

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

JESSIE RIVERA,

Plaintiff,

OPINION AND ORDER

v.

13-cv-056-wmc

WARDEN HOLINKA, DR. R. GUPTA,
MEDICAL ADMINISTRATOR LOPEZ, and
FOOD SERVICE ADMINISTRATOR
HIBBERT,

Defendants.

Citing *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), plaintiff Jessie Rivera alleges that various employees of Oxford Federal Correctional Institution were deliberately indifferent to both his physical safety and serious medical needs in violation of the Eighth Amendment. Plaintiff's original complaint brought a claim for damages under the Federal Tort Claim Act and named the U.S. Department of Justice Federal Bureau of Prisons as the sole defendant. (Dkt. #1.) As explained in the court's order denying plaintiff leave to proceed, that claim was barred because Rivera was injured while working in the prison Food Service Department and the Inmate Accident Compensation Act ("IACA") provides the exclusive remedy against the government for such work-related injuries. (Dkt. #5.) Nevertheless, the court permitted plaintiff to file an amended complaint asserting *Bivens* actions against individual prison staff, as those claims are not barred by the IACA. See *Bagola v. Kindt*, 131 F.3d 632, 642-45 (7th Cir. 1997).

Before allowing Rivera to proceed on his amended complaint, the court must still screen Rivera's claims to assess whether they are (1) frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3) seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. For the reasons set forth below, the court will allow Rivera to proceed on his Eighth Amendment claim against medical staff defendants Dr. R. Gupta and Medical Administrator Lopez as to the treatment of his leg pain and numbness in the months following his burn injury. In all other respects, Rivera is denied leave to proceed.

ALLEGATIONS OF FACT

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). For the purposes of this order, the court accepts the following well-pled allegations as true.¹

Plaintiff Jessie Rivera is an inmate at Oxford Federal Correctional Institution in the Western District of Wisconsin. On May 5, 2011, Rivera was seriously injured while working in the bakery in the Food Service Department at Oxford. The kettle pots in the bakery had been boiling with dirty water, butter and shortening, and water was leaking from the pots. (Am. Compl. (dkt. #6) 3.) Rivera fell underneath the kettle pot due to

¹ For purposes of this screening order, the court has reviewed both the original and amended complaint. The court has also reviewed and considered various exhibits attached to plaintiff's original complaint, which were not included with the amended complaint. *See* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *see also* *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim).

water on the floor and suffered a serious burn. Rivera alleges that the Food Service Administrator, Hibbert (first name unknown), had received several complaints from Inmate Food Service workers that the floor around the kettle pots was slippery due to leaking. (*Id.* at 3.) Despite these complaints, Hibbert allegedly failed to address the leaking pots, which led to plaintiff's injury. (*Id.* at 3-4.)

Rivera's medical records are attached to his original complaint and indicate that he was diagnosed with a "second degree burn to the lateral left lower leg and ankle area." (Compl., Ex. 3 (dkt. #1-3) 2). In addition to cleaning and bandaging the wound on the day of the injury, medical staff gave plaintiff Acetaminophen with Codeine, Ibuprofen and a Ketorolac injection for the pain. (*Id.* at 2-3.) In the weeks that followed, plaintiff had his dressing changed almost daily by medical staff, who also debrided any dead skin, monitored the wound for infection and applied antibacterial burn cream. (*Id.* at 2-37.)

Rivera asserts that he "constantly and repeatedly requested to have proper medical care," but the medical facility and staff at FCI have offered no remedies for his injury. (Am. Compl. (dkt. #6) 5.) Specifically, Rivera alleges requesting to see a burn specialist, but this request was denied. Rivera also claims that in the time following his injury, he reported to Mr. Lopez, the Medical Administrator, and medical staff that "he was in severe pain and could not feel his lower leg," but he received no additional medical care beyond what was described above. (*Id.*) Even now, Rivera contends that he still experiences pain and numbness in his left leg and ankle area as a result of the burn.

Additionally, plaintiff contends that Oxford's Warden, Carol Holinka, failed in her duty to properly train prison officials to ensure the safety of working inmates. Rivera

alleges that the lack of training resulted in the prison officials ignoring inmates' safety requests and failing "to inspect or repair the area or equipment that plaintiff contends was defectively maintained." (*Id.* at 7.)

OPINION

Rivera appears to assert deliberate indifference claims against: (1) Hibbert for failing to maintain the leaking kettle, resulting in Rivera's leg injury; (2) Warden Carol Holinka for failing to properly train prison staff on safety procedures and ensure that they were responsive to the safety concerns of working inmates; and (3) Dr. Gupta and Lopez for failing to adequately treat his injury.

I. Claim Against Food Service Administrator Hibbert

To state a claim for deliberate indifference, a prisoner must allege that a prison official failed to take reasonable measures to abate a substantial risk of serious harm once made aware of it. *Farmer v. Brennan*, 611 U.S. 825, 847 (1994). "Inadvertent error, negligence, and even gross negligence are insufficient to invoke the Eight Amendment." *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *see also Bagola*, 131 F.3d at 647 (negligent acts "do not rise to the level of [a] constitutional [violation] simply because [the accident] occurred within prison walls"). Similarly, the mere "failure to alleviate a significant risk that [a prison official] should have perceived but did not," does not by itself amount to deliberate indifference. *Farmer*, 611 U.S. at 838.

Rivera's allegations against Hibbert are primarily conclusory, asserting that Hibbert ignored inmates' complaints regarding the leaking pot that caused Rivera's injury. While the court is troubled by Hibbert's alleged failure to respond to what may have been legitimate safety concerns, Rivera's allegations in this context cannot be construed as anything more than an ordinary negligence claim. Accordingly, plaintiff has failed to state a claim that Hibbert also violated the Eighth Amendment.

II. Claim Against Warden Holinka

Rivera's claim against Warden Holinka rests on even more tenuous allegations. His claim can be summarized as follows: Warden Holinka failed to properly train and supervise prison officials. Of course, Rivera's allegations are purely conclusory; he offers nothing, beyond the fact that he was injured, to support this claim. Even if the court were to accept that the Warden had failed to appropriately train and supervise prison officials, this, too, would only amount to a negligence claim. *See Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir. 2011) (*en banc*) (a claim of deliberate indifference against a supervisor for her failure to train or supervise must allege that the "the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm") (citing *Farmer*, 511 U.S. 825).

III. Claim Against Dr. R. Gupta and Medical Administrator Lopez

Rivera's final claim of deliberate indifference is against Dr. R. Gupta and Mr. Lopez, who allegedly failed to provide adequate medical treatment for his injury. The court will allow Rivera to proceed on this claim, but only on a limited basis. The Eighth

Amendment mandates that the government provide prisoners with medical care. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prison official acting with deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996). A “serious medical need” may be life-threatening, carries risks of permanent, serious impairment if left untreated, or results in needless pain and suffering when treatment is withheld. *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997). “[M]ere differences of opinion among medical personnel regarding a patient’s appropriate treatment do not give rise to deliberate indifference.” *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996); *Snipes*, 95 F.3d at 591 (“whether one course of treatment is preferable to another [is] beyond the [Eighth] Amendment’s purview”).

Rivera’s course of medical treatment (or lack thereof) can be broken down into two distinct phases of care. The first phase consisted of the treatment he received in the immediate days and weeks following his injury. The second phase includes the months following the injury, at which point Rivera’s burn had healed, but he allegedly still experienced severe leg pain and numbness that went untreated.

Rivera’s allegations regarding the first phase of treatment do not provide sufficient grounds to bring a deliberate indifference claim. On the contrary, Rivera’s medical records also indicate that immediately following the injury, he received reasonable medical care for his second degree burn. He was given an injection for the pain, as well as prescribed additional pain relievers such as Acetaminophen with Codeine. The wound itself was dressed, debrided and treated with antibacterial burn cream. In the days

following the injury, Rivera had his dressing changed and the wound treated by medical staff almost daily. During these visits, medical staff continued to debride any dead skin, apply antibacterial cream and monitor the wound for infection.

While Rivera's burn constitutes a serious medical need, the treatment outlined above does not rise to the level of deliberate indifference. To clear such a hurdle, the alleged actions must be "so inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. *Snipes*, 95 F.3d at 592. Rivera does allege that he requested to see a burn specialist, and that request was denied. However, when one considers the treatment Rivera actually received, the initial denial of his request to see a specialist at most represents a disagreement between Rivera and prison medical staff over the proper course of treatment; again, this does not constitute deliberate indifference. *See, e.g., id.* at 590-91.

The only remaining basis for Rivera's claim of deliberate indifference is his assertion that in the months following his injury he continued to experience pain and numbness that the medical staff allowed to go untreated. Rivera alleges that he "constantly and repeatedly" requested medical care to address the pain and numbness in his leg, which allegedly has persisted even after his original burn had healed. (Am. Compl. (dkt. #6) 5.) At the screening stage, taking these allegations as true, the denial of additional treatment, in spite of Rivera's reports of pain, could be construed as deliberately causing needless pain and suffering in violation of the Eighth Amendment. *See, e.g., Gutierrez*, 111 F.3d at 1371-73. As a result, Rivera's claim against Dr. Gupta and

Medical Administrator Lopez will be allowed to proceed on the grounds that the refusal to treat his continuing pain and numbness may constitute deliberate indifference.

Even with respect to this claim, Rivera should be aware that deliberate indifference is a high standard. In particular, it will be his burden to prove that lingering medical issues related to his burn injury are a serious medical need, which may well require expert testimony rebutting medical evidence to the contrary. Rivera also should be on notice that in order to prevail on his Eighth Amendment claim at summary judgment or trial, it will not be sufficient for him to show that he disagrees with defendants' medical opinions about the proper course of treatment. *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006). Rivera will also have to show that the defendants had both the ability and the authority to grant his request for follow up medical care. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). All of this means, that while Rivera has managed to clear this initial screening stage hurdle with respect to a single claim, he will face an up-hill battle when it comes to ultimately prevailing on his claim.

ORDER

IT IS ORDERED that

- 1) Plaintiff Jessie Rivera is GRANTED leave to proceed on his Eighth Amendment Claims that defendants Dr. R. Gupta and Medical Administrator Lopez were deliberately indifferent to his severe leg pain and numbness in the months following his second-degree burn.
- 2) Plaintiff is DENIED leave to proceed on all other claims and against all other defendants.
- 3) For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the

name of the lawyer that will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to defendants or defendants' attorney.

- 4) Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 5) 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 warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.
- 6) Copies of plaintiff's complaint, amended complaint, the court's December 18, 2013, order and this order are being sent today to the United States Marshal for service on defendants.

Entered this 24th day of June, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge