IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NORMAN STAPLETON,

Plaintiff,

OPINION and ORDER

16-cv-406-bbc

v.

RANDALL R. HEPP, EDWARD WALL,
JOHN J. MAGGIONCALDA, STEVE BETHKE
and GEORGE COOPER,

Defendants.

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Pro se prisoner Norman Stapleton is a prisoner at the Fox Lake Correctional Institution. In this civil action brought under 42 U.S.C. § 1983 and state law, plaintiff alleges that various prison officials are subjecting him to an unreasonable risk of harm by giving him contaminated drinking water. In addition, plaintiff contends that a grievance examiner should not have denied his grievance about the drinking water. Plaintiff asserts legal theories under the Eighth Amendment to the United States Constitution and state common law negligence.

Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915(e)(2) and § 1915A. Having reviewed the complaint, I conclude the plaintiff may proceed on his claim that defendants Randall Hepp and Edward Wall violated the Eighth Amendment by

giving plaintiff unsafe drinking water. However, I am dismissing the complaint as to the other claims and other defendants.

OPINION

Plaintiff's claims arise out of a memo he says he received in June 2015. The memo informed prisoners that "life endangering contaminants" such as lead, copper and arsenic were detected in the prison's drinking water. In addition, the memo stated that individuals with certain medical conditions, such as high blood pressure, would be subjected to a heightened risk from the lead. Plaintiff has high blood pressure.

Plaintiff alleges that the water at the prison "smells and tastes disgusting" and "sometimes has a brownish color." Even when he allows the water to run "for a couple minutes," the water looks, smells and tastes the same.

Plaintiff filed a grievance and sent a letter to defendant Randall Hepp (the warden) about the problem. Plaintiff noted his high blood pressure and asked for bottled water or to be transferred to a different prison, but Hepp did not respond. Defendant Hepp, defendant John Maggioncalda (the building grounds superintendent) and defendant Steven Bethke (the building grounds supervisor) know that the drinking water contains "toxic contaminants," but they have failed to take any action to correct the problem. In addition, I understand plaintiff to allege that defendant Edward Wall (former Secretary of the Wisconsin Department of Corrections) and defendant Geoge Cooper (a grievance examiner) both knew from plaintiff's grievance about the risk to plaintiff in particular.

Plaintiff's allegations state a claim upon which relief may be granted under the Eighth Amendment against defendants Hepp and Wall. A prison official may violate the Eighth Amendment if he is aware of a substantial risk of serious harm to a prisoner's health or safety, but consciously refuses to take reasonable measures to protect the prisoner. Farmer v. Brennan, 511 U.S. 825, 842 (1994); Rosario v. Brawn, 670 F.3d 816, 821-22 (7th Cir. 2012); Santiago v. Walls, 599 F.3d 749, 756 (7th Cir. 2010). Another way of saying this is that a prison official may not deprive a prisoner of "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

At this stage of the proceedings, it is reasonable to infer that plaintiff is being subjected to a substantial risk of serious harm and being denied the minimal civilized measure of one of life's necessities, safe drinking water. "Just as correctional officers cannot deprive inmates of nutritional food, they cannot deprive inmates of drinkable water." Smith v. Dart, 803 F.3d 304, 313 (7th Cir. 2015). Because plaintiff alleges that the water at the prison is contaminated with unreasonably high levels of lead, arsenic and copper and that his high blood pressure makes him especially susceptible to lead poisoning, his allegations are adequate to state a claim that the water is unsafe for him to drink. Id. ("Certainly, the presence of contaminants such as cyanide and lead may render water unsafe to drink."). Although plaintiff does not identify any harm that he has suffered *yet*, that is not required. A prisoner does not have to wait until serious harm occurs to seek relief. Helling v. McKinney, 509 U.S. 25, 33–34 (1993) ("[A] prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.").

In addition, plaintiff's allegations are adequate to allow an inference that defendants Hepp and Wall knew both about the problem generally and that plaintiff's high blood pressure subjects him to a greater risk of harm. In particular, it is reasonable to infer from the memo plaintiff received that Hepp and Wall knew that the drinking water was contaminated and it is reasonable to infer that Hepp and Wall knew from plaintiff's letter and grievance about the heightened risk to plaintiff.

Finally, plaintiff has alleged that defendant Hepp and Wall refused to provide prisoners bottled drinking water or take any other action to protect prisoners. This is sufficient at the pleading stage to show that these defendants consciously refused to take reasonable measures to help plaintiff and that plaintiff does not have reasonable alternatives for staying hydrated without safe drinking water.

At summary judgment or trial, plaintiff will have to come forward with admissible evidence sufficient to allow a reasonable jury to find in his favor on each element of his claim. Henderson v. Sheahan, 196 F.3d 839, 848 (7th Cir. 1999). For example, plaintiff will have to submit admissible evidence showing that the water is actually a health risk for him. His own belief from the way the water looks, tastes and smells may not be enough. Jones v. Walker, 358 F. App'x 708, 711 (7th Cir. 2009) (fact that water was discolored not sufficient to show it was unsafe).

Plaintiff should pay particular attention to Carroll v. DeTella, 255 F.3d 470, 471–72 (7th Cir. 2001), another case involving allegations of contaminated water in prison. Although the plaintiff in Carroll alleged that the prison's water was contaminated with lead

and radium, the court affirmed summary judgment in the defendants' favor because the plaintiff did not have sufficient evidence that the level of contaminants was harmful. In particular, the court concluded that it was *not* sufficient for the plaintiff to show that the levels of radium were above the levels recommended by the Environmental Protection Agency and that prison staff received free bottled water so that they did not have to drink from the local water supply. Id. The court stated that "failing to provide a maximally safe environment, one completely free from pollution or safety hazards, is not" a violation of the Constitution. Id. at 472-73.

Because Carroll was decided on summary judgment, it would be inappropriate to rely on that case at the screening stage. White v. Monohan, 326 F. App'x 385, 387 (7th Cir. 2009) (reversing district court's dismissal at screening stage of unsafe drinking water claim and rejecting conclusion that, under Carroll, prisoner "could not maintain a claim based on allegations of polluted water as a matter of law"). However, because plaintiffs' allegations are similar to the allegations in Carroll, that case is likely to be important at later stages in this case.

Plaintiff named two other defendants on this claim, John Maggioncalda and Steve Bethke. However, other than saying that these defendants knew about the problem and failed to correct it, the only allegation against them that plaintiff includes in his complaint is their job titles, superintendent and supervisor of the building grounds. What is missing from plaintiff's complaint is any allegation that Maggioncalda or Bethke could have taken any action to help plaintiff, even if they wanted to do so. Miller v. Harbaugh, 698 F.3d 956,

962 (7th Cir. 2012) ("[D]efendants cannot be thought to [violate the Eighth Amendment] if the remedial step was not within their power."). It is reasonable to infer from defendant Hepp's status as the warden and defendant Wall's status as department secretary that they could have issued orders to provide prisoners with bottled water or make some other accommodation, but it is not reasonable to infer without more specific allegations that building grounds supervisors would have similar authority. Although Maggioncalda and Bethke could be involved in implementing an order to fix a contaminated water supply, plaintiff does not allege that they refused to make repairs that they could have made or even that they had the authority to make decisions to take such steps. Thus plaintiff's allegations do not provide any basis for inferring that Maggioncalda and Bethke violated the Eighth Amendment.

Plaintiff raises a negligence claim against defendants Hepp, Maggioncalda and Bethke for the same conduct. However, plaintiff does not allege that he complied with Wisconsin's notice of claim statute, Wis. Stat. § 893.82, which is required before plaintiff can sue state officials for negligence. Kellner v. Christian, 197 Wis. 2d 183, 194-95, 539 N.W.2d 685, 689 (1995); Modica v. Verhulst, 195 Wis. 2d 633, 640, 536 N.W.2d 466 (Wis. Ct. App. 1995); Oney v. Schrauth, 197 Wis. 2d 891, 541 N.W.2d 229, 233 (Ct. App. 1995). Because the notice of claim statute is jurisdictional, "[a] complaint that fails to show compliance with § 893.82 fails to state a claim upon which relief can be granted." Weinberger v. State of Wisconsin, 105 F.3d 1182, 1188 (7th Cir. 1997) (additionally noting that substantial compliance cannot cure failure to strictly comply with statute).

Accordingly, I cannot allow plaintiff to proceed on a state law claim.

Finally, plaintiff raises a claim that defendant George Cooper (a grievance examiner) violated plaintiff's Eighth Amendment rights by failing to provide an adequate response to his grievance. Plaintiff says nothing about that response, except to say that his grievance was denied.

This allegation does not state a claim upon which relief may be granted. The general rule is that grievance examiners cannot be held liable simply for denying a grievance. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009); George v. Smith, 507 F.3d 605, 609-10, (7th Cir. 2007). Particularly because plaintiff does not identify any reason that a grievance examiner would have the authority to correct a problem of this magnitude, I am dismissing plaintiff's complaint as to defendant Cooper.

ORDER

IT IS ORDERED that

1. Plaintiff Norman Stapleton is GRANTED leave to proceed on his claim that defendants Randall Hepp and Edward Wall failed to provide plaintiff safe drinking water, in violation of the Eighth Amendment.

2. Plaintiff's negligence claim is DISMISSED for his failure to comply with the Wisconsin notice of claims statute. Plaintiff's claims against defendants John Maggioncalda, Steven Bethke and George Cooper are DISMISSED for plaintiff's failure to state claims against them upon which relief may be granted.

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 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 their 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.

5. 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 failure to prosecute.

Entered this 24th day of August, 2016.

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