

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

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DAVID CZAPIEWSKI, ANTHONY RIACH,  
LARRY ANDREWS, MATTHEW REILLY,  
DAVID THOMAS, MICHAEL CONNELLY,  
JACOB DIETRICH, DONTRELL ANDERSON  
and WILLIAM ZIEMER,

OPINION AND ORDER  
15-cv-654-bbc

Plaintiffs,

v.

KURT THOMAS, KEITH FREY, JESSIE RHINES  
JOHN DOE #1, JOHN DOE #2, JOHN DOE #3,  
JOHN DOE #4 and JOHN DOE #5,

Defendants.  
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Plaintiffs David Czapiewski, Anthony Riach, Larry Andrews, Matthew Reilly, David Thomas, Michael Connely, Jacob Dietrich, Dontrell Anderson and William Ziemer, all of whom are inmates at the Wisconsin Resource Center, have filed suit under 42 U.S.C. § 1983. Plaintiffs assert that various members of the Resource Center’s medical staff—defendants Kurt Thomas, Keith Frey, Jessie Rhines and John Does ##1-5—violated plaintiffs’ Eighth Amendment rights by knowingly exposing them to a risk of contracting Hepatitis C from a fellow inmate.

Plaintiffs have each made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so their complaint is ready for screening under 28 U.S.C. §§ 1915 and 1915A. Having reviewed the complaint, I conclude that plaintiffs have stated a

claim that defendants Thomas, Rhines and John Does ##2-5 violated plaintiffs' Eighth Amendment rights. However, I am dismissing plaintiffs' claims against defendants Frey and John Doe #1 for failing to state a claim upon which relief may be granted.

Plaintiffs have also filed a motion to transfer this action to the Eastern District of Wisconsin on the grounds that venue is not proper in this district, one or more defendants do not reside in this district and a substantial part of the events giving rise to the claims at issue occurred in the Eastern District of Wisconsin. This motion will be denied because objections to venue can only be raised by defendants and plaintiffs have failed to establish that the Eastern District of Wisconsin is a more convenient forum.

Plaintiffs' complaint contains the following allegations, which for screening purposes, I must accept as true and read in the light most favorable to them. Perez v. Fenoglio, 792 F.3d 768, 774 (7th Cir. 2015).

#### ALLEGATIONS OF FACT

While incarcerated at Columbia Correctional Institution, an inmate by the name of Jerry DuBose was given a diagnosis of Hepatitis C by Wisconsin Department of Corrections doctors. DuBose was subsequently transferred to the Wisconsin Resource Center on March 25, 2015 and assigned to housing unit H-17. In connection with his transfer, medical staff at the Resource Center reviewed DuBose's medical file, which indicated that DuBose had contracted Hepatitis C, and they conducted a medical examination of DuBose. During the medical exam, DuBose told one of the Resource Center's psychiatric care technicians/nurses,

John Doe #2, about his condition.

In light of the fact that DuBose had tested positive for Hepatitis C, defendant Kurt Thomas completed a “DHS F-20159 medical restriction/special needs form,” which stated that DuBose should be assigned a personal razor for shaving. Defendant Thomas assigned DuBose a personal razor so that he did not infect other inmates by using a “community shared shaver” that the plaintiffs in unit H-17 used. However, defendant Thomas and defendant Jessi Rhines (a Resource Center nurse in charge of infectious disease control) failed to forward the DHS F-20159 form to unit H-17 staff or otherwise notify unit H-17 staff about the fact that DuBose needed a personal razor.

When DuBose arrived at unit H-17 he was again screened by the unit H-17 manager, defendant Keith Frey. However, during this screening, defendant Frey failed to detect that DuBose had Hepatitis C and failed to assign DuBose a personal razor.

For approximately three months, plaintiffs and DuBose used the same community shaving device. Eventually, on June 15, 2015, unit H-17 staff received a DHS F-20159 form completed by defendant Frey that required them to assign DuBose a personal shaver. During this three-month time period, John Does ##2-5 (psychiatric care technicians), were aware of the fact that DuBose had Hepatitis C, but failed to provide DuBose a personal razor and allowed him to use the shared shaver plaintiffs also used.

## OPINION

### A. Screening

Plaintiffs contend that defendants violated the Eighth Amendment prohibition on cruel and unusual punishment by knowingly exposing them to a risk of infectious disease. Specifically, they allege that defendants allowed a fellow inmate, Jerry DuBose, to use plaintiffs' "community shared shaver" despite knowing that DuBose had Hepatitis C. According to plaintiffs, defendants should have given DuBose a personal shaver, rather than allow DuBose to use the shaver plaintiffs used.

Under the Eighth Amendment, prison officials are required to maintain humane conditions of confinement and must take reasonable measures to guarantee the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832 (1994). However, prison officials' failure to protect inmates from harm violates the Eighth Amendment only when (1) the risk of harm at issue was sufficiently serious; and (2) defendants had actual knowledge of the risk. Gevas v. McLaughlin, 798 F.3d 475, 480 (7th Cir. 2015). I conclude that plaintiffs' allegations satisfy both of these requirements and that defendants consciously failed to take reasonable measures to protect plaintiffs.

#### 1. Was the risk of harm sufficiently serious?

With respect to the first requirement, I conclude at the pleading stage that plaintiff has alleged sufficient facts to support an inference that the risk of harm was "sufficiently serious." There is no question that contracting Hepatitis C constitutes "serious harm" for

purposes of the Eighth Amendment. And although there are questions regarding the likelihood of infection, I will assume at the pleading stage that requiring plaintiffs to share shaving devices with an infected inmate posed a “substantial risk” of harm. Farmer, 511 U.S. at 834 (citing Helling v. McKinney, 509 U.S. 25, 35 (1993)).

2. Did defendants have “actual knowledge” of the risks at issue?

The next question is whether plaintiffs have alleged sufficient facts to support an inference that each defendant had “actual, and not merely constructive, knowledge” of the risk of infection posed by DuBose, but nevertheless failed to take protective action. Gevas, 798 F.3d at 480. To establish actual knowledge in this case, plaintiffs must show that each defendant (1) knew DuBose had Hepatitis C; (2) knew DuBose and plaintiffs shared the same community shaver; and (3) knew that using the same shaving device presented a substantial risk of infection. Under this standard, plaintiffs’ complaint contains sufficient allegations to support an inference that some, but not all, defendants had the requisite actual knowledge.

Plaintiffs’ allegations with respect to defendants Kurt Thomas and Jessi Rhines are sufficient to support an inference that they had actual knowledge of a substantial risk of harm. Plaintiffs allege that defendants Thomas and Rhines completed a “special needs” form so that DuBose would receive a personal razor. This allegation supports an inference that defendants Thomas and Rhines not only knew that DuBose had Hepatitis C, but also knew that the risk of infecting fellow inmates through the use of the community shaver was

sufficiently serious to justify giving DuBose a personal razor.

Next plaintiffs allege that John Does ##2-5, all of whom were psychiatric care technicians at the Resource Center, “knew that DuBose had Hepatitis C,” but failed to prevent DuBose from using the shaving device plaintiffs shared. Although the only specific allegation with respect to how John Does ##2-5 knew DuBose had Hepatitis C applies to John Doe #2 (plaintiffs allege that DuBose told Doe #2 about his disease during DuBose’s March 26 medical exam), it is reasonable to infer at the pleading stage that as Resource Center medical personnel they were aware of which inmates suffered from chronic infectious diseases. It is also reasonable to infer that they knew there was a substantial risk that Hepatitis C could be transmitted by sharing razors and shaving devices, such as the community shaver the Resource Center provided.

Early on in this lawsuit, magistrate judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline for plaintiff to amend his complaint to include these individuals.

Although I am allowing plaintiff to proceed against defendants Thomas, Rhines and John Does ##2-5, I am dismissing plaintiffs’ claims with respect to defendant Keith Frey. Plaintiffs’ only allegation with respect to defendant Frey is that he failed to “properly screen[]” DuBose upon his admission to their prison unit. A failure to properly screen an inmate for disease does not support a claim for deliberate indifference. At most, plaintiffs’ allegations against Frey support a claim for negligence, which is not actionable under § 1983.

Walker v. Benjamin, 293 F.3d 1030, 1039 (7th Cir. 2002).

Plaintiffs' claim against John Doe #1 is similarly not actionable. Plaintiffs' claim against John Doe #1 is founded on nothing more than the fact that Doe #1 "was a Nurse Supervisor" and that he "had an obligation to supervise nursing staff at [the prison]." Supervisors do not violate prisoners' Eighth Amendment rights by failing to supervise their staff properly. Only individuals that are personally involved in the alleged misconduct can be held liable. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003).

#### B. Motion to Transfer

Plaintiffs have filed a motion to transfer this case to the Eastern District of Wisconsin. Although plaintiffs do not specify whether they are filing their motion to transfer under either 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406, transfer is not warranted under either provision.

To the extent plaintiffs are moving to transfer under § 1406, their motion is denied on the ground that they chose to file suit here, thereby waiving any defects in venue. Olberding v. Illinois Central Railroad Co., 346 U.S. 338, 340 (1953) ("The plaintiff, by bringing suit in a district other than that authorized by the statute, relinquished his right to object to the venue."). Moreover, none of the defendants have been served, so it is unclear at this stage whether any of them reside in this district. If it turns out that one or more of the defendants resides in this district, then venue would be proper here. 28 U.S.C. § 1391(b)(1) ("A civil action may be brought in . . . a judicial district in which *any* defendant

resides, if all defendants are resident of the State in which the district is located[.]”)(emphasis added).

To the extent that plaintiffs seek transfer under § 1404(a), plaintiffs’ motion is denied on the ground that they fail to establish that transfer would best serve “the convenience of [the] parties and witnesses” and be “in the interest of justice.” 28 U.S.C. § 1404(a). Plaintiffs have offered no facts supporting a finding that transfer would be in the interest of justice and this determination is impossible to make without giving defendants an opportunity to respond. Moreover, it is difficult to see how plaintiffs can argue that venue is inconvenient when they are the ones that chose to file suit here. E.g., Minasian v. Standard Chartered Bank, PLC, No. 93-C-6131, 1994 WL 532290, at \*1 (N.D. Ill. Sept. 26, 1994) (“[I]n considering the convenience of the parties, we find that Plaintiffs cannot claim any inconvenience due to litigating a suit in the forum they chose initially.”).

## ORDER

IT IS ORDERED that

1. Plaintiffs David Czapiewski, Anthony Riach, Larry Andrews, Matthew Reilly, David Thomas, Michael Connely, Jacob Dietrich, Dontrell Anderson and William Ziemer are GRANTED leave to proceed on their claims that defendants Kurt Thomas, Jessie Rhines and John Does ##2-5 violated plaintiffs’ Eighth Amendment rights by allowing plaintiffs to use the same shaving device used by a fellow inmate defendants knew to have Hepatitis C.

2. Plaintiffs' claims against defendants Keith Frey and John Doe #1 are DISMISSED with prejudice for failing to state a claim upon which relief may be granted.

3. Plaintiffs' motion to transfer to the Eastern District of Wisconsin is DENIED.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiffs' complaint and this order are being sent today to the Attorney General for service on the named defendants. Once plaintiffs identify the names of John Does ##2-5, the court will direct those defendants to answer the complaint.

5. For the time being, plaintiffs must send defendants a copy of every paper or document they file with the court. Once plaintiffs have learned what lawyer will be representing defendants, they should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiffs unless plaintiffs show on the court's copy that they have sent a copy to the defendants or to defendants' attorney.

6. Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do not have access to a photocopy machine, they may send out identical handwritten or typed copies of their documents.

7. If plaintiffs are transferred or released while this case is pending, it is their obligation to inform the court of their new address. If they fail to do this and defendants

or the court are unable to locate them, their case may be dismissed for failure to prosecute.

Entered this 5th day of February, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB

District Judge