IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MATTHEW D. RENNER,

OPINION and ORDER

Plaintiff,

11-cv-419-bbc

v.

JAN COLE, JUDY SPAHN,
JOHN DOES I – IV and
THE UNITED STATES OF AMERICA,

Defendants.

- -

In this civil action for monetary relief brought under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, plaintiff Matthew Renner is proceeding on claims that defendants Jan Cole, Judy Spahn and several members of the nursing staff at the Federal Correctional Institution in Oxford, Wisconsin, violated his rights under the Eighth Amendment and FTCA by failing to provide him adequate medical treatment for his appendix. Plaintiff is represented by counsel.

Now before the court is a motion to dismiss filed by defendants Jan Cole and Judy Spahn. Dkt. #11. (The John Doe defendants did not join the motion. Thus, I will refer to Cole and Spahn as "defendants" throughout this opinion.) Defendants contend that

plaintiff's claims against them should be dismissed because (1) plaintiff failed to exhaust his administrative remedies; (2) plaintiff failed to allege facts that allow an inference that defendants were deliberately indifferent to plaintiff's medical needs; and (3) defendants are entitled to qualified immunity.

I will deny defendants' motion. I conclude that there are disputed facts related to exhaustion that make resolution of this question improper on a motion to dismiss. However, I will give defendants an opportunity to file a motion for summary judgment regarding their exhaustion defense. After the parties have presented their exhaustion arguments and supporting evidence according to this court's summary judgment procedures, I will determine whether it is necessary to hold an evidentiary hearing on this issue.

With respect to defendants' other arguments, I conclude that plaintiff has stated a claim under the Eighth Amendment against defendants and that defendants' qualified immunity defense cannot be resolved at this stage of the case.

OPINION

A. Motion to Dismiss for Failure to Exhaust

Under 42 U.S.C. § 1997e(a), a prison may not bring a challenge under Bivens or any federal law "until such administrative remedies as are available are exhausted." This means that a prisoner must "properly take each step within the administrative process." Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002) (emphasis added). Because plaintiff is

a federal prisoner, the exhaustion requirements are set forth in the Bureau of Prisons' three-step administrative remedy procedure. 28 C.F.R. §§ 542.14; 542.15. An inmate must first submit an Administrative Remedy Request (BP-9), and then file appeals with the appropriate regional director (BP-10) and then with the Central Office (BP-11) if he is not satisfied with the decision. The initial BP-9 must be filed within "20 calendar days following the date on which the basis for the Request occurred." Id. § 542.14(a). However, "[w]here the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed." Id. § 542.14(b). "Valid reasons for delay include . . . an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal." Id.

Defendants contend that plaintiff's claim should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies before filing suit. In particular, they contend that plaintiff failed to exhaust because his initial BP-9 was filed more than 90 days after the events at issue and he did not seek an extension or demonstrate a valid reason for delay.

Failure to exhaust is not a jurisdictional issue that is evaluated under Rule 12(b)(1). Mosely v. Board of Education of City of Chicago, 434 F.3d 527, 532 (7th Cir. 2006). Rather, "failure to exhaust is an affirmative defense that the defendants have the burden of pleading and proving." Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004). Thus, a motion to dismiss for failure to exhaust is evaluated under Rule 12(b)(6). Mosely, 434 F.3d at 533. However, both plaintiff and defendants submitted documents and relied on facts and

arguments related to exhaustion that fall outside the pleadings. When this happens, Rule 12(d) requires courts to convert the motion to dismiss into a motion for summary judgment, provide notice to the plaintiff and give the plaintiff an opportunity to respond. Massey v. Helman, 259 F.3d 641, 646 n.8 (7th Cir. 2001); Fleischfresser v. Directors of School District 200, 15 F.3d 680, 684 (7th Cir. 1994).

In some cases in which the facts related to exhaustion are undisputed and neither party will suffer prejudice, I have converted motions to dismiss for failure to exhaust into motions for summary judgment without providing the parties an opportunity for additional briefing. E.g., Hudson v. Penaflor, 10-cv-478-bbc, March 18, 2011 Order, dkt. #19, aff'd, Hudson v. Penaflor, 2011 WL 5562653, *1 (7th Cir. Nov. 16, 2011) ("Since the parties had submitted documents outside the public record and did not dispute the facts about exhaustion, the court converted the motion to dismiss into a motion for summary judgment and granted it."). See also Massey, 259 F.3d at 646 n.8 (failure to give parties opportunity to respond to converted motion for summary judgment appropriate if "there is nothing the litigants could have submitted to the court that would have created a genuine issue of material fact").

In this case, however, it is clear from the parties' submissions that there are genuine disputes of material fact related to exhaustion that cannot be resolved on the briefs and evidence that have been provided to the court. In particular, the parties dispute whether plaintiff was physically incapable of filing a BP-9 while he was hospitalized and whether he

filed one within a reasonable time after being released from the hospital. Plaintiff contends that he could not file a BP-9 within the 20-day deadline because he was in the hospital undergoing five major surgeries and could not file one immediately after being released from the hospital because he had debilitating conditions, including an open abdominal wound, "JP drain" and abdominal sepsis being treated with antibiotics. In their reply brief, defendants introduce additional evidence about plaintiff's physical condition and argue that plaintiff's medical conditions were not so severe that he could not have filed a BP-9 earlier. Dfts.' Reply, dkt. #21, at 6-10. Such additional facts are not properly raised in a brief in reply to a motion to dismiss. Rather, defendants' facts and arguments should have been made in conjunction with a motion for summary judgment that complies with this court's summary judgment procedures and provides both sides an opportunity to respond to evidence and arguments in an organized manner.

Perhaps realizing that the additional facts related to plaintiff's health fall outside the scope of their motion to dismiss, defendants argue in their reply brief that this court need not consider any of the facts or arguments related to plaintiff's physical condition because even if plaintiff had a valid reason for delay, it is undisputed that he failed to explain *why* his BP-9 was untimely when he filed it initially. Dfts.' Reply Br., dkt. #21, at 4. They cite 28 C.F.R. § 542.14(b), which allows the Bureau of Prisons to grant an extension "[w]here the inmate demonstrates a valid reason for delay." They also cite Bureau of Prisons Program Statement 1330.16, which states that, "[o]rdinarily, the inmate should submit written

verification from staff for any claimed reason for delay." Defendants contend that under the regulation and Program Statement, plaintiff was required to provide an explanation for his untimely BP-9 when he filed it.

However, defendants have failed to show any reason why plaintiff would have known that he was required to explain in his BP-9 why he was filing it late. Neither the regulation, 28 C.F.R. § 542.14(b), nor the BP-9 form itself, dkt. #18-1, gives plaintiff notice of such a requirement. In fact, the form does not appear to mention the 20-day deadline, does not tell the prisoner what he should do it if he misses the deadline for reasons beyond his control and does not provide a space for explaining a "valid reason" for an untimely BP-9. Additionally, Program Statement 1330.16 cannot carry the day for defendants. The language of the Program Statement is not mandatory. It says only that "*ordinarily*, the inmate *should* submit written verification from staff for any claimed reason for delay." Moreover, it is not clear whether plaintiff knew about this Program Statement or even had access to it. In Romanelli v. Suliene, Case No. 07-cv-19-bbc, 2008 WL 4587110, *6 (W.D. Wis. Jan. 10. 2008), I concluded that the burden was on the defendants to show that the prisoner knew about the rule he allegedly failed to follow. See also Russell v. Unknown Cook County Sheriff's Officers, 2004 WL 2997503 at *4-5 (N.D. Ill. Dec. 27, 2004) (defendants must establish that they gave plaintiff notice of grievance procedure); Burgess v. Garvin, 2004 WL 527053 at *5 (S.D.N.Y. Mar. 16, 2004) (holding that "procedural channels . . . not made known to prisoners . . . are not an 'available' remedy in any

meaningful sense . . . [Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept entirely ignorant."). Because the record is silent regarding plaintiffs' knowledge of the regulations and defendants have the burden on this issue, defendants cannot prevail on their argument that plaintiff did not exhaust because he failed to explain his untimeliness in his BP-9.

Thus, the question remains whether plaintiff had a legitimate reason for filing an untimely BP-9. As explained above, this question cannot be resolved on defendants' motion to dismiss. However, this does not mean that the exhaustion question may be put aside. In order to allow the parties to present all facts and arguments relevant to exhaustion, defendants may have until January 20, 2012 to file a motion for summary judgment regarding plaintiff's alleged failure to exhaust. Plaintiff may have until February 10, 2012 to file a response; defendants may have until February 17, 2012 to file a reply. If it still appears from the evidence in the record that there are disputed facts related to exhaustion, the court will schedule an evidentiary hearing on the matter, as prescribed in Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

B. Motion to Dismiss for Failure to State a Claim

Defendants have moved to dismiss plaintiff's Eighth Amendment claims for failure to state a claim upon which relief may be granted. (Defendants have not moved to dismiss plaintiff's claims under the Federal Tort Claims Act.) In addressing a motion to dismiss a

prisoner's complaint under Fed. R. Civ. P. 12(b)(6), courts apply the same standard as when screening the complaint under 28 U.S.C. § 1915A. Arnett v. Webster, 658 F.3d 742, 751 (7th Cir. 2011); Lagerstrom v. Kingston, 463 F.3d 621, 624 (7th Cir. 2006). Specifically, the court construes a complaint in the light most favorable to the plaintiff, accepts well-pleaded facts as true and draws all inferences in the plaintiff's favor. Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 533 (7th Cir. 2011). To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). "Deliberate indifference" means that the prison official "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." Walker v. Benjamin, 293 F.3d 1030, 1036 (7th Cir. 2002). With respect to medical treatment, a plaintiff need show only that the defendants' responses were so plainly inappropriate as to permit the inference that the defendants intentionally or recklessly disregarded his needs. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005).

Defendants concede that plaintiff's appendicitis was a serious medical need. However, they contend that plaintiff has not alleged sufficient facts to permit an inference that defendants were deliberately indifferent to this need.

In his complaint, plaintiff alleges that he started experiencing symptoms of illness on February 26, 2009, including loss of appetite, lethargy and sharp pain in his lower abdomen. The symptoms continued and worsened over the following two days and plaintiff suffered abdominal pain, vomiting, diarrhea and inability to sleep. On the morning of Saturday, February 28, plaintiff could not eat. He went to the pill line and told defendant Cole, a registered nurse in the health services unit, that he had been suffering from lower abdominal pain for at least 6-12 hours. Cole did not conduct any examination of plaintiff and did not take his vital signs. She gave plaintiff Maalox and told him to come back if he did not feel better. The Maalox did not help, and plaintiff returned to the pill line later that day. He told Cole that the pain in his lower abdomen was worse. Cole gave plaintiff more Maalox and told him to go to sick call on Monday morning.

As I explained in the order screening this complaint, dkt. #2, these allegations are sufficient to state an Eighth Amendment claim against defendant Cole. Plaintiff may be able to prove that Cole's failure to check plaintiff's vital signs or assess him in any other way "substantially departed from professional judgment." Gonzalez v. Feinerman, 663 F.3d 311, 311 (7th Cir. Dec. 2, 2011) (prisoner stated claim for deliberate indifference where it could be inferred that doctors "substantially departed from professional judgment"). Additionally,

a medical professional's decision to continue a course of treatment that is known to be ineffective can amount to deliberate indifference in some situations. Arnett, 658 F.3d at 754 ("A prison physician cannot simply continue with a course of treatment that he knows is ineffective in treating the inmate's condition."). Thus, plaintiff may be able to establish that Cole's decision to give plaintiff Maalox, despite his telling her that his condition had worsened after taking it, amounted to reckless disregard for his serious medical need. Id. (prisoner's "allegations that the medical defendants knowingly ignored his complaints of pain by continuing with a course of treatment that was ineffective and less efficacious without exercising professional judgment are sufficient to state a claim").

Defendants argue that the pill line was an inappropriate place for plaintiff to seek a medical examination and that plaintiff should have taken advantage of other opportunities for treatment, such as telling his unit supervisor that he needed emergency medical care. Dfts.' Reply Br., dkt. #22, at 15. In addition, defendants argue that plaintiff's symptoms were not necessarily indicative of a serious medical condition such as appendicitis. Defendants are free to make these factual arguments in the context of a motion for summary judgment; they are not appropriate at this stage of the case.

With respect to defendant Spahn, plaintiff alleges that on Monday, March 2, 2009 at approximately 7:53 a.m., plaintiff went to sick call in the health services unit. He was seen by Spahn, an advanced nurse practitioner. He complained of pain on the right side of his abdomen, nausea, vomiting, diarrhea, fever and chills. He told Spahn that he had been

experiencing abdominal pain for six days. Spahn took plaintiff's temperature and conducted a physical examination, noting that he had a temperature of 101.9 degrees and tenderness in the right lower quadrant. Spahn gave plaintiff acetaminophen. A couple of hours later, plaintiff returned to the health services unit because his symptoms continued. Defendant Spahn took an abdominal x-ray and conducted lab tests. The lab results showed large amounts of nitrates and traces of blood in plaintiff's urine. Spahn prescribed an antibiotic to plaintiff. The next day, plaintiff returned to the health services unit where a different nurse referred him to a physician, and the physician transferred him immediately to a hospital emergency room. The emergency room doctor determined that plaintiff had appendicitis, that his appendix had ruptured and that he needed surgery. Ultimately, plaintiff underwent multiple surgeries and approximately half of his colon and part of his small intestine were removed.

These allegations are sufficient to state an Eighth Amendment claim against defendant Spahn. It is true, as defendants point out, that Spahn gave plaintiff some treatment in the form of a pain reliever, lab tests and an antibiotic. However, plaintiff does not need to show that he was "literally ignored." Arnett, 658 F.3d at 751. "That [plaintiff] received some treatment does not foreclose his deliberate indifference claim if the treatment received was 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition.'" Id. (quoting Greeno, 414 F.3d at 653). Ultimately, plaintiff may be able to prove that because Spahn knew that plaintiff had a fever of 101.9

degrees, tenderness in his right lower abdominal quadrant and a six-day history of nausea, vomiting, diarrhea, fever, chills and pain in that lower right quadrant, Spahn's failure to refer plaintiff to a doctor or send him outside the institution for emergency consultation was "blatantly inappropriate" and amounted to a complete lack of medical judgment. McGowan v. Hulick, 612 F.3d 636, 641 (7th Cir. 2010) (medical professional's actions may reflect deliberate indifference if he "chooses an easier and less efficacious treatment without exercising professional judgment") (citation and quotation marks omitted); Duckworth v. Ahmad, 532 F.3d 675, 679 (7th Cir. 2008) (deliberate indifference can be inferred "on the basis of a physician's treatment decision [when] the decision [is] so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment") (citation omitted).

In sum, plaintiff describes a plausible Eighth Amendment claim against defendants Cole and Spahn because the complaint contains sufficient allegations that defendants knew of plaintiff's medical needs, and may have intentionally or recklessly disregarded them. Therefore, I will deny defendants' motion to dismiss plaintiff's complaint for failure to state a claim.

C. Motion to Dismiss on Grounds of Qualified Immunity

Government officials generally are shielded from liability for civil damages if their conduct did not violate clearly established constitutional rights of which a reasonable person

would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Narducci v. Moore, 572 F.3d 313, 318 (7th Cir. 2009). Defendants contend that they are entitled to qualified immunity on plaintiff's claims because it was not clearly established that their treatment of plaintiff amounted to a constitutional violation.

There is no question that a prisoner's right to adequate medical care was clearly established at all times during the relevant actions in this case. Roe v. Elyea, 631 F.3d 843, 858 (7th Cir. 2011) (prisoner's right to medical care is "clearly established right"). However, defendants contend that it was not clearly established that the responses given by defendants Cole and Spahn to plaintiff's medical needs amounted to a constitutional violation. In particular, defendants contend that at most, Cole and Spahn's conduct was negligent. They argue that "[i]n light of the numerous cases which have held that the incorrect treatment or diagnosis of a serious medical need does not by itself constitute a violation of the Eighth Amendment, a reasonable person engaging in the same conduct as Cole and Spahn in the circumstances presented would not have fair warning that the conduct was illegal." Dfts.' Br., dkt. #12, at 16.

The Court of Appeals for the Seventh Circuit has cautioned courts on numerous occasions that most claims for qualified immunity cannot be decided on a motion to dismiss. Tamayo v. Blagojevich, 526 F.3d 1074, 1090 (7th Cir. 2008); Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001) ("Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate. . . ."; Jacobs v. City of Chicago, 215

F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground for dismissal"); Schneider v. County of Will, 366 Fed. Appx. 683, 684 (7th Cir. 2010) ("[M]ost claims for qualified immunity are too fact-intensive to be decided on a motion to dismiss. . . ."). In this case, qualified immunity cannot be resolved on a motion to dismiss because defendants' entitled to immunity depends on facts outside the complaint.

As I explained above, plaintiff has stated a claim for deprivation of his constitutional right to medical attention. I cannot conclude at this stage that defendants' actions amounted to mere negligence or malpractice because there are disputed facts regarding whether defendants' actions were blatantly inappropriate and whether defendants knew that their actions were in reckless disregard of plaintiff's constitutional rights. Thus, I cannot determine at this stage whether defendants are entitled to qualified immunity.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants Jan Cole and Judy Spahn, dkt. #11, is DENIED.

2. Defendants may have until January 20, 2012 to file a motion for summary judgment regarding plaintiff Matthew Renner's alleged failure to exhaust. Plaintiff may have until February 10, 2012 to file a response; defendants may have until February 17, 2012 to

file a reply. If it still appears from the evidence in the record that there are disputed facts related to exhaustion, the court will schedule an evidentiary hearing on the matter, as prescribed in Pavey v. Conley, 544 F.3d 739,742 (7th Cir. 2008).

Entered this 6th day of January, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge