IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSHUA A. ANEY,

Plaintiff,

OPINION
AND ORDER

v.

01-C-532-C

JON E. LITSCHER, Secretary of
Dept. of Corrections; JOHN BETT,
Warden of Dodge Correctional Institution,

Defendants.

- -

In this civil action for declaratory, injunctive and monetary relief, plaintiff Joshua Aney alleges that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment by exposing him to environmental tobacco smoke. Jurisdiction is present under 28 U.S.C. § 1331. Presently before the court are defendants' motion in limine to preclude plaintiff from presenting expert testimony and defendants' motion for summary judgment. Because I conclude that plaintiff has failed to create a genuine issue of material fact that he was exposed to unreasonably high levels of environmental tobacco smoke or that defendants acted with deliberate indifference to his health or safety, I will grant defendants'

motion for summary judgment. Defendant's motion in limine will be denied as moot.

For the purpose of deciding this motion, I find from the parties' proposed findings of fact that there is no genuine issue with respect to the following material facts.

UNDISPUTED FACTS

Plaintiff Joshua Aney is an inmate at Green Bay Correctional Institution. Between July 5, 2000, and August 2, 2001, the time at issue in this lawsuit, plaintiff was an inmate at the Dodge Correctional Institution in Waupon, Wisconsin. Defendant Jon Litscher is Secretary of the Wisconsin Department of Corrections. Defendant John Bett is the warden of the Dodge Correctional Institution.

While he was confined at Dodge Correctional Institution, plaintiff was housed in various units, all of which banned cigarette smoking by inmates. However, in at least some of those units, prison staff were permitted to smoke. Plaintiff was exposed to the second hand smoke of Dodge prison staff. He experienced difficulty breathing through his nose, severe tightness in his chest, and numbness in his hands and face. Medical staff at the prison provided plaintiff with an albuterol inhaler.

In late January 2001, plaintiff filed an inmate complaint, which stated:

> I have seen posted numerous times that inmates are not allowed to smoke because of health risks, mainly second hand smoke. However, the guards still smoke all throughout the institution, giving off that harmful, second hand smoke.

> Therefore, since we all know that the "second hand smoke" story is just an excuse for [D]odge to take another thing from inmates, I feel we should get smoking back, or that they should take it away from everyone, including the guards.
>
> To my knowledge, only Portage and Dodge are smoke free, which isn't right. Besides, think of all the time and hassle you would save. You wouldn't have to constantly monitor the break room or worry about people stealing guards' cigarettes.

The institution complaint examiner reviewing plaintiff's complaint summarized it as "officers being allowed to smoke but inmates are not." The examiner recommended that the complaint be dismissed because "officers . . . are allowed to smoke at their posts in accordance with contractual agreements" and "inmates must understand they are under a completely different set of rules than staff." Defendant Bett reviewed the complaint and accepted the recommendation to dismiss without providing further justification.

Plaintiff appealed the dismissal to a corrections complaint examiner. He wrote in part:

> My appeal can be summarized as follows – I was forced to quit smoking in a matter of weeks, so they [prison staff] should have to refrain while in the building, seeing as how we get no fresh air during the winter months. And if they can't do that, then inmates should be given tobacco products again.
>
> It should also be noted that I will not smoke again, regardless. But I don't want to be subjected to second hand smoke from guards if I can't even subject myself to first hand smoke.
>
> Also, I have had some breathing problems in the last few months that I believe were caused from too much smoke and not enough fresh air.

The corrections complaint examiner and Cindy O'Donnell in defendant Litscher's office

concurred with the institution complaint examiner and dismissed plaintiff's complaint.

OPINION

A. Summary Judgment Standard

Summary judgment is appropriate when the evidence in the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to avoid summary judgment, the non-moving party must supply evidence sufficient to allow a reasonable jury to render a verdict in his favor. Sanchez v. Henderson, 188 F.3d 740, 743 (7th Cir. 1999). If the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. Eighth Amendment - Environmental Tobacco Smoke

The applicable law for plaintiff's Eighth Amendment claim was set forth in the October 25, 2001 order granting plaintiff leave to proceed. In Helling v. McKinney, 509 U.S. 25 (1993), the Supreme Court held that a prison inmate could state a claim under the

Eighth Amendment for involuntary exposure to environmental tobacco smoke. However, the Court did not recognize an absolute right to a smoke-free environment. Rather, the Court held, to succeed on an Eighth Amendment claim involving environmental tobacco smoke, the plaintiff must satisfy a two-part test. First, there is an objective component in which the plaintiff must show that he is "being exposed to unreasonably high levels of [environmental tobacco smoke]." Id. at 35. An unreasonably high level is one that "pose[s] an unreasonable risk of serious damage to his [current or] future health." Id.

Second, the plaintiff must prove that the defendants exposed him to second hand smoke with "deliberate indifference" to his health or safety. Id. A prison official acts with deliberate indifference when she "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

I conclude that plaintiff has failed to supply sufficient evidence regarding either the objective or subjective part of the Helling test. The order granting leave to proceed alerted plaintiff to two cases that would assist him in determining what he would have to prove to satisfy the objective component, Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001), and Oliver v. Deen, 267 F.3d 648 (7th Cir. 1996). Both of these cases concerned claims by prisoners that their exposure to second hand smoke violated the Eighth Amendment. In

Alvarado, 267 F.3d at 653, the court concluded that the plaintiff stated a claim under § 1983 when he alleged that he had "chronic, severe asthma from childhood, which was worsened by" environmental tobacco smoke. Although Alvarado involved a motion to dismiss rather than a motion for summary judgment, it identified one example of what a plaintiff could show to prevail on an Eighth Amendment claim involving second hand smoke.

In Oliver, 77 F.3d at 161, the court affirmed the district court's decision to grant the defendant's summary judgment motion, despite the fact that the plaintiff had produced evidence that he had been housed in the same cell as a smoker and that he was a"mild asthmatic" and "showed signs of distress," such as "difficulty breathing," "chest pains" and "wheez[ing]." Id. at 158-59, 160. The court noted that no doctor had ordered that the plaintiff be celled with nonsmokers only. Id. at 160. Further, other than some news articles discussing how smoke can aggravate asthma, the plaintiff had failed to present any evidence showing a causal relationship between the smoke and his symptoms. Id. Therefore, the court concluded, the plaintiff had not shown that "he had a medical need sufficiently serious to implicate the Constitution." Id. at 161.

After discussing Alvarado and Oliver, I told plaintiff what he would be required to prove: "Whether petitioner's exposure is likely to cause serious health problems depends as much on the severity of his asthma as on the amount of smoke to which he was exposed."

Oct. 25, 2001 order, dkt. #3, at 5. I advised plaintiff that "he will need to produce substantially more evidence of the actual effects on his health of environmental tobacco smoke if he hopes to succeed at later stages of this case." Id. at 6.

Despite these admonitions, plaintiff has failed to produce evidence regarding the severity of his medical condition, the amount of smoke to which he was exposed or the actual effects the second hand smoke had on his health. With respect to the amount of smoke, plaintiff has produced evidence that he witnessed staff members smoking in the units in which he was housed, but no evidence to show how often staff members smoked or how often plaintiff was exposed to their smoke. More important, plaintiff has presented no evidence regarding the seriousness of any medical condition that he might have. Although the undisputed facts reveal that plaintiff had a lung condition requiring an inhaler, there is no medical evidence indicating the severity of his case or whether it required him to be placed in a smoke-free environment. (Although plaintiff states in his proposed findings of fact that cigarette smoke was a "trigger" for his breathing problems, the document on which he relies for this proposition states that plaintiff's triggers are "non-identified.") Finally, there is no evidence that would suggest that plaintiff's exposure to the smoke complained of will harm him in the future.

In short, plaintiff has failed to adduce evidence such as was discussed in Alvarado that

he had a chronic, severe medical condition that was worsened by environmental tobacco smoke. Moreover, he has failed to distinguish his situation from that of the plaintiff in Oliver, whose case was dismissed on summary judgment because he had failed to show that he had a medical condition serious enough to require a completely nonsmoking environment or that the second hand smoke aggravated his condition. See also Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999) (concluding that plaintiff had failed to state a claim under the Eighth Amendment when he failed to allege that a physician either recommended a smoke-free environment or concluded that his symptoms were caused by second hand smoke). For plaintiff to prevail on the current record, I would have to conclude that the Eighth Amendment is violated when there is any exposure to second hand smoke occurring at the same time a prisoner experiences potentially smoke-related symptoms. However, that conclusion is not consistent with either Supreme Court or Seventh Circuit case law.

Plaintiff relies on Reilly v. Grayson, 157 F. Supp. 2d 762, 772-73 (E.D. Mich. 2001), in which the court concluded that the failure to place an asthmatic inmate in a smoke-free environment violated the Eighth Amendment. Unlike the prisoner in Reilly, plaintiff has produced no evidence that a physician recommended that he be placed in a smoke-free environment. Id. Accordingly, I conclude that plaintiff has failed to create a genuine issue of fact that he was exposed to an unreasonably high level of environmental tobacco smoke.

Moreover, even if plaintiff had demonstrated that there was a genuine issue of material fact regarding Helling's objective component, I would conclude nevertheless that plaintiff had failed to create a jury issue with regard to whether defendants acted with deliberate indifference. Plaintiff's complaints referred to "harmful, second hand smoke" and stated that he "had some breathing problems." However, plaintiff has produced no evidence that either defendant Bett or Litscher had "knowledge of a substantial risk of serious harm" to plaintiff as a result of prison staff being permitted to smoke. Farmer, 511 U.S. at 842.

Plaintiff has not shown that either defendant even saw the complaint in which he complained of breathing problems. The facts show that the complaint was filed with the corrections complaint examiner and dismissed by Cindy O'Donnell. Further, plaintiff supplied no evidence that defendants knew that he had a medical condition that could be exacerbated by second hand smoke or that plaintiff wanted to be transferred to a smoke-free environment. Rather, in both his complaints, plaintiff proposed that one solution to the problem of smoking by prison staff would be to return smoking privileges to the inmates. Defendants could not be expected to know that plaintiff needed protection from second hand smoke when he was requesting potential exposure to even more cigarette smoke. Therefore, even if defendants believed that environmental tobacco smoke was generally unhealthy, under these facts, no reasonable jury could conclude that defendants knew of and disregarded "an excessive risk to inmate health or safety." Farmer, 511 U.S. at 837.

ORDER

IT IS ORDERED THAT

1. The motion for summary judgment of defendants Jon E. Litscher and John Bett is GRANTED.

2. The motion of defendants Jon E. Litscher and John Bett to exclude expert testimony is DENIED as moot.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 27th day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge