

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

TERRY DUTCHER,

Plaintiff,

MEMORANDUM and ORDER
05-C-154-S

v.

COUNTY OF LACROSSE, WISCONSIN
MUNICIPAL MUTUAL INSURANCE COMPANY,
MIKE WEISSENBERGER, DORIS DAGGETT
and JOHN DOES 1-6,

Defendants.

Plaintiff Terry Dutcher brought this civil action under 42 U.S.C. §1983 and state law against defendants County of LaCrosse, Wisconsin Mutual Insurance Company, Mike Weissenberger, Doris Daggett and John Does 1-6.

On July 15, 2005 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. This motion has been fully briefed and is ready for decision.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds there is no genuine dispute as to any of the following material facts.

Plaintiff Terry Dutcher is an adult resident of LaCrosse County, Wisconsin. Defendant County of LaCrosse is a Wisconsin Municipal Corporation. Defendant Mike Weissenberger is the Sheriff of LaCrosse County and defendant Doris Daggett is the supervisor of all LaCrosse County jail personnel. Defendant Wisconsin Municipal Insurance Company is a domestic insurance corporation.

Plaintiff was incarcerated at the LaCrosse County Jail on October 15, 2001. On November 15, 2001 John Snyder, a Registered Nurse who works at the jail, examined the plaintiff who was complaining of head congestion, increased temperature, fatigue and loss of appetite. Snyder evaluated his vital signs, gave him Tylenol and moved him to the infirmary for the evening.

On November 16, 2001 plaintiff indicated that his symptoms were getting worse and that he had chest discomfort over his heart. Snyder observed that plaintiff was wheezing and that he was pale. Snyder had plaintiff transported to Gunderson Lutheran on November 16, 2001. Dr. Todd Phillips diagnosed plaintiff with "Sinusitis/Anemia". Plaintiff was provided a prescription for Azithromycin and told to return to his primary care physician in one week for follow up on the anemia.

Upon his return to the jail on November 16, 2001 plaintiff was placed in Medical Cell #1. On November 17, 2001 Susan Kramer, a registered nurse who worked at the jail, saw plaintiff and concluded his vital signs were stable. He was provided nasal spray he requested. Plaintiff asked to return to hospital but Kramer believed based on plaintiff's vital signs that his return to the hospital was not necessary.

Kramer saw plaintiff again on the November 18, 2001 and his vital signs remained stable. Plaintiff indicated he was unable to

take his pills. At 11:30 a.m. he took his pills with three glasses of water.

On November 19, 2001 plaintiff was observed standing in the middle of his cell having urinated on himself. He was unresponsive. His vital signs were taken and perspiration was noted. Plaintiff was then transported to Gunderson Lutheran Hospital for evaluation and hospitalized in the intensive care unit.

It is disputed whether plaintiff was denied medical assistance by jailers on the night of November 17, 2001 when he pushed the intercom button at least ten or twelve different times. It is disputed whether a jailer told him to stop ringing the bell or he would be thrown into solitary confinement.

MEMORANDUM

Defendants move to dismiss plaintiff's complaint for his failure to exhaust administrative remedies. The statute, 42 U.S.C. § 1997e(a), provides as follows:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.

Wisconsin law has a similar requirement. §801.02(7)(b), Wis. Stats. Defendant has not shown that plaintiff was a prisoner on

March 11, 2005 when he filed this action. The statute applies only to individuals confined in any jail, prison or other correctional facility. Accordingly, defendants' motion to dismiss for failure to exhaust administrative remedies will be denied.

Plaintiff claims that defendants were deliberately indifferent to his serious medical need between November 16 and November 19, 2001. Deliberate indifference of a serious medical need violates an inmate's Eighth Amendment rights. Estelle v. Gamble, 429 U.S. 97 (1976). Plaintiff has raised a genuine issue of fact whether jail personnel were deliberately indifferent to his serious medical need between November 16 and November 19, 2001.

Defendants argues that plaintiff has not shown that either defendant Wiessenberger or Daggett were deliberately indifferent to plaintiff's medical need and that he should not be allowed to continue against the unnamed defendants. Defendants Weissenberger and Daggett were supervisors of jail personnel. Either defendant Weissenberger or Daggett would be personally involved if either acted or failed to act with deliberate or reckless disregard of plaintiff's rights concerning the actions of the jailers who denied plaintiff's request for medical treatment. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). A genuine issue of material fact remains as to the personal involvement of defendants Weissenberger and Daggett.

Although this case was filed on March 11, 2005 plaintiff contends that he has not completed sufficient discovery to determine the names of the John Doe defendants. At this time plaintiff may proceed against the John Doe defendants.

The individual defendants move for qualified immunity. Factual disputes concerning defendants' conduct preclude granting summary judgment on the basis of qualified immunity and are beyond the narrow legal issue of qualified immunity which is subject to an interlocutory appeal. See Marshall v. Allen, et al., 984 F. 2d 787 (7th Cir. 1993). Accordingly, defendants' motion for summary judgment on the basis of qualified immunity cannot be decided as a matter of law at this time nor is it an appealable issue.

Plaintiff also pursues a state law claim for negligence. Defendants argues that this claim is barred by a three year statute of limitations. According to § 893.55(1), Wis. Stats., the applicable statute of limitations for state law negligence/malpractice claims is three years. Accordingly, plaintiff's state law claims are barred by the statute of limitations.

ORDER

IT IS ORDERED that defendants' motion for summary judgment on plaintiff's Eighth Amendment claim is DENIED.

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IT IS FURTHER ORDERED that plaintiff's state law claims are
DISMISSED with prejudice as time barred.

Entered this 30th day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge