

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

CHAD ANDREW STITES,

Plaintiff,

OPINION AND ORDER

v.

12-cv-383-wmc

SHERRIFF DAVID MAHONEY, *et al.*,

Defendants.

Plaintiff Chad Andrew Stites has filed this proposed civil action pursuant to 42 U.S.C. § 1983, alleging that his constitutional rights were violated because of defendants' failure to implement adequate policies at the Dane County Jail. The defendants include Dane County Sheriff David Mahoney,¹ Dane County Jail Administrator John Doe, Deputy Jason Russell, Deputy Sergeant John Brogan, Dr. Jane Doe and Nurse Jane Doe. Stites has been found eligible for indigent status and he has made an initial payment toward the full filing fee for this lawsuit as required by the Prison Litigation Reform Act (the "PLRA"), 28 U.S.C. § 1915(b)(2). Having filed an amended version of his complaint (dkt. # 11), Stites seeks leave to proceed.

Because Stites filed this case while he was incarcerated, the court is required to screen the 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

¹ Stites also names former Dane County Sheriff Gary Hamblin as a defendant. The claims against former Sheriff Hamblin concern actions taken in his official or supervisory capacity. Because Hamblin no longer holds public office in Dane County, current Sheriff David Mahoney (who is also named in the complaint) is the appropriate defendant for his predecessor's alleged past conduct as well. *See* Fed. R. Civ. P. 25(d).

defendant who by law cannot be sued for money damages. *See* 28 U.S.C. §§ 1915(e)(2), 1915A. For reasons set forth briefly below, the court will grant plaintiff leave to proceed with his claims solely against the Dane County Sheriff, the Dane County Jail Administrator, and Dr. Jane Doe.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's pleadings, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts plaintiff's well-pleaded allegations as true and assumes the following probative facts:

When Stites filed this lawsuit, he was in custody at the Wisconsin Department of Corrections in the Oakhill Correctional Institution in Oregon. His pending complaint concerns the conditions of confinement at the Dane County Jail, where Stites was in custody during 2006. In March of 2006, Stites contracted "a virulent, penicillin resistant infection" known as Methacillin Resistant Staphylococcus Aureus ("MRSA"), which affected one of his hands. According to Stites, MRSA is "known to be highly infectious, re-occurring and contagious." He adds that a MRSA infection can be chronic, painful, disfiguring and debilitating "if not treated promptly and effectively."

After his hand became infected, Stites wrote to the "health services department" for help. Stites does not provide any details about when he first requested help, but he asserts that his request was "ignored for days." By the time Stites was able to see a nurse, his infected hand was "extremely swollen and painful." Stites was then "rushed" to a

local hospital because “it had been determined that the disease had become life threatening.” Stites had “emergency surgery” for his MRSA infection and remained in the hospital for several days.

Upon his return to the Dane County Jail, Stites claims that “jail health service staff did not follow the directives of the hospital staff which included proper care and cleaning, changing of dressing and prescribing medication.” As a result, Stites suffered a recurrent MRSA infection and was placed in “medical observation” status.² Stites complained about the lack of adequate medical care to defendant Russell, who reportedly told him that “it was common for the nursing staff to not show up after being summoned for 6 to 8 hours as their office was located across the street” from the Jail. After filing “many grievances,” Sergeant Brogan visited with Stites, but there was “never any agreement made as to the resolution” of Stites’ complaints.

Stites further contends that he became infected with MRSA as the result of defendants “abject failure, neglect and deliberate indifference” to his need for protection from this disease. In particular, Stites asserts that: (1) the Dane County Jail has a “policy, custom and/or practice of failing to protect inmates who are under their jurisdiction from conditions which foster the contraction or transmission of infectious diseases;” and (2) that officials in charge of the Jail “fail to keep inmates separate from others who are known carriers of infectious disease vectors.” Stites contends, therefore,

² Although Stites does not provide specific dates that for the recurrent MRSA infections that he suffered, he indicates in one portion of his original complaint that this may have occurred from April through August 2006. Considering that Stites did not file his complaint until May 25, 2012, the six-year statute of limitations that applies to civil rights actions under 42 U.S.C. § 1983 may be a factor in this case.

that the defendants “have clearly failed to institute policies, customs or practices which would have prevented or alleviated conditions at the jail which foster and propagate infectious disease.” Stites seeks nominal and compensatory damages in the amount of \$50,000.00, punitive damages in the amount of \$100,000.00.

OPINION

Section 1983 provides a remedy or private right of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

Here, Stites maintains that the defendants’ failure to develop and enforce effective policies to treat and prevent the spread of infectious diseases like MRSA constitutes deliberate indifference to the health and safety of detainees in the Jail. While the pleadings leave somewhat unclear whether Stites was a pretrial detainee or a convicted inmate when he contracted MRSA at the Dane County Jail in March 2006, his complaint may implicate the Fourteenth Amendment’s Due Process Clause, which dictates that “a pretrial detainee may not be punished,” *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979),

and/or the Eighth Amendment's prohibition against "cruel and unusual punishment," which protects the rights of convicted state prisoners. *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005) (quoting *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254 259, n.1 (7th Cir. 1996)). Since the Seventh Circuit has recognized that the due process rights of a pre-trial detainee are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *Brown*, 398 F.3d at 909 (internal citation and quotation omitted), "§ 1983 claims brought under the Fourteenth Amendment are analyzed under the Eighth Amendment test." *Id.*

While prisons are not required to be comfortable, prisoners are entitled to confinement under conditions which provide for their "basic human needs." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement" by ensuring that inmates receive adequate food, clothing, shelter, and medical care, and that "reasonable measures" are taken to guarantee inmate safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Eighth Amendment also protects prisoners from conditions that pose an unreasonable risk of damage to an inmate's future health, such as exposure to environmental toxins. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993) (establishing a two-prong test to determine whether exposure to second-hand or environmental tobacco smoke ("ETS") violates a prisoner's Eighth Amendment rights).

To state a claim with respect to an inmate's conditions of confinement, he must allege that the adverse conditions were "sufficiently serious," such that the acts or omissions of prison officials giving rise to these conditions deprived the prisoner of a

“minimal measure of life’s necessities.” *Farmer*, 511 U.S. at 834; *Chapman*, 452 U.S. at 347. He must also demonstrate that officials were subjectively aware of, but deliberately indifferent to, the complained of condition. *Farmer*, 511 U.S. at 837.

The failure to implement an adequate policy may be a basis for imposing liability under 42 U.S.C. § 1983 if the plaintiff can show that the failure to adopt a particular policy reflects a deliberate or conscious choice on the part of a policymaker. *See Rice ex rel. Rice v. Correctional Medical Servs.*, 675 F.3d 650, 675 (7th Cir. 2012). Stites alleges that supervisory officials here failed to adopt a policy or take reasonable measures to stop the spread of MRSA and were deliberately indifferent to the serious risk that this type of infection posed to the inmate population at the Dane County Jail. Assuming that all of his allegations are true, Stites adequately alleges a claim under the Fourteenth Amendment Due Process Clause and/or the Eighth Amendment against policymakers at the Jail.

Although his allegations are sufficient at this early screening stage, Stites will have to present admissible evidence permitting a reasonable fact finder (the court or a jury) to conclude that the defendants acted with deliberate indifference to a serious risk to health or safety, which is a high standard. In particular, to demonstrate that the defendants are liable in their official capacities for a harmful custom or practice, the plaintiff must show that policymakers at the Jail were “deliberately indifferent as to [the] known or obvious consequences.” *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010) (quoting *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002)). “In other words, they must have been aware of the risk created by the custom or practice and must have

failed to take appropriate steps to protect the plaintiff.” *Id.* “Therefore, in situations where rules or regulations are required to remedy a potentially dangerous practice, the . . . failure to make a policy is also actionable.” *Thomas*, 604 F.3d at 303.

Stites will be allowed to proceed against defendants identified in the complaint as having the potential for making and enforcing policy at the Jail.³ Only three would arguably meet that description. Therefore, the court will grant Stites leave to proceed with his claims against the Dane County Sheriff, the Jail Administrator, and Dr. Jane Doe. Because the complaint does not allege facts showing that Deputy Jason Russell, Deputy Sergeant John Brogan, or Nurse Jane Doe had any policymaking authority or personal involvement in the failure to adopt a policy to prevent MRSA infections, the court will deny leave to proceed with claims against these defendants at this time.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Chad Stites’ request for leave to proceed against Dane County Sheriff David Mahoney and Jail Administrator John Doe is GRANTED. The clerk’s office will prepare summons and the U.S. Marshal Service shall effect service upon these individuals.
- 2) Plaintiff’s request to proceed with claims against defendants Deputy Jason Russell, Deputy Sergeant John Brogan, Dr. Jane Doe or Nurse Jane Doe is DENIED.
- 3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will

³ A supervisor may not be held liable for a civil rights violation under a theory of *respondeat superior* or vicarious liability. *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). In order for supervisory officials to be liable, they must be “personally responsible for the deprivation of the constitutional right.” *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012) (citations omitted).

be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

- 4) 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.

Entered this 9th day of August, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District