintenance personnel had worked on his sink and allegedly used "spray chemicals." Defendant Miller responded to plaintiff's request, stating that she would let the grounds supervisor know about his complaints.

On November 10, 2010, plaintiff filed a health service request in which he said that an unnamed maintenance worker told him that he had contaminated plaintiff's drinking water. Defendant Miller responded, stating that plaintiff's concerns were sent to the maintenance department and that the department had replied, saying that the city had the water safe to drink. Miller concluded that because the city report about the water indicated that the water was safe to drink, plaintiff's allegations were false.

On November 15, 2010, plaintiff filed inmate grievance no. WSPF-2010-23726, alleging that a "maintenance official" told plaintiff that the official was contaminating plaintiff's water. On the same day, defendant Trumm recommended the rejection of this complaint on the ground that plaintiff had submitted the complaint solely to harass or cause malicious injury. On November 17, 2010, plaintiff filed an appeal of Trumm's rejection recommendation. On November 22, 2010, defendant Haines decided that Trumm had acted properly in rejecting plaintiff's complaint.

On December 6, 2010, Randy Kuykendall, the prison's plumber, performed scheduled preventive maintenance on the Foxtrot Range 1, which is where plaintiff was housed at the time. The maintenance included cleaning the flush valves. (Plaintiff disputes this account, stating that Kuykendall used this time to contaminate his water.)

On December 27, 2010, plaintiff filed a health service request asking that someone take samples of his drinking water to check for possible contamination, saying that they are "spraying chemicals in my drinking water!! I'm totally sick!" Defendant Miller responded by stating that if plaintiff had concerns about the drinking water, he should speak with his health care provider, Dr. Cox. In sending this response, Miller did not believe that plaintiff was correct in his allegation of water tampering. Miller has known plaintiff to fabricate complaints in the past. (Plaintiff filed 75 "staff" complaints, 16 "staff sexual misconduct" complaints and 14 "staff misconduct" complaints between March 9, 2009 and November 15, 2010.)

On January 12, 2011, Kuykendall received a report that the water controller for cells 409 & 410 (plaintiff's cell at that time) was leaking. (Plaintiff disputes this account, stating that Kuykendall started the leak intentionally so that he could justify bringing tools to work on the water controller.)

Kuykendall went to the maintenance area to repair the controller. The maintenance area runs behind the cells. In order to repair the controller, Kuykendall had to shut off the water to both cells 409 and 410. After 15 minutes of work, Kuykendall turned the water back on and realized that there were still leaks in the plumbing pipes. Kuykendall did not have the required part to make the necessary repairs, so he exited the maintenance area. Later that day, Kuykendall returned to the maintenance area behind plaintiff's cell to complete the repairs. It took Kuykendall approximately 15 minutes to complete the repairs. Kuykendall then turned the water back on and left the area. (Plaintiff states that Kuykendall

left because plaintiff yelled at him, causing other staff to pay attention to the maintenance area. Plaintiff states further that Kuykendall performed further work on March 14, 2011.)

Defendant Beerkircher is responsible for opening and processing all mail that comes into the institution complaint examiner's office. In doing so, Beerkircher reads all of the complaints and determines whether they are to be accepted for filing or returned to the inmate. If the complaint does not meet the criteria in Wis. Admin. Code § DOC 310.09, it is returned to the inmate along with a letter stating the reason it was returned.

On January 14, 2011, plaintiff attempted to file an offender complaint concerning his drinking water. The same day, defendant Beerkircher returned plaintiff's complaint materials under Wis. Admin. Code § DOC 310.09(2), on the ground that plaintiff had already filed two offender complaints that calendar week.

On January 31, 2011, plaintiff filed inmate grievance no. WSPF-2011-2143, alleging that defendant Health Services Manager Miller had not taken water samples of plaintiff's drinking water. On the same day that plaintiff filed this complaint, defendant Trumm recommended its rejection on the ground that it did not raise a significant issue. On February 8, 2011, defendant Huibregtse decided that Trumm's rejection of the complaint was proper.

On March 7, 2011, Kuykendall wrote an incident report regarding a broken shower located in plaintiff's cell at the time (A-424). Kuykendall found that when the water was activated, plaintiff's toilet and cold water worked, but his hot water did not work. (Plaintiff states that this incident report was "falsified.")

On May 2, 2011, plaintiff attempted to file two inmate grievances. In inmate grievance no. WSPF-2011-8557, plaintiff alleged that defendants Trumm, Huibregtse and Haines failed to protect plaintiff's health and safety by not conducting any followup with respect to his first two grievances. On the same day that plaintiff filed this complaint, Trumm recommended the rejection of this complaint, because it contained more than one issue and was untimely; it was filed well after the 14-day deadline that began running from the date of final decision on plaintiff's previous inmate grievances. (Plaintiff states that his previous efforts were "intercepted" by prison staff. However, he does not allege that any of the named defendants foiled his efforts or that they were aware of these events.) Trumm concluded that the complaint contained more than one issue because plaintiff cited the dispositions of two prior offender complaints. On May 5, 2011, plaintiff filed an appeal of defendant Trumm's rejection recommendation to defendant Haines. The same day, Haines upheld the rejection of the complaint as untimely.

The other May 2, 2011 grievance concerned defendant Beerkircher's return of plaintiff's previous offender complaint about his drinking water. The same day, Beerkircher returned plaintiff's complaint materials on the grounds that the complaint contained more than one issue and plaintiff had already filed two offender complaints for that calendar week.

Defendants Trumm, Haines and Huibregtse based their decisions to reject plaintiff's three successfully filed grievances on two points: (1) they believed that it was impossible for staff to contaminate the drinking water of one inmate's cell when all of the water for the cells comes from the same water supply; and (2) they believed plaintiff had little credibility in

light of his past complaints.

Since 2009, plaintiff has filed 51 "John Doe" criminal proceedings in Grant County against Department of Corrections employees. Each of these lawsuits has been denied or dismissed.

OPINION

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In determining whether factual issues exist, the court must view all the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. Weber v. Universities Research Association, Inc., 621 F.3d 589, 592 (7th Cir. 2010). The court does not "judge the credibility of the witnesses, evaluate the weight of the evidence, or determine the truth of the matter. The only question is whether there is a genuine issue of fact." Gonzalez v. City of Elgin, 578 F.3d 526, 529 (7th Cir. 2009).

However, Rule 56(a) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Sarver v. Experian Information Solutions, 390 F.3d 969, 970 (7th

Cir. 2004) (citations omitted). "A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." Egonmwan v. Cook County Sheriff's Department, 602 F.3d 845, 849 (7th Cir. 2010) (internal quotation marks omitted).

A. Conditions of Confinement

The Eighth Amendment requires the government to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). Conditions of confinement that expose a prisoner to a substantial risk of serious harm are unconstitutional. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

To state a conditions of confinement claim under the Eighth Amendment, a plaintiff must satisfy a test that involves both a subjective and objective component. Farmer, 511 U.S. at 834. The objective component focuses on "whether the conditions at issue were sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities." Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008) (internal quotations omitted). The subjective component focuses on "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994).

In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). To meet this component, "it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk." Townsend, 522 F.3d at 773. Rather, "the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference." Id.

This is plaintiff's third attempt at setting out the facts surrounding his conditions of confinement claims; he previously filed two motions for preliminary injunctive relief, both of which I denied for his failure to adduce facts showing a likelihood of success on his claims. At this stage, defendants have produced evidence that plaintiff has filed repeated complaints about the state of his drinking water and that at least one has been shown to be false. It is now plaintiff's responsibility to put forth evidence showing that a rational trier of fact could rule in his favor. Sarver, 390 F.3d at 970; see also Celotex, 477 U.S. at 322.

(I note as an initial matter that defendants also claim that it would have been "impossible" to contaminate plaintiff's water because all cells share the same water supply and there were no complaints from other prisoners. I will not credit these statements at the summary judgment stage; defendants' own summary judgment materials state that

Kuykendall was able to shut off the water to plaintiff's cell and the adjoining cell only. This implies that, in theory, the water to as few as two cells could be the subject of tampering.)

This time around, plaintiff manages to set forth more facts regarding his conditions of confinement claim, but he still fails to show that a rational trier of fact could rule in his favor on both the objective and subjective components. With regard to the objective component, plaintiff states that Kuykendall contaminated his water on more than one occasion, but he has no evidence to support his assertion. Plaintiff has no personal knowledge of what Kuykendall was actually doing when he worked on the plumbing behind plaintiff's cell, because plaintiff could not see what was happening.

Moreover, plaintiff fails to describe in detail the events that should have been within his personal knowledge. Plaintiff alludes to the fact that his drinking water "smelled and tasted like toxic waste" and that he "became totally sick due to the sprayed chemicals in my drinking water" but oddly, never describes in detail in his proposed findings of fact what actually occurred to him as a result. He has not identified when and how long his water was "contaminated," how much water he drank or what symptoms he suffered. Plaintiff seems to rely on his prison grievances or health service reports to tell the story, but as I have stated in the two previous orders denying his motions for preliminary injunctive relief, these documents are not admissible evidence because they are not sworn. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006). In any case, to the extent that plaintiff states in one of his grievances that the water gave him a stomachache and made him feel lightheaded, he is not qualified to provide medical conclusions about what caused those maladies. Also,

plaintiff avers that "at one time, there were threats to harm the plaintiff by way of contamination to his drinking water," but he does not say who made those threats (even though he is aware of Kuykendall's identity).

In short, plaintiff has failed to make a sufficient showing that his water was being contaminated by prison staff to overcome defendants' motion for summary judgment. Evidence based only on speculation cannot be a defense to summary judgment. Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 931-32 (7th Cir. 1995); see also Vasquez v. Frank, 290 Fed. Appx. 927, 929 (7th Cir. 2008) ("Vasquez presented no evidence regarding the duration of the alleged excessive heat and no evidence that his medical problems resulted from the conditions of his confinement."); Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) ("conclusory allegations, without backing from medical or scientific sources, that the rank air exposed [the plaintiff] to diseases and caused respiratory problems which he would not otherwise have suffered" are insufficient to survive summary judgment). A motion for summary judgment "requires the responding party to come forward with the evidence that it has—it is the 'put up or shut up' moment in a lawsuit." Eberts v. Goderstad, 569 F.3d 757, 767 (7th Cir. 2009) (citations omitted).

Plaintiff tries to get around this problem by averring that prison surveillance cameras taped Kuykendall's misdeeds, but that the footage was intentionally deleted. However, plaintiff has neither personal knowledge of what was on the videotapes nor any foundation for the idea that the tapes were erased in an effort to conceal Kuykendall's actions. Unsatisfied with defendants' explanation at the preliminary injunction stage that tapes are

recorded-over after 10-14 days, plaintiff submits a recording of a different incident between plaintiff and correctional officers that is "over a year old" to show that defendants' explanation is false. It is unclear why plaintiff believes that this footage of a previous unrelated altercation helps him, when it is the prison's practice is to save only footage of altercations rather than all footage. The question is whether there was a reason to save the tape of Kuykendall's repair work. Plaintiff says that they should have saved the tape, but this begs the question; the only reason to save the recording would be if there *was* an "incident," and I have already explained that plaintiff does not give a rational trier of fact reason to believe that Kuykendall contaminated his water.

Turning to the subjective factor, by failing to amend his complaint to identify the Doe defendants, plaintiff is not bringing claims against Kuykendall or the unidentified maintenance person who he says threatened to contaminate his water. Rather, he brings claims only against defendants Trumm, Haines, Huibregtse, Beerkircher and Miller for failing to give proper consideration to his various complaints and medical requests following the alleged misdeeds of Kuykendall or other maintenance staff or both. However, he has difficulty explaining why defendants' actions constituted deliberate indifference. He seems to argue that they should have each conducted a more thorough investigation before rejecting or dismissing his various complaints, but this is not required under the Eighth Amendment. To the extent that defendants rejected plaintiff's complaints for failure to adhere to prison regulations, those rejections do not constitute deliberate indifference. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (complaint examiner's "[d]ismissal

[for untimeliness] no more manifests 'deliberate indifference' to the underlying problem than does a judge's decision dismissing a § 1983 suit as barred by the statute of limitations").

As for defendants' other responses, plaintiff seems to base his theory on the idea that defendants violated Division of Adult Institutions policy no. 310.00.01, which states that "allegations of staff misconduct shall be expediently referred to the Warden for investigation" and that "the inmate must be interviewed as soon as possible." Plaintiff believes that there should have been a more thorough investigation of his allegations, but even assuming that defendants violated the policy (it is unclear how this policy fits into the usual four-step inmate complaint review process in Wisconsin), plaintiff does not explain how the failure to conduct a better investigation constitutes deliberate indifference when the examiner already believes the allegations to be frivolous. Defendants have proposed facts indicating they simply did not believe plaintiff, given the implausibility of a single prisoner's water being poisoned and the fact that plaintiff has filed scores of baseless complaints in the past. Plaintiff proposes no facts suggesting that defendants took his complaints seriously yet decided to dismiss his grievances anyway.

This brings me to plaintiff's health service requests to defendant Miller. Plaintiff says that "[t]here [have] been other times when I complained about my drinking water making me feel sick and that defendant Miller had personally looked into the matter herself by contacting her HSU medical staff despite her own personal belief because her job training comes first." I take this to mean that on previous occasions, plaintiff was satisfied with Miller's responses to his water-related health requests, but this fact does not show that she

was deliberately indifferent to his problems when she responded as she did to the complaints that are the subject of this case. Plaintiff fails to develop a record of what Miller did in the past that he deemed satisfactory. (Defendants point out that plaintiff would not authorize the release of medical information, so they have not presented information about Miller's previous responses either.) It is undisputed that Miller took plaintiff's complaints to the ground supervisor and maintenance department and ultimately suggested that plaintiff see his doctor to talk about his health problems, even though she did not believe plaintiff's assertions. (Again, because plaintiff did not authorize the release of his medical records, the record does not show whether he ever met with his doctor.) These responses do not show the type of intentional disregard or reckless behavior that can sustain an Eighth Amendment claim. Because plaintiff fails to show either that his water was actually being contaminated or that defendants' responses constituted deliberate indifference, I must grant defendants' motion for summary judgment on his conditions of confinement claims.

B. Retaliation

Plaintiff is proceeding on claims that defendants failed to properly investigate his grievances and health requests because he had previously initiated state "John Doe" criminal proceedings against prison personnel. Persons alleging First Amendment claims of retaliation claim must prove three things: (1) plaintiff was engaged in constitutionally protected speech; (2) a public official took adverse actions against him that would likely deter him from engaging in First Amendment activity in the future; and (3) the adverse actions were

motivated at least in part as a response to plaintiff's protected speech. Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009); Mosely v. Board of Education of Chicago, 434 F.3d 527, 533 (7th Cir. 2006).

Defendants have proposed facts indicating that none of their decisions regarding plaintiff's grievances or health requests were related to the state John Doe criminal proceedings initiated by plaintiff. Ordinarily, plaintiff's failure to respond to any of defendants' arguments regarding the retaliation claims would constitute waiver. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007). In any case, to establish a prima facie case of retaliation, a prisoner must show that a protected activity was "at least a motivating factor" in retaliatory action taken against him. Bridges, 557 F.3d at 546. The burden then shifts to the defendants to show that they would have taken the action despite the bad motive. Hasan v. U.S. Department of Labor, 400 F.3d 1001, 1005-06 (7th Cir. 2005). Plaintiff has not produced any evidence indicating that defendants were even aware of the John Doe proceedings, much less motivated by them. Accordingly, defendants must be granted summary judgment on plaintiff's retaliation claims.

Because all of plaintiff's claims are resolved in this order, defendants' motion to stay pretrial deadlines and strike the trial date will be denied as moot.

ORDER

IT IS ORDERED that

1. Defendants Unknown Maintenance Department Personnel are DISMISSED from

the case for plaintiff's Hakim Naseer's failure to identify them as instructed by the court.

2. The motion for summary judgment filed by defendants Kelly Trumm, Tim Haines, Warden Huibregtse, Christine Beerkircher and Mary Miller, dkt. #55, is GRANTED. The clerk of court is directed to enter judgment in favor of these defendants and close this case.

3. Defendants' motion to stay the pretrial deadlines and June 18, 2012 trial date, dkt. #73, is DENIED as moot.

Entered this 16th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge