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

BRANDON PHILLIP STULL,

Plaintiff,

v.

SHERIFF DAVID MAHONEY and DANE COUNTY,

Defendants.

OPINION & ORDER

Case No. 18-cv-571-wmc

Plaintiff Brandon Stull brings this action under 42 U.S.C. § 1983 against defendants Sheriff David Mahoney and Dane County. Stull claims that the presence of lead in the water at the Dane County Jail violates his constitutional rights. The complaint is now before the court for screening pursuant to 28 U.S.C. § 1915A. After review, the court concludes that plaintiff may proceed on a Fourteenth Amendment conditions of confinement claim against defendants related to the alleged exposure to unsafe levels of lead in the drinking water, although the court cautions plaintiff that similar claims have run into substantial proof problems at summary judgment.

## ALLEGATIONS OF FACT[1]

Brandon Stull currently is incarcerated at the Green Bay Correctional Institution, but he alleges that as of 2018, he had been incarcerated at the Dane County Jail for three years at a time over the past decade. Stull alleges further that every time he has been at

[1] Courts must read allegations in *pro se* complaints generously, resolving ambiguities and drawing reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). The court assumes the facts above based on the allegations made in plaintiff's complaint.

the jail, he has been housed in the "old" jail, where the water has a bad taste, which was caused by lead contamination. Stull noticed that signs were posted in the cells instructing prisoners to run their water for two to three minutes at a time. He claims that he submitted a grievance complaining about lead and other chemicals in the water, and he received a response, "We do not test for lead." (Compl. (dkt. #1) 3.)

## OPINION

While not apparent in his complaint, the court will assume for purposes of screening that his claims are governed by the due process clause of the Fourteenth Amendment. *Smith v. Dart*, 803 F.3d 304, 309–10 (7th Cir. 2015). The Court of Appeals for the Seventh Circuit has concluded that conditions of confinement claims brought by pretrial detainees are governed by the due process clause of the Fourteenth Amendment, under the standard set forth by the United States Supreme Court in *Kingsley v. Hendrickson,* 576 U.S. 389 (2015). *See Hardeman v. Curren*, 933 F.3d 816, 821-22 (7th Cir. 2019). Therefore, the failure to provide adequate conditions of confinement violates the Due Process Clause if: (1) the defendants acted with purposeful, knowing, or reckless disregard of the consequences of their actions; and (2) the defendants' conduct was objectively unreasonable. *Miranda v. Cty. of Lake*, 900 F.3d 335, 353 (7th Cir. 2018). While it is not enough to show negligence, the plaintiff is not required to prove the defendant's subjective awareness that the conduct was unreasonable. *Id.* at 353.

While plaintiff's complaint contains very few allegations, his alleged exposure to lead in the water at the Dane County Jail appears sufficient to permit an inference that he

was subjected to conditions that create a risk of injury, at least under the generous standard to which *pro se* litigants are entitled at the screening stage. *See Miller v. Winnebago Cty. Sheriff's Office*, No. 18 C 50334, 2019 WL 184078, at *2 (N.D. Ill. Jan. 14, 2019) (citing *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017)). Exposure to lead can cause significant health issues.

Plaintiff does not explicitly allege that Mahoney knew that lead was in the water, but the court will infer that Mahoney was aware of the lead in the water given that plaintiff also alleges that there were notices in the cells instructing prisoners to run the water for two minutes. *See Mitchell v. Dane Cty. Sheriff Dept.*, No. 16-cv-352, slip op. at *6 (W.D. Wis. Dec. 2, 2016). The decision simply to instruct prisoners to run their water, coupled with plaintiff's allegation that the jail did not test the water for lead, supports an inference that he acted unreasonably in response to a risk of harm. As such, the court will grant plaintiff leave to proceed against Mahoney on this claim.

The court will also permit plaintiff to proceed against Dane County. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), to state a claim against a county, plaintiff must allege that the alleged constitutional violation was "caused by: (1) an official policy adopted and promulgated by [the county's] officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010). Reading plaintiff's complaint generously, it is reasonable to infer that Dane County continued an ongoing practice of routinely placing inmates in cells with potential for lead exposure despite knowing about the danger posed by that condition

and failing to test for lead. As such, plaintiff will be permitted to proceed against Dane County on a conditions-of-confinement claim concerning the lead in the jail's water supply.

As plaintiff proceeds with these claims, he should be aware that he faces an uphill battle. This court has already determined, in two different lawsuits, that Mahoney and Dane County, among others, were not liable for constitutional violations related to the presence of lead in the water at the jail because of significant remediation efforts taken at the jail starting in 2016, and because the plaintiffs made no showing that they suffered injury as a result of lead exposure. *See Coleman v. Mahoney*, No. 18-cv-902-wmc, 2021 WL 3128856 (W.D. Wis. July 23, 2021); *Shields v. Mahoney*, No. 17-cv-267-wmc, 2020 WL 4431741(W.D. Wis. July 31, 2020). Absent a showing that plaintiff actually suffered an injury associated with elevated levels of led in the water *and* some evidence that Dane County Jail officials failed to take appropriate action to remediate the risk to plaintiff's health during plaintiff's confinement at the jail, it is highly unlikely that this claim will survive summary judgment.

## ORDER

IT IS ORDERED that:

1. Plaintiff Brandon Stull is GRANTED leave to proceed on a Fourteenth Amendment conditions of confinement claim against defendants Mahoney and Dane County.

2. The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon defendants.

3. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to the defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. If plaintiff moves while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 17th day of September, 2021.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge