

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

WALTER LEE HALL,
Plaintiff,

v.

MEMORANDUM and ORDER

PAUL CLEMENS,

06-C-505-S

Defendant.

Plaintiff Walter Lee Hall was allowed to proceed on his Eighth Amendment claim against Paul Clemens. In his complaint he alleges that the defendant gave him a tuberculosis skin test although plaintiff advised him that he had positive reactions to skin tests.

On April 16, 2007 defendant moved to dismiss plaintiff's complaint or in the alternative for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, an affidavit and a brief in support thereof. This motion has been fully briefed and is ready for decision.

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.

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 defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Walter Lee Hall is an inmate at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford). From September 2005 to July 2006 defendant Paul Clemens was a commissioned officer of the United States Public Health Service

assigned to FCI-Oxford. He was a Physician's Assistant assigned to the Medical Services Department.

On July 25, 2005 plaintiff was designated to FCI-Oxford. In his initial intake medical screening plaintiff reported a history of a positive reaction to a tuberculosis skin test.

On March 3, 2006 plaintiff was placed on the institution callout list to receive an annual tuberculin skin test. Defendant Clemens was assigned to administer the tuberculin skin tests. Plaintiff informed the defendant that he had previously had positive tuberculin skin tests but did not indicate that his previous positive reaction had been severe or painful. Defendant required plaintiff to submit to the test.

On March 6, 2006 Clemens reviewed Hall's test and determined that he had an 11 millimeter positive reaction. There is no indication in Plaintiff's medical records that he complained of any severe or painful reaction to the skin test.

MEMORANDUM

Plaintiff claims that defendant violated his Eighth Amendment rights by being deliberately indifferent to his health when he gave him a tuberculosis skin test. Defendant moves to dismiss plaintiff's claim for lack of subject matter jurisdiction. He argues that 42 U.S.C. §233(a) makes the Federal Tort Claims Act the exclusive remedy for damages for personal injury, including death,

resulting from the performance of medical, surgical, dental or related functions by any employee of the Public Health Service while acting within the scope of his office or employment.

In Cuocco v. Moritsugu, 222 F.3d 99 (2nd Cir. 2000), the Court held that the Federal Torts Claims Act would not be the exclusive remedy where an employee of the Public Health Service violated an individual's Constitutional rights in the course of something other than the performance of a medical related function. In Mendez v. Belton, 739 F. 2d 15 (1st Cir 1984), the Court held that 42 U.S.C. § 233(a) was inapplicable where a Public Health Service employee's actions had nothing to do with the performance of medical functions.

These two cases suggest that the Federal Tort Claims Act would be the exclusive remedy for a Constitutional claim against a Public Health Service employee that was performing a medical related function as in this case. In the event that it is not the Court will address the defendant's motion for summary judgment on plaintiff's Eighth Amendment Deliberate indifference claim.

The Eighth Amendment prohibits deliberate indifference to an inmate's serious medical need. Estelle v. Gamble, 429 U.S. 97 (1976). Deliberate indifference is a subjective standard which requires that the defendants knew that plaintiff was at risk of serious harm and acted with callous disregard to this risk. An official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists and

must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

On March 3, 2006 defendant Clemens administered a tuberculin skin test to plaintiff Hall after Hall told him he had previously had a positive skin test. Plaintiff had also self-reported this positive test at his initial intake medical screening. Plaintiff did not advise Clemens that his previous positive skin test had been severe or painful.

The Bureau of Prisons Program Statement 6190.03 , Infections Disease Management, and the Clinical Practice Guidelines on the Management of Tuberculosis, dated December 2004, state that a self-reported, prior positive tuberculin skin test without a millimeter reading is not a contraindication to repeat testing. Defendant Clemens followed this policy when performing a skin test on plaintiff.

Defendant did not know plaintiff was at risk of serious harm nor acted with callous disregard to this risk. According to Farmer, defendant was not deliberately indifferent to any serious medical need of plaintiff.

As a matter of law defendant did not violate plaintiff's Eighth Amendment rights. Accordingly, defendant's motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 9th day of May, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge