

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

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OSCAR GARNER,

Plaintiff,

v.

WILLIAM POLLARD, DANIEL BREMER,  
PAM ZANK and OFFICER JOPP,

Defendants.  
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ORDER

11-cv-719-slc<sup>1</sup>

In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Oscar Garner, a prisoner at the Waupun Correctional Institution, contends that defendants William Pollard, Lt. Daniel Bremer and Officer Jopp violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment for an asthma attack. Also, plaintiff contends that defendant Pollard and corrections supervisor Pam Zank violated his right to equal protection by prohibiting him from possessing certain property in segregation. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

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<sup>1</sup> For the purpose of issuing this order, I am assuming jurisdiction over this case.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that plaintiff may proceed on his claim that defendant Officer Jopp disregarded a substantial risk of serious harm by failing to provide him treatment for his asthma attack. However, plaintiff has not stated a claim under the Eighth or Fourteenth Amendments against defendants Pollard, Breamer or Zank. Therefore, I will dismiss these defendants from the case.

Also before the court is plaintiff's motion for appointment of counsel. Dkt. #3. Because I am not persuaded that counsel is necessary, I will deny the motion. Plaintiff may renew his motion for appointment of counsel at a later date if he finds that he cannot adequately represent himself.

In his complaint, plaintiff alleges the following facts.

## ALLEGATIONS OF FACT

### A. Plaintiff's Asthma Attack

On May 30, 2011 at approximately 6:35 p.m. plaintiff told the range officer, defendant Officer Jopp, that he was feeling extremely hot, was suffering from chest pain and was having difficulty breathing because of his asthma. Plaintiff was wheezing and asked to be seen by a nurse. Jopp told plaintiff that he would contact a nurse after Jopp was finished supervising recreation. Plaintiff used his inhaler, but it did not help him breathe. At approximately 7:00 p.m., he pressed the intercom button and told the guard on duty that he was having an asthma attack, could not breathe, that his inhaler was not helping and that he needed to see a nurse. The guard told plaintiff that he would tell someone right away. Approximately 15 minutes later, plaintiff pressed the intercom again but no one answered.

At approximately 8:10 p.m., defendant Officer Jopp walked by plaintiff's cell and plaintiff told him that he had suffered from an asthma attack. Plaintiff asked why Jopp had never called a nurse. He also told Jopp that he still needed to see a nurse because he was having problems breathing. Jopp told plaintiff that because it was so late in the day and almost time for a shift change, plaintiff needed to submit a health service request. Plaintiff submitted a health service request stating that he had an asthma attack, that Officer Jopp had refused to contact the health service unit and that he needed to see a nurse about his asthma and breathing. Plaintiff also wrote to defendant Lt. Breamer about what had

happened, stating that Jopp had failed to call a nurse even though he knew plaintiff was having an asthma attack. Defendant Breamer wrote plaintiff, saying that he had spoken with Jopp and Jopp denied that plaintiff had said he was having an asthma attack.

On June 1, 2011, plaintiff saw a nurse about his asthma. She told him that no one had contacted the health service unit about plaintiff's asthma on the previous night. She told plaintiff that she could not do anything about an asthma attack that happened in the past, but that plaintiff should try to stay cool by using the fan and a cool towel on his head. She told him to use the intercom if he had another asthma attack.

#### B. Property Restrictions in Segregation

Plaintiff has been incarcerated in the segregation building at the Waupun Correctional Institution since February 2011. From February 8, 2011 until July 6, 2011, he was in the "A range"; from July 6, 2011 until August 1, 2011, he was in the "B range"; and, since August 1, 2011, he has been incarcerated in the "C range."

Inmates on the C range are permitted to have certain hygiene items in their cell, including aloe vera lotion, dandruff shampoo, Colgate cavity protection toothpaste, gel and conditioner. Inmates on the A and B range are not permitted to have these items unless they have a serious medical condition such as irritated skin or sores requiring these items. Inmates on A and B range are also not permitted to have uncontrolled medication and can

ingest medication only at designated medication distribution times.

Inmates who have achieved “step 3” status in segregation are permitted to order certain canteen items, regardless whether they are on A, B or C range. These items include electronics, fans, uncontrolled medications, magazines and soap boxes.

## DISCUSSION

### A. Eighth Amendment Medical Care

Plaintiff contends that defendants William Pollard, Daniel Breamer and Officer Jopp violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment for his asthma attack on May 30, 2011. To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a “serious medical need” and that prison officials were “deliberately indifferent” to this need. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, “significantly affects an individual’s daily activities,” Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825, 847 (1994). “Deliberate

indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff’s claim has three elements:

- (1) Did plaintiff need medical treatment?
- (2) Did defendants know that plaintiff needed treatment?
- (3) Despite defendants’ awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

Plaintiff alleges that he has asthma. Asthma “can be, and frequently is, a serious medical condition, depending on the severity of the attacks.” Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005); see also Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir. 2001) (“Asthma, depending upon its degree, can be a serious medical condition.”). Plaintiff alleges that he told defendant Officer Jopp that he was having trouble breathing because of his asthma, that his chest hurt and that he needed to see a nurse. Plaintiff alleges that Jopp did not call a nurse or provide plaintiff with any care. At this stage, I can infer that defendant Jopp was aware of plaintiff’s medical condition and need for treatment, but failed to take reasonable measures to address that need. Therefore, plaintiff may proceed on his Eighth Amendment claim against defendant Jopp.

Plaintiff may not proceed on his Eighth Amendment claim against defendants

Breamer or Pollard. Plaintiff's claims against these defendants seem to be premised on a view that as supervisors, they should have taken defendant Jopp's failure to call a nurse more seriously. However, an unsympathetic attitude is not a violation of federal law. In addition, these defendants cannot be held liable solely because they are in supervisory capacities. Aschroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Plaintiff must show that these defendants were aware that he was suffering from an asthma attack and failed to take reasonable measures to address his medical needs. George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Only persons who cause or participate in the violations are responsible."); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) (if "defendants learned [of violation when it was] too late [to prevent it] . . . they did not offend the Constitution"). Because there was nothing defendants Breamer or Pollard could have done to help plaintiff at the time they learned of the problem, they cannot be held liable for violating plaintiff's rights. Therefore, I will dismiss plaintiff's Eighth Amendment claim against these defendants.

#### B. Equal Protection

In addition to his Eighth Amendment claim, plaintiff says that he is bringing claims against defendants William Pollard and Pam Zank for refusing to allow plaintiff to have the same types of fans, hygiene products, electronics and other property that inmates in other areas of segregation may possess. Plaintiff contends that the property restrictions violate his

right to equal protection under the Fourteenth Amendment.

Under the equal protection clause, government officials must have at least a rational basis for different treatment, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985), and in the case of different treatment because of race, even more is required. Johnson v. California, 543 U.S. 499, 506 (2005) (heightened scrutiny applies). Plaintiff's allegations do not support a claim under the equal protection clause. Plaintiff does not allege that defendants treated them differently because of his race or another characteristic that requires heightened scrutiny. In fact, plaintiff does not suggest that defendants singled him out for being a member of a particular group or sharing a particular characteristic. This means that defendants' conduct does not violate the equal protection clause so long as there is a rational basis for the conduct. Johnson v. Daley, 339 F.3d 582, 585-86 (7th Cir. 2003).

It is often not irrational for prisoners in different security classifications to receive different privileges, even if they are all housed in segregation. E.g., Hammer v. Ashcroft, 570 F.3d 798, 800-01 (7th Cir. 2009). Plaintiff has alleged no facts "sufficient to overcome the presumption of rationality that applies to government classifications." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). Therefore, plaintiff may not proceed on his equal protection claim.



### C. Motion for Appointment of Counsel

Plaintiff filed a motion for appointment of counsel in conjunction with his complaint. He states that he needs counsel because he has no knowledge of the law, he has only limited access to the law library, his case is complex and defendants' counsel are skilled at presenting evidence and cross-examining witnesses. He says that he is currently receiving help from another inmate and cannot proceed with the case on his own. He has shown that he made reasonable efforts to find a lawyer by submitting the names and addresses of three lawyers who declined to represent him on the issues in this case.

Appointment of counsel is appropriate in those relatively few cases in which it appears from the record that the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Pruitt v. Mote, 503 F.3d 647, 645-55 (7th Cir. 2007). Although plaintiff may lack legal knowledge, that is not a sufficient reason to appoint counsel, because this handicap is almost universal among pro se litigants. To help him and others in similar situation, this court instructs pro se litigants at a preliminary pretrial conference about how to use discovery techniques available to all litigants so that he can gather the evidence he needs to prove his claim. In addition, plaintiff will be provided with a copy of this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work.

Plaintiff's case is not complex and he may continue to receive help from other inmates. As this case progresses, it may become apparent that appointment of counsel is warranted, but for now I will deny his motion. Plaintiff is free to renew his motion at a later date.

## ORDER

IT IS ORDERED that

1. Plaintiff Oscar Garner is GRANTED leave to proceed on his claim that defendant Officer Jopp violated his rights under the Eighth Amendment by failing to take reasonable measures in response to plaintiff's asthma attack.

2. Plaintiff is DENIED leave to proceed on his claims that defendant William Pollard, Daniel Breamer and Pam Zank violated his constitutional rights.

3. Defendants Pollard, Breamer and Zank are DISMISSED from this case.

4. Plaintiff's motion for appointment of counsel, dkt. #3, is DENIED.

5. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf

of the state defendant.

6. For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the Waupun Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 4th day of January, 2012.

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