

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

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JUAN SALINAS,

Plaintiff,

v.

DALIA SULIENE, BURT TAMMINGA,  
TRAVIS BITTELMAN, PATRICK HOOPER,  
JOSEPH CICHANOWICZ, BRIAN NEUMAIER,  
JOHN DOES 1-4 and JANE DOES 1-5,

Defendants.  
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OPINION AND ORDER

12-cv-82-slc<sup>1</sup>

Pro se plaintiff Juan Salinas has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that various prison officials violated his constitutional rights by feeding him spoiled food and then refusing to provide medical assistance when he got food poisoning. He has made an initial partial payment as required by 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. §§ 1915(e)(2) & 1915A.

Having reviewed plaintiff's complaint, I conclude that he has stated a claim upon which relief may be granted with respect to the following claims under the Eighth Amendment:

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<sup>1</sup> I am exercising jurisdiction over this case for the purpose of this order.

(1) several unknown officers refused to provide medical assistance when he complained about his symptoms; (2) defendant Dalia Suliene refused to treat him until his condition became so serious that he had to be taken to the emergency room; and (3) defendants Burt Tamminga, Travis Bittelman, Patrick Hooper, Joseph Cichanowicz and Brian Neumaier refused to do anything when plaintiff told them that he still was being served spoiled food and getting sick. I am dismissing plaintiff's remaining claims for his failure to state a claim upon which relief may be granted.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint, plaintiff fairly alleges the following facts.

#### ALLEGATIONS OF FACT

Plaintiff Juan Salinas is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. On August 5, 2010, plaintiff began experiencing symptoms such as stomach cramps, vomiting and diarrhea. Plaintiff informed two unknown officers of his symptoms, but they refused to provide medical assistance. On August 13, 2010, plaintiff informed "all guards on first and second shift" that he was suffering from food poisoning, but they refused to do anything. Plaintiff continued to suffer from these symptoms "for the whole month."

At some point, plaintiff saw defendant Dalia Suliene, who is a doctor at the prison. She told him to “wait it out” for seven to ten days. In September 2010, after plaintiff began vomiting blood, defendant Suliene sent plaintiff to the emergency room, where he was placed on an IV to hydrate his body. Test results showed that plaintiff had been suffering from food poisoning and had lost 20 pounds. The doctor ordered an antibiotic and gave instructions to send a stool sample back to the hospital.

Back at the prison, an unknown nurse refused to follow the doctor’s instructions on the ground that he lost them, so a week passed before prison staff sent plaintiff’s stool sample for testing. During the delay, plaintiff “was under psychological stress thinking that he could have something deadly.” (Plaintiff does not say what the results of that test were.)

Plaintiff discovered spoiled food on his tray many times and he complained to defendants Burt Tamminga (a sergeant), Travis Bittelman (a correctional officer II), Patrick Hooper (a correctional officer II), Joseph Cichanowicz (a correctional officer II) and Brian Neumaier (a correctional officer II), but they did not do anything about it. Plaintiff continued to suffer from nausea, stomach cramps, diarrhea and vomiting as a result of spoiled food.

Plaintiff is on a kosher diet. Prison staff in the kitchen “know nothing about the preparation of Jewish food.” They “failed to check to see if the food was spoiled before they sent it.”

## OPINION

All of plaintiff's claims relate to allegedly spoiled food he received in prison: (1) several unknown officers refused to provide medical assistance when he complained about his symptoms; (2) defendant Suliene refused to treat him until his condition became so serious that he had to be taken to the emergency room; (3) an unknown nurse refused to take a stool sample from plaintiff for one week; (4) plaintiff complained to defendants Tamminga, Bittelman, Hooper, Cichanowicz and Neumaier about the spoiled food, but they refused to do anything; and (5) unknown members of the kitchen staff "know nothing about the preparation of Jewish food" and "failed to check to see if the food was spoiled before they sent it." Most of these claims arise under the Eighth Amendment.

Plaintiff's claims against defendant Suliene, the unknown officers and the unknown nurse are for alleged refusals to provide medical care. A prison official may violate the Eighth Amendment if he or she is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17

(7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). “Deliberate indifference” means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff’s claim has three elements:

- (1) Did plaintiff need medical treatment?
- (2) Did defendants know that plaintiff needed treatment?
- (3) Despite their awareness of the need, did defendants fail to take reasonable measures to provide the necessary treatment?

With respect to the unknown officers, plaintiff alleges that they refused to seek medical treatment for him after he complained that he was suffering from diarrhea, vomiting and stomach cramps. At this stage of the proceedings, it is reasonable to infer that plaintiff had a serious medical need, that the unknown officers were aware of that need and that they failed to respond reasonably to that need. At summary judgment or trial, plaintiff will have to prove each of these elements with specific evidence.

Although plaintiff does not know the names of these officers, that is not a reason for dismissing the claim. “[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint.”

Donald v. Cook County Sheriff's Department, 95 F.3d 548, 555 (7th Cir. 1996). Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include the unnamed defendants.

With respect to defendant Suliene and the unknown nurse, plaintiff alleges that they delayed his care. A delay in treatment may violate the Eighth Amendment if the prisoner's "condition worsened because of the delay." Knight v. Wiseman, 590 F.3d 458, 466-67 (7th Cir. 2009). Plaintiff alleges that Suliene's delay in treating him led to a trip to the emergency room, so he has satisfied that standard as to Suliene for the purpose of pleading. In addition, it is reasonable to infer at this stage that Suliene knew of a substantial risk that plaintiff would be harmed by the delay. However, at summary judgment or trial it will not be enough for plaintiff to show that Suliene made a mistake. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006). Rather, plaintiff will have to show that any medical judgment by Suliene was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

Plaintiff does not allege that his condition worsened as a result of the delay in testing a stool sample, so he cannot proceed on a claim against the unknown nurse. Although he

says that he “was under psychological stress thinking that he could have something deadly,” that is inconsistent with his allegation that the doctor at the hospital told him that the problem was food poisoning. In any event, “psychological stress” generally is not enough to sustain a claim under the Eighth Amendment. Babcock v. White, 102 F.3d 267, 271-72 (7th Cir. 1996) (prisoner may not obtain damages for “psychological distress” on claim that relies on deliberate indifference theory). Further, plaintiff’s allegation that the nurse failed to follow the instructions because he lost them is more consistent with a claim of negligence than with a claim under the Eighth Amendment, which requires purposeful actions.

Plaintiff’s claim against defendants Tamminga, Bittelman, Hooper, Cichanowicz and Neumaier is that they failed to protect him from the spoiled food. This claim is governed by a standard similar to the one that applies to plaintiff’s medical claim. The question is whether plaintiff was subjected to a substantial risk of serious harm and defendants knew about it but they consciously disregarded the risk by failing to take reasonable measures. Boyce v. Moore, 314 F.3d 884, 888 (7th Cir. 2002). In particular, plaintiff alleges that he told each of these defendants about problems with the food, but they refused to take any action and he continued to get sick from it. That is sufficient to state a claim upon which relief may be granted. E.g., Strope v. Sebelius, No. 06-3144, 2006 WL 2045840 (10th Cir. July 24, 2006) (repeated instances of serving spoiled food may violate Eighth Amendment); Nelson v. Metts, No. 8:10-1831-HMH-BHH, 2010 WL 3421021, \*1 (D.S.C. Aug. 27,

2010) (same); Lunney v. Brureton, No. 04-Civ.-2438-LAK-GWG, 2005 WL 121720 at \*6 (S.D.N.Y. Jan. 21, 2005) (same).

At summary judgment or trial, plaintiff will have to come forward with specific evidence proving each of element of his claim. With respect to defendants' response to plaintiff's complaints, plaintiff will have to show that each of them had some authority over the food plaintiff was being served. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) (prison official cannot be held liable for failing to take action outside his job duties).

Plaintiff's claim against the kitchen staff is the least developed. He says only that they "failed to check to see if the food was spoiled before they sent it" and "know nothing about the preparation of Jewish food." To the extent plaintiff is asserting a claim under the Eighth Amendment, that claim fails because he does not allege that kitchen staff knew that the food was spoiled or that the food would make him sick. Again, negligence is not enough to state a claim under the Eighth Amendment.

To the extent plaintiff is asserting a claim that kitchen staff violated his right to practice his religion, that claim fails because he does not allege that any of the food he received violated any religious dietary laws that he follows. Even if eating spoiled food was contrary to plaintiff's religious beliefs, the kitchen staff could not be held liable for this unless they knew of plaintiff's belief and knew that the food was spoiled. Plaintiff does not allege either of these facts.



## ORDER

IT IS ORDERED that

1. Plaintiff Juan Salinas is GRANTED leave to proceed on the following claims:

- (a) several unknown officers refused to provide medical assistance when he complained about his symptoms on August 5, 2010 and August 13, 2010, in violation of the Eighth Amendment;
- (b) defendant Dalia Suliene refused to treat him until his condition became so serious that he had to be taken to the emergency room, in violation of the Eighth Amendment; and
- (c) plaintiff complained to defendants Burt Tamminga, Travis Bittelman, Patrick Hooper, Joseph Cichanowicz and Brian Neumaier about the spoiled food, but they refused to do anything.

2. Plaintiff is DENIED leave to proceed on the following claims:

- (a) an unknown nurse refused to take a stool sample from plaintiff for one week; and
- (b) unknown members of the kitchen staff “know nothing about the preparation of Jewish food” and “failed to check to see if the food was spoiled before they sent it.”

3. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund account until the filing fees have been paid in full.

Entered this 24th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge