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

DAVID D. AUSTIN, II,

Plaintiff,

v.

G4S SECURE SOLUTIONS USA, SHANE L. PETERSON, SHANTEL L. BELOT, JOHN DOES, JANE DOES, MILWAUKEE COUNTY, DAVID A. CLARKE,[1] JR., GARY HAMBLIN, JEFFREY PUGH, and M. SAMBORSKI,

Defendants.

OPINION & ORDER

15-cv-259-jdp

In May 2012, pro se plaintiff David D. Austin, II was incarcerated at the Stanley Correctional Institution. Plaintiff alleges that he had a court hearing more than 200 miles away in Wauwatosa, Wisconsin. While he and five other inmates were being transported to their hearings, they were in a motor vehicle accident and plaintiff was injured. Plaintiff has filed a proposed civil action under 42 U.S.C. § 1983, alleging that defendants were negligent and that they violated his rights under the Eighth Amendment.

Plaintiff seeks leave to proceed in *forma pauperis*, Dkt. 3, and has made an initial partial payment of the filing fee as directed by the court. As a next step, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915, 1915A. After considering plaintiff's allegations and construing them generously, *see McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010), I conclude that plaintiff has stated claims under the Eighth Amendment and under state law for negligence.

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[1] I have amended the caption to include the correct spelling of defendant's name.

ALLEGATIONS OF FACT

I draw the following facts from plaintiff's complaint. Plaintiff was incarcerated at the Stanley Correctional Institution and was due in court for a hearing in Wauwatosa, Wisconsin. On May 10, 2012, two employees of defendant G4S Secure Solutions USA, which plaintiff alleges contracts with the Wisconsin Department of Corrections and Milwaukee County to transport inmates, picked plaintiff up from the prison. The employees, defendants Shane L. Peterson and Shantel L. Belot, placed plaintiff in handcuffs, attached the handcuffs to his belt, shackled his feet, and helped him into the back of a transport van. The van was a 2003 Chevy Express cargo van with a metal cage that held the inmates. The metal bench seats in the cage had no padding, although there was a long black non-skid strip along the bench seat to keep passengers from sliding around. I infer from plaintiff's description of the events that plaintiff was not wearing a seatbelt. They stopped along the way to pick up five additional inmates, who joined plaintiff in the cage.

While driving on I-94, another car rear-ended the transport van. Plaintiff was knocked unconscious. Defendant State Highway Patrol Trooper M. Samborski responded to the accident and assessed the scene. He filed an accident report. Meanwhile, the six inmates remained in the cage. Defendants Peterson, Belot, and Sambroski merely looked into the cage and called to the inmates to determine whether they were alright. Some of the inmates, including plaintiff, told defendants that they were injured and needed to go to the hospital. Peterson, Belot, and Sambroski did not attempt to assist the inmates or call for an ambulance. Instead, they spoke on their cell phones to unknown people—presumably supervisors—to determine what to do. Those on the other end of the phone calls are named as defendants John Does and Jane Does.

After assessing the accident, defendants Peterson and Belot got on the road again with the six inmates and drove 55 miles in the damaged van to the Milwaukee County jail. Part of the van's back panel was flapping in the wind and the inmates could see the road surface from their seats. During the drive, the van hit potholes and bumps, jarring the inmates. Plaintiff was thrown from his seat onto the floor of the cage during a turn. He contends that the jostling exacerbated his injuries.

When they arrived at the Milwaukee County jail, Peterson and Belot ordered the inmates out of the van. Those who did not get out were lifted and pulled out. The inmates were instructed to sit on a cement bench. They had not yet received medical attention. Milwaukee County deputies were also present. About three and a half hours had passed from the time of the accident when defendants finally called for a Milwaukee County jail nurse to assess the inmates. Defendants falsely told the nurse that they had been in a low-speed accident and that the inmates had all been wearing seatbelts.

The nurse and intake medical staff assessed plaintiff and declined to admit him into the jail because of his injuries. Plaintiff was seated in a wheelchair and waited 30 minutes before defendants heeded the medical staff's advice to take him to the hospital. Defendants Peterson, Belot, and the Milwaukee County deputies lifted plaintiff out of the wheelchair and into another transport van—instead of an ambulance—with a similar steel cage. When they arrived at Mount Sinai Hospital, they lifted plaintiff out of the van and into another wheelchair to take him into the emergency room. The trip to the hospital also included jostling that contributed to plaintiff's pain and discomfort. By the time he arrived at the hospital, it had been about five hours since the accident. At the hospital, Peterson and Belot

repeated their false statements about the accident. Plaintiff was then assessed and received x-rays and a CAT scan. He had suffered closed head trauma and a strained neck and back.

Although plaintiff does not accuse defendants Stanley Correctional Institution Warden Jeffrey Pugh, former DOC Secretary Gary Hamblin, Milwaukee County, or Milwaukee County Sheriff David A. Clarke, Jr. of being directly involved in his accident or its aftermath, he alleges that they are responsible for overseeing inmate transportation. Plaintiff alleges that there had been similar accidents in the past and that each of these defendants knew that the transportation policies in place and the medical emergency response training that their employees received were insufficient. He alleges that, nevertheless, they turned a blind eye and failed to address the risk of harm to plaintiff. Plaintiff timely filed his complaint in this court on May 4, 2015.

ANALYSIS

For his federal claims, plaintiff is proceeding under 42 U.S.C. § 1983, which requires him to show that defendants intentionally deprived him of a constitutional right while acting under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009). He alleges that defendants violated his Eighth Amendment rights when they subjected him to a substantial risk of serious harm by transporting him in an unsafe van. He alleges that after the accident, defendants were deliberately indifferent to his serious medical need by delaying medical care, thereby inflicting unnecessary and wanton pain. Plaintiff also asserts state-law claims for negligence for the conduct that lead to his injuries. He requests $7,321 in compensatory damages and $2,500,000 in punitive damages. He also seeks declaratory and injunctive relief

to prevent defendants from transporting anyone else in a vehicle that does not meet the "Federal Transportation Safety Standard" for transporting people on the highways.

A. Constitutional claims

The Eighth Amendment prohibits cruel and unusual punishment. That includes instances where: (1) there is a serious medical need or excessive risk to inmate health or safety of Constitutional proportions; (2) a defendant is subjectively aware of that need or risk; and (3) the defendant consciously disregards it. *Farmer v. Brennan*, 511 U.S. 825, 838-840 (1994) ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."). A "serious medical need" may be a condition that a doctor has recognized as needing care or one for which the necessity of care would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006). Delay in care, even for a condition that is not life-threatening, can support a claim under the Eighth Amendment. *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010) ("A significant delay in effective medical treatment [] may support a claim of deliberate indifference, especially where the result is prolonged and unnecessary pain."). However, "[n]egligence—even gross negligence—is insufficient" under § 1983. *Farmer*, 511 U.S. at 836. "Instead, deliberate indifference requires evidence that an official actually knew of a substantial risk of serious harm and consciously disregarded it nonetheless." *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004).

1. Individual capacity liability

Plaintiff has alleged that defendants Shane L. Peterson, Shantel L. Belot, and G4S Secure Solutions USA,[2] knowingly used an unsafe van to transport him, exposing him to a

[2] Entities that contract with the state (and their employees) assume the same liability under

substantial risk of serious harm. After the accident, those defendants, as well as the Doe defendants (who answered defendants' calls after the accidents and purportedly directed them to continue on to the county jail) exacerbated plaintiff's risk of harm by driving him (or allowing him to be driven) to the Milwaukee County jail in that same van. Finally, these defendants delayed plaintiff's medical care by several hours despite knowing that he was injured soon after the accident.

Construing the complaint generously, plaintiff's allegations suggest that defendants Peterson, Belot, and G4S acted with deliberate indifference to the risk of harming plaintiff when they drove him on the highway in a metal cage in the back of the transportation van. Defendants Peterson, Belot, and the John and Jane Does also acted with deliberate indifference to increasing plaintiff's risk of harm by allowing Peterson and Belot to continue driving him in the back of the van, despite being aware of his injuries. Those defendants caused plaintiff additional harm and prolonged his pain by delaying his access to medical care. I will allow plaintiff to proceed on his Eighth Amendment claims against these defendants.

However, because defendants were attempting to get plaintiff medical care by having the intake nurse examine him and by taking him to the hospital, plaintiff may find it difficult to prove the delayed medical care claim at summary judgment or trial. He will need to present evidence that their actions were deliberately indifferent and not just incidental to their overall effort to attend to his medical need.

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42 U.S.C. § 1983 as the state. *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 827 (7th Cir. 2009).

Plaintiff also alleges that several higher ranking individuals should be held liable. Under § 1983, plaintiff may not proceed on claims of vicarious liability; he must allege sufficient facts to show that each defendant personally caused or participated in the alleged constitutional deprivation. *See Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000) ("[Section] 1983 does not allow actions against individuals merely for their supervisory role of others."). But a supervisor can be found personally responsible for a constitutional violation if he knows about the actions causing the violation and facilitates them, approves them, condones them, or turns a blind eye to them. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

Plaintiff alleges that the DOC secretary, then Gary Hamblin, set the policy around transporting inmates and personally approved the use of the unsafe vans to transport them. At the time, Hamblin was a state actor, and turned a blind eye to the obvious risk that the vans present. Plaintiff has therefore adequately alleged a claim against Hamblin in his individual capacity. Plaintiff makes similar allegations against Milwaukee County Sheriff David A. Clarke, Jr. He alleges that Clarke knew of the use of the vans and the risk that they present, but turned a blind eye to that risk. He has stated a claim against Clarke. Similarly, plaintiff has stated a claim that Warden Jeffrey Pugh also knew of the unsafe conditions and allowed plaintiff to be transported from his prison, turning a blind eye to the risk.

Plaintiff is proceeding against at least one John Doe defendant. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to identify the names of the Doe defendants and to amend the complaint to include the proper identities of these defendants.

2. Official capacity liability

In addition to suing defendants for damages, plaintiff also seeks injunctive relief. He therefore alleges that the DOC secretary, Warden Pugh, Milwaukee County, and Sheriff Clarke violated his rights in their official capacities.

Under § 1983, Milwaukee County and Sheriff Clarke in his official capacity may not be held liable unless they implement a county policy or practice that causes the constitutional violation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). To prevail on this claim, plaintiff must show: "(1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the final force of law; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Lewis v. City of Chicago*, 496 F.3d 645, 656 (7th Cir. 2007). Plaintiff alleges that it is Milwaukee County policy and practice to transport inmates unsafely. He alleges that Clarke has the policymaking authority to approve of the use of G4S's vans and has exercised his authority to allow it, despite the vans being obviously unsafe for inmates. Additionally, plaintiff alleges that the county and sheriff failed to train their deputies to adequately respond to a medical emergency. Accordingly, plaintiff has stated a claim against Clarke and against the county under § 1983.

Plaintiff may also proceed against the DOC secretary and Warden Pugh in their official capacities for purposes of his injunctive relief. However, defendant Hamblin no longer serves as DOC secretary. I will direct the clerk to add current Secretary Jon Litscher to this case under Federal Rule of Civil Procedure 25.

B. State law claims

The facts that plaintiff alleges in his complaint also state claims under Wisconsin law for negligence against all of the defendants in their individual capacities. "The test of negligence is whether the conduct foreseeably creates an unreasonable risk to others." *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 275 N.W.2d 660, 664-65 (1979). To state a claim, plaintiff must show that defendants owed him a duty of care that they breached, causing him actual damage. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 11, 308 Wis. 2d 17, 746 N.W.2d 220.

Plaintiff alleges that defendants G4S, Peterson, Belot, John Does, Jane Does, Milwaukee County, Sheriff Clarke, Secretary Hamblin, Warden Pugh, and Samborski all owed him a duty of care because he was an inmate in their custody or control. He alleges that they breached their duty by transporting him in an unsafe van that exposed him to an unreasonable risk of harm. Because of their breach, the risked harm actually came to fruition and plaintiff was injured in the car accident. I will allow plaintiff to proceed against these defendants on negligence claims for the same reasons I am allowing him to proceed against them in their individual capacities on his Eighth Amendment claims.

Although not all of the defendants were personally involved in transporting plaintiff, employers, like G4S and Milwaukee County, may be vicariously liable for their employees' conduct. *Shannon v. City of Milwaukee*, 94 Wis. 2d 364, 370, 289 N.W.2d 564, 568 (1980) ("Under the doctrine of respondeat superior an employer can be held vicariously liable for the negligent acts of his employees while they are acting within the scope of their employment."). Plaintiff will also be allowed to proceed on his state law negligence claims against these defendants.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to add Jon Litscher in the caption for this case.

2. Plaintiff is GRANTED leave to proceed on Eighth Amendment and state law negligence claims against defendants Shane L. Peterson, Shantel L. Belot, G4S Secure Solutions USA, M. Samborski, John and Jane Does, Warden Jeffrey Pugh, Milwaukee County Sheriff David A. Clarke, Jr., and former DOC Secretary Gary Hamblin in their individual capacities.

3. Plaintiff is GRANTED leave to proceed on his claims Milwaukee County, Milwaukee County Sheriff David A. Clarke, Jr., Warden Jeffrey Pugh, and current DOC Secretary Jon Litscher in their official capacities.

4. Pursuant to 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 defendants, in this case Hamblin, Litscher, Pugh, and Samborski. Plaintiff should not attempt to serve these defendants on his own at this time. 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 for these defendants.

5. The United States Marshal is directed to serve the remaining defendants: Peterson, Belot, G4S, Clarke, and Milwaukee County.

6. For the time being, 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 or lawyers who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' lawyers.

7. 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.

8. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered June 1, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge