IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SERGIO L. SHAW,

Plaintiff,

v.

BRIAN NEUMAIER,

Defendant.[1]

OPINION and ORDER

09-cv-747-bbc

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Pro se plaintiff Sergio Shaw, a prisoner in the custody of the Wisconsin Department of Corrections, is proceeding on a claim that defendant Brian Neumaier, a correctional officer, violated plaintiff's rights under the Eighth Amendment by failing to protect him from self harm. In particular, plaintiff alleged in his complaint that he told defendant on April 1, 2009 that he "felt suicidal and wanted to kill" himself, that defendant handed plaintiff a razor, stating, "here is a razor, kill yourself" and that plaintiff later used the razor to cut his arm and wrist. Dkt. #1. Defendant has filed a motion for summary judgment, dkt. #62, which is ready for decision. Because I conclude that genuine issues of material fact remain, I will deny defendant's motion. Fed. R. Civ. P. 56(a) ("The court shall grant summary

[1] Plaintiff identified defendant in his complaint as "Officer Neumier." I have amended the caption to reflect defendant's full name and correction spelling, as identified in defendant's summary judgment materials.

judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

A prison employee may violate the Eighth Amendment if he is aware of a substantial risk that the prisoner will seriously harm himself and the employee disregards that risk by failing to take reasonable measures to protect the prisoner. Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003). The same standard applies regardless of the reason the prisoner may harm himself. Estate of Hill v. Richards, 525 F. Supp. 2d 1076, 1082-83 (W.D. Wis. 2007) ("[T]he constitutional duty to prevent a suicide exist[s] regardless whether a suicide attempt [i]s the result of mental illness or manipulation.").

In his summary judgment materials, defendant admits that he gave plaintiff a razor. Dft.'s PFOF ¶ 12, dkt. #64. In addition, he admits that he failed to note this in the prison log and then failed to retrieve the razor 20 minutes later, which is the "standard protocol" whenever a razor is distributed to a prisoner. Id. at ¶¶ 13-14. Finally, defendant does not deny that plaintiff was seriously harmed, so I will not consider that issue. Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 736 (7th Cir. 2006) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision.").

Defendant says that giving plaintiff a razor was not a violation of the Eighth Amendment because he was not aware that plaintiff was feeling suicidal. In particular, he says that he gave plaintiff a razor because there was no sign on plaintiff's cell indicating that

he was not supposed to have sharp objects, as there normally would be if plaintiff had been under a restriction. Id. at ¶¶ 5, 12. He says that the only reason he did not log the delivery of the razor or retrieve it 20 minutes later is that he was "distracted" by another prisoner who began talking to him immediately after he gave the razor to plaintiff. Id. at ¶ 14.

Defendant's argument fails for two reasons. First, plaintiff avers in his affidavit that a "sharps restriction" *was* posted outside his cell door. Plt.'s Aff. ¶ 9, dkt. #69. At summary judgment, courts must view the facts in the light most favorable to the nonmoving party. Healy v. City of Chicago, 450 F.3d 732, 738 (7th Cir. 2006). Second, both plaintiff and two other prisoners in nearby cells aver that plaintiff *told* defendant that he wanted a razor to commit suicide and that, in response, defendant told plaintiff to kill himself with the razor. Plt.'s Aff. ¶¶ 4-7, dkt. #69; Salas Aff. ¶¶ 6-10, dkt. #71; Gurney Aff. ¶¶ 5-7, dkt. #70. Thus, even if I assumed that no sign was posted or that defendant did not see the sign, this testimony makes it clear that genuine issues of material fact exist on the question whether defendant was aware of a substantial risk that plaintiff would use the razor to harm himself.

In his reply brief, defendant argues that the testimony of plaintiff and his witnesses is not a barrier to granting summary judgment because

> it is undisputed that Neumaier gave Shaw the razor at about 8:00 a.m. on April 1, 2009 and that Shaw didn't injure himself until about 2:50 a.m. on April 2, 2009. Consequently, it was not Neumaier's intention for Shaw to have the razor at the time he injured himself. Indeed, it is undisputed that, had Neumaier not been distracted, he would have retrieved the razor from Shaw at about 8:20 a.m. on April 1, 2009, and, therefore was not even aware that Shaw had the razor at the time he injured himself.

Dft.'s Br., dkt. #72, at 2.

Defendant's argument in not clear. He may mean to argue that he cannot be held liable because plaintiff did not attempt to harm himself immediately after defendant gave him the razor. Alternatively, his argument may be that he had forgotten that he had failed to collect the razor from plaintiff, which means that he was not aware that plaintiff still had the razor the following day.

Neither argument is persuasive. To the extent defendant is relying on the passage of time, neither defendant's proposed findings of fact nor his affidavit indicates when on April 1 defendant gave plaintiff the razor, so I cannot rely on the time span between the delivery and the act of self harm for the purpose of summary judgment. Even if I assume that 19 hours passed between the two events, defendant cites no authority for the proposition that a prison official may not be held liable under the Eighth Amendment because a prisoner does not harm himself until the day after the defendant became aware of the risk of self harm. Mombourquette ex rel. Mombourquette v. Amundson, 469 F. Supp. 2d 624, 645 (W.D. Wis. 2007) (lapse of four days between prisoner's warning signals and her attempted suicide did not entitle defendants to judgment as matter of law). The question is not whether plaintiff harmed himself at a particular time, but whether a jury could infer reasonably that defendant was aware of a substantial risk of harm at the time it occurred. Viewing the facts in the light most favorable to plaintiff, a reasonable jury could infer that defendant was aware of that risk as soon as plaintiff told defendant that he wanted a razor to kill himself. Defendant does not suggest that he received any new information in the interim supporting a view that plaintiff was no longer at risk. Thus, the passage of time bears little relevance to

the question whether defendant continued to be aware of a risk the following day.

Defendant's other possible argument, that he had forgotten that plaintiff still had the razor, fails because I could not accept the argument without drawing inferences against plaintiff and in favor of defendant. It may be that defendant intended to retrieve the razor from plaintiff and simply forgot to do so because he was "distracted" by another prisoner. However, if plaintiff's testimony and that of his witnesses is credited, as it must be for the purpose of summary judgment, defendant was not only aware of a risk of harm to plaintiff, but he intentionally facilitated that harm by giving plaintiff the means to harm himself and an instruction to do so. Under that view of the facts, a reasonable jury could infer that defendant did not simply forget to retrieve the razor.

The only other argument defendant raises is qualified immunity. Again, I must accept plaintiff's testimony as true for the purpose of determining whether a reasonable officer in defendant's position would know that his actions violated plaintiff's rights under the Eighth Amendment. Gonzalez v. City of Elgin, 578 F.3d 526, 540 (7th Cir. 2009). It is well established that "prison officials are not entitled to [a qualified immunity] defense . . . if they are aware of a risk of injury to an inmate and nevertheless fail to take appropriate steps to protect the inmate from that known danger. . . . A plaintiff with known suicidal tendencies obviously falls within this rule." Hall v. Ryan, 957 F.2d 402, 405 (7th Cir.1992). See also Cavalieri, 321 F.3d at 623-24 ("The rule that officials, including police officers, will be liable under section 1983 for a pre-trial detainee's suicide if they were deliberately indifferent to a substantial suicide risk was clearly established prior to 1998."); Sanville v. McCaughtry,

266 F.3d 724, 740-41 (7th Cir. 2001) ("There can be little debate that it was clearly established, long before 1998, that prison officials will be liable under Section 1983 for a pretrial detainee's suicide if they were deliberately indifferent to a substantial suicide risk.") (quoting Hall, 957 F.2d at 406.); Mombourquette, 469 F. Supp. 2d at 654 -655 ("It appears that the Court of Appeals for the Seventh Circuit has taken a view . . . that a finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who deliberately ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law.") (Internal quotations omitted). Under plaintiff's view of the facts, a reasonable jury could find that defendant intentionally disregarded a substantial risk that plaintiff would seriously harm himself. Accordingly, defendant is not entitled to qualified immunity at this time.

ORDER

IT IS ORDERED that defendant Brian Neumaier's motion for summary judgment, dkt. #62, is DENIED.

Entered this 21st day of December, 2010.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge