UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------X
JOHN MORGAN,

Plaintiff,

-against-

03-CIV-3987(KMW)(AJP)
ORDER

CARL J. KOENIGSMANN, M.D., Medical Director Green Haven C.F., and LESTER N. WRIGHT, M.D., Associate Commissioner Chief Medical Officer.

Defendants.
-----------------------------------X

WOOD, U.S.D.J.:

Plaintiff John Morgan, pro se, sues defendants pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants Carl J. Koenigsmann, M.D. ("Koenigsmann") and Lester N. Wright, M.D. ("Wright") have been deliberately indifferent to plaintiff's serious medical needs, in violation of his constitutional rights under the Eighth Amendment to the United States Constitution. Plaintiff seeks a declaratory judgment, an injunction ordering defendants to immediately treat plaintiff's hepatitis C,[1] and compensatory and punitive damages in the amount of $10 million. Defendants moved for summary judgment, arguing (1) that defendants lack the personal involvement required to be liable, (2) that plaintiff cannot prove that defendants acted with deliberate indifference toward him, and (3) that defendants are entitled to

[1] Plaintiff's complaint seeks "declaratory relief in the form of immediate treatment for his condition." (Complaint, 6). The Court construes pro se plaintiff's complaint liberally, see Branham v. Meachum, 77 F.3d 626, 628-29 (2d Cir. 1996), and treats this as a request for both declaratory and injunctive relief.

qualified immunity. For the reasons stated below, defendants' motion is granted with respect to defendant Koenigsmann and denied with respect to defendant Wright.

I. Factual Background

Unless otherwise noted, the following facts are undisputed, and are derived from the parties' Rule 56.1 statements, affidavits, and other submissions.[2]

A. The Parties

Plaintiff is an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), and is currently incarcerated in Green Haven Correctional Facility ("Green Haven"). Prior to his transfer to Green Haven in September 1996, plaintiff had been incarcerated in Attica Correctional Facility ("Attica") since, at least, 1992. (Defs' 56.1 Stmt., ¶ 1; Plaintiff's Statement Pursuant to United States District Court Rules Southern and Eastern District of New York, Civil Rule 56.1. ("Plnt's 56.1 Stmt."), dated Apr. 9, 2004, ¶ 1). Plaintiff was diagnosed with the Hepatitis C virus ("HCV") in 1992, and alleges that defendants have denied him treatment for that illness over the past five years on the ground that plaintiff has not enrolled in DOCS' Alcohol and

[2] The Court requested and received from defense counsel in August 2004 unexcerpted copies of all DOCS Hepatitis C Primary Care Practice Guidelines, as well as several medical reports referred to in Defendants' Statement Pursuant to Local Civil Rule 56.1 ("Defs' 56.1 Stmt."), dated Jan. 30, 2004, ¶ 18. The Court has placed a copy of these documents in the court file. When possible, the Court will refer to the documents by reference to their Bates stamp numbers.

Substance Abuse Treatment ("ASAT") program.[3] Plaintiff argues that there is no basis for conditioning his treatment for HCV on his enrollment in an ASAT program. Plaintiff admits that he used drugs and alcohol prior to his incarceration, but claims that he has been free of both drugs and alcohol for the past thirteen years. (Plnt's 56.1 Stmt. ¶ 2).[4]

Defendant Koenigsmann is a medical doctor, licensed to practice medicine in the State of New York. (Declaration of Carl Koenigsmann ("Koenigsmann Decl."), dated Jan. 29, 2004, ¶ 2). From March 1999 until April 17, 2003, Koenigsmann served as Facility Health Services Director ("FHSD") at Green Haven. In that capacity, Koenigsmann "reviewed the care rendered by Green Haven

---

[3] The term "ASAT" is used interchangeably with the term "RSAT", which refers to DOCS' Residential Substance Abuse Treatment program. The Court will refer to both programs using the term "ASAT."

[4] Defendants argue that plaintiff should not be taken "at his word," and suggest that plaintiff's claim to be drug- and alcohol-free is "absurd[]" in light of his "steadfast refusal to participate in the drug treatment programs made available by DOCS." (Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment ("Defs' Reply Memo"), dated May 24, 2004, at 2). Plaintiff does not ask to be taken "at his word." Plaintiff has provided (1) a Certificate of Participation, indicating that he successfully completed a twelve-step Alcoholics Anonymous program in October 1992, and (2) a Certificate of Completion, indicating that he successfully completed a twelve-step Narcotics Anonymous program in March 2000. (Plnt's 56.1 Stmt. Exh. 10). Plaintiff has also submitted evidence that in September 2003, he was ordered to submit to a urinalysis test for marijuana by C.O. Haywood, following Haywood's claim that "Inmate Morgan's eyes appeared glossy, and Inmate was emanating an odor of marijuana." (Id., at Exh. 1). Plaintiff's urinalysis test came back negative. (Id.). Finally, plaintiff has submitted disciplinary records from his period of incarceration at both Green Haven and Attica, which indicate that there is no record that plaintiff has ever been disciplined for alcohol or drug use. (Id., at Exh. 2). Defendants have presented no evidence to the contrary. In fact, the record indicates that the only reason defendants know that plaintiff used drugs and alcohol prior to his incarceration is that plaintiff freely admitted it when his medical history was being prepared, (see Medical History, Declaration of Donald Nowve ("Nowve Decl."), dated Jan. 29, 2004, Exh. B), and he has continued to admit it in this case, (see Defs' 56.1 Stmt., ¶ 2; Plnt's 56.1 Stmt., ¶ 2).

primary care providers and also reviewed and approved all requests by Green Haven primary care providers for specialty care services by outside medical providers, including surgeons, medical specialists, physical therapists, procedures and diagnostic studies." (Id. at ¶ 4).

Defendant Wright is also a medical doctor. Wright has held the position of Deputy Commissioner and Chief Medical Officer of the DOCS throughout plaintiff's incarceration at Green Haven. Wright's primary responsibility at DOCS is "to set the overall direction for [DOCS'] provision of health care." Brock v. Wright, 315 F.3d 158, 165 (2d Cir. 2003) (unrelated case).

B. Plaintiff's Illness

In 1992, while incarcerated in Attica, plaintiff was diagnosed with HCV, a chronic liver disease that can result in inflammation, scarring, and ultimately cirrhosis of the liver.[5] (Defs' 56.1 Stmt. ¶ 11; Plnt's 56.1 Stmt. ¶ 5). On or about December 3, 1999, plaintiff underwent a liver biopsy to gauge the severity of his illness. (Defs' 56.1 Stmt. ¶ 13; Plnt's 56.1 Stmt. ¶ 7). The liver biopsy revealed that plaintiff had developed fibrosis, and

[5] Defendants appear to assume that how plaintiff became infected is relevant (defendants state that plaintiff contracted the virus, and developed liver fibrosis, "due to plaintiff's history of substance abuse." (Defs' 56.1 Stmt. ¶ 14)). Their contention not only is irrelevant, but also is without evidentiary basis. Defendants provide no support for this claim; defendants presumably base their assumption on the fact that plaintiff admits that in the past he engaged in intravenous drug use, and intravenous drug use is a primary route of infection for HCV. Plaintiff denies that he contracted HCV as a result of his drug use, because he claims that although he did use heroin intravenously for a period of two weeks in 1983, he used "sterile syringes and did not share his needle with anyone else and did not use the same needle twice." (Affidavit of John Morgan ("Morgan Aff."), dated Apr. 12, 2004, ¶ 3). Whatever the cause, the issue of treatment is a separate matter altogether.

chronic hepatitis, grade 2, stage 2. (St. Agnes Hospital Surgical Pathology Report, Bates stamp number SA8, Nowve Decl., Exh. B).

C. DOCS Hepatitis C Primary Care Practice Guidelines[6]

On March 31, 1999, DOCS Division of Health Services released a practice guideline regarding the screening of inmates for HCV, and the treatment of inmates diagnosed with HCV. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Mar. 31, 1999 ("March 1999 Guideline"), Nowve Decl., Exh. D). The March 1999 Guideline was developed by a committee consisting of medical doctors and nurses, and purported to be consistent with "community standards of care." (Id. at 1). It also recognized "the need for periodic reviews and revisions . . . to insure that this Guideline remains current." (Id.) The March 1999 Guideline provided that treatment for Hepatitis C "should be considered in accordance with the following criteria." (Id. at 2). These criteria included, inter alia:

> 10. No evidence of active substance abuse (drugs and/or alcohol) during the past 2 years (check urine toxicology screen if drug use is suspected).
>
> 11. Successful completion of an ASAT program (the inmate may be enrolled concurrently with hepatitis C treatment if time does not allow for prior completion of the program).

(Id. at 3)

The March 1999 Guideline was revised on December 17, 1999. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice

[6] The Court will refer to the numerous versions of the Practice Guideline collectively as the "Practice Guidelines." However, the Court will refer to each version of the Guideline by month and year when it is necessary to reference the language contained in a particular version of the Guideline.

Guideline, dated Dec. 17, 1999 ("December 1999 Guideline"), Nowve Decl., Exh. D). The only revision relevant to plaintiff's claim is the revision of the tenth criterion. Instead of requiring "no evidence of active substance abuse . . . during the past 2 years", (March 1999 Guideline, 3) (emphasis added), the December 1999 Guideline required "no evidence of active substance abuse . . . during the past 6 months . . . ." (December 1999 Guideline, 3) (emphasis added).

The December 1999 Guideline was in turn revised on December 13, 2000, when the tenth and eleventh criteria were merged into a single paragraph. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Dec. 13, 2000 ("December 2000 Guideline"), Nowve Decl., Exh. D).

> 10. No evidence of active substance abuse (drug and/or alcohol) during the past 6 months (check urine toxicology screen if drug use is suspected). Those who have a substance use history must successfully complete or be enrolled in an ASAT program.

(December 2000 Guideline, 3)

The Practice Guideline was most recently updated on March 10, 2003. (Defs' 56.1 Stmt. ¶ 16; Hepatitis C Primary Care Practice Guideline, dated Mar. 10, 2003 ("March 2003 Guideline"), Nowve Decl., Exh. D). No changes have been made to the ASAT requirement since December 2000.

D. Plaintiff's Refusal to Participate in an ASAT Program, and his Subsequent Denial of Treatment

Plaintiff claims that he was first offered treatment for his hepatitis C in 1997, but that his attending physician at Green

Haven advised him to refuse the treatment in anticipation of a new, less intrusive treatment with fewer side effects. (Plnt's 56.1 Stmt., ¶ 15).

The full factual picture pertaining to plaintiff's subsequent and continuing efforts to obtain treatment for his condition is difficult to discern from the record.[7] All parties agree that following plaintiff's liver biopsy in 1999, plaintiff's treating physicians requested that plaintiff (1) receive drug therapy for his illness, (2) be referred to a liver specialist, and (3) receive an updated liver biopsy to track the progression of his illness.

Each of these requests was ultimately denied by defendant Koenigsmann, who cited plaintiff's refusal to participate in an ASAT program as the reason for the denial.[8] Koenigsmann's position was that because plaintiff used drugs and alcohol in the past, he was required by the Practice Guidelines to participate in an ASAT program as a pre-condition to being treated for hepatitis C, which treatment would presumably include drug therapy, a referral to a

---

[7] Defendants' papers do not make any attempt to chronicle these efforts. Plaintiff has attempted to collect records of these incidents to document the number of times Dr. Koenigsmann denied plaintiff's, and plaintiff's treating physicians', requests for treatment and referral to a specialist. (See generally Plnt's 56.1 Stmt., Exh. 3). Plaintiff has also attempted to collect records of his grievances pertaining to these incidents. (See generally id. at Exh. 9).

[8] For instance, Koenigsmann denied the request by plaintiff's treating physician that plaintiff received an "updated liver biopsy to assess [the] progression of chronic HCV" because treatment was "out of the question" unless plaintiff agreed to participate in an ASAT program. (Koenigsmann Denial, Bates stamp number GHM 75, dated May 23, 2003, Plnt's 56.1 Stmt. Exh. 3).

liver specialist, and an updated liver biopsy.[9]

On August 27, 2002, plaintiff wrote to defendant Wright, complaining about Dr. Koenigsmann's denial of his requests for treatment. (See Letter to Dr. Wright, dated Aug. 27, 2002, Plnt's 56.1 Stmt. Exh. 4). On September 30, 2002, Marc F. Stern, Regional Medical Director, responded to plaintiff's letter, on behalf of Dr. Wright. (See Letter to Mr. Morgan, dated Sept. 30, 2002, Plnt's 56.1 Stmt. Exh. 5). Stern's letter stated that the reason plaintiff was being denied treatment was that he had not yet participated in a drug abuse prevention program, and that participation is "required by our Guidelines and is non-negotiable." (Id.). Stern's letter also stated that "[i]f you are seriously interested in beginning treatment for your Hepatitis C infection, I would strongly encourage you to agree to participate in the drug treatment program. It is a worthwhile program, but at the very least, it should not be harmful." (Id.).

In this lawsuit, plaintiff has offered no reason to refuse to

---

[9] Because the record does not clearly indicate when plaintiff and his treating physicians made each of their requests, it is unclear which version of the Practice Guidelines was in place each time Koenigsmann denied the requests due to plaintiff's failure to enroll in an ASAT program. Defendants gloss over this fact, stating that "all of the Guidelines uniformly providee [sic], in essence, that in order for an inmate to be eligible for antiviral drug therapy for Hepatitis C, there must be no evidence of active substance abuse (drug and/or alcohol) for a specified period of time. Those who have a history of substance abuse must 'successfully complete or be enrolled in [ASAT]' as a co-requisite for antiviral treatment." (Defs' 56.1 Stmt. ¶ 19). In fact, until the December 2000 Guideline, the Practice Guidelines did not specify who must participate in an ASAT program as a prerequisite for treatment. It was not until the December 2000 Guideline that persons with a "substance use history" were specifically required to participate in an ASAT program. The Practice Guidelines do not define the term "substance use history."

participate in an ASAT program.[10] In 2002 or 2003, plaintiff appears to have placed his name on the waiting list for an ASAT program, but he subsequently withdrew his name from the list. The record contains an undated, handwritten letter from plaintiff asking that his name be withdrawn from the waiting list.[11] (Plaintiff's Withdrawal Letter, Bates stamp number D0091, undated, Nowve Decl., Exh. C). In that letter, plaintiff states that he expects the requirement to be eliminated "in the near future":

> [I] received a letter from the law firm of White & Case requesting permission to obtain my medical records from the medical department at Green Haven. I gave them my permission to access the records. They are for the purpose of assisting White & Case in their class action law suit against all medical Departments in D.O.C.S. The purpose of this law suit is to remove all medical department policies that require patients infected with cronic [sic] Hepatitis-C to participate in A.R.S.A.T. or any other voluntary drug rehabilitation program in order to receive medical treatment for this <u>deadly disease</u>.
>
> It is my belief that in the near future I will not be required to be enrolled in the A.R.S.A.T. program in order to receive medical treatment for my cronic [sic] Hepatitis-C infection! That is my motivation for withdrawing my application to participate in A.R.S.A.T.

---

[10] One reason an inmate might not want to enroll in an ASAT program, particularly if that inmate has successfully completed other rehabilitation programs, is that participating in an ASAT program can be very time-consuming. <u>See</u> <u>Domenech v. Goord</u>, 196 Misc. 2d 522, 524 n.1, 766 N.Y.S.2d 287 (N.Y. Sup. Ct. May 28, 2003) ("ASAT is a six-month rehabilitation program for substance abusers which apparently requires full-day attendance. This time commitment would evidently interfere with petitioner's full schedule of attending school during the day and working as a porter at night.")

[11] It is unclear from the record when plaintiff signed up for, and withdrew his name from, the ASAT waiting list. In plaintiff's deposition, he acknowledged that he refused "ASAT participation" in <u>2002</u>. (Defs' 56.1 Stmt., ¶ 26). However, the record contains a letter to plaintiff from E. Mamane, dated May 9, <u>2003</u>, acknowledging receipt of plaintiff's request to withdraw his application for the ASAT program. (Mamane's Acknowledgment Letter, Bates stamp number D0092, May 9, 2003, Nowve Decl., Exh. C).

Id. (emphasis in original)

II. Discussion

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must demonstrate that there are no genuine issues of material fact to be tried, and that it is entitled to judgment as a matter of law. See Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Citizens' Bank v. Hunt, 927 F.2d 707, 710 (2d Cir. 1991). The moving party "bears the initial responsibility of informing the district court of the basis for its motion"; that responsibility includes identifying the materials in the record that the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts to be tried. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003).

B. Section 1983 and Personal Involvement

In order for a plaintiff to obtain damages against a defendant in a Section 1983 action, the plaintiff must prove that that defendant was personally involved in the constitutional deprivation. See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). Defendants argue that because they did not personally

render treatment to plaintiff, plaintiff cannot prove that they were personally involved in the alleged, constitutional deprivation.

Defendants' argument misses the point. Plaintiff does not contend that his treating physicians denied him a constitutional right; instead, he contends that defendants, who were supervisory officials, denied him that right. A supervisory official may be shown to have sufficient personal involvement if:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Id. (citing Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)

Defendant Koenigsmann was the FSHD at Green Haven. In this capacity, Koenigsmann reviewed the care rendered to inmates, and he either approved or denied requests for specialty care services, procedures, and diagnostic studies. (Koenigsmann Decl., ¶ 4). Plaintiff has produced evidence that Koenigsmann, who is himself a medical doctor, repeatedly denied requests by plaintiff's primary care physicians that plaintiff receive drug therapy, a referral to a liver specialist, and an additional biopsy for diagnostic purposes. (See generally Plnt's 56.1 Stmt., Exh. 3). Koenigsmann's personal involvement does not, therefore, rest

impermissibly on a theory of respondeat superior. See Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). Rather, plaintiff has offered evidence that Koenigsmann participated directly in the alleged constitutional violation, by deciding to withhold treatment from plaintiff.

Defendant Wright is the Deputy Commissioner and Chief Medical Officer of the DOCS. Plaintiff has offered evidence that Dr. Wright promulgated to health personnel within the DOCS system the Practice Guidelines that are central to this suit. (See Memorandum from Lester N. Wright, M.D., MPH, to Facility Health Services Directors, dated Mar. 25, 2003, Koenigsmann Decl., Exh. 1).[12] There is no dispute that treatment is being withheld from plaintiff as a result of the Guidelines that Dr. Wright promulgated; thus, to the extent that unconstitutional acts have occurred as a result of applying the Guidelines, a reasonable jury could conclude that Wright was personally involved in that deprivation, because he "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom." Colon, 58 F.3d at 873. Cf. Brock, 315 F.3d at 165-66 (holding that a jury could conclude that Wright was personally involved in an alleged deprivation due to Wright's promulgation of the DOCS policy

---

[12] The documents produced by defense counsel pursuant to the Court's request contain additional evidence that Dr. Wright promulgated and oversaw the implementation of the Guidelines. (See Memorandum from Lester N. Wright, M.D., MPH, Associate Commissioner/Chief Medical Officer, to Facility Health Services Directors, dated Apr. 12, 1999, Bates stamp numbers D0054-56; Memorandum from Lester N. Wright, M.D., MPH, Associate Commissioner/Chief Medical Officer, to Facility Health Services Directors, Nurse Administrators, Pharmacists, dated Sept. 27, 1999, Bates stamp numbers D0040-44).

at issue in that case).[13]

C. Eighth Amendment[14]

Plaintiff claims that defendants violated plaintiff's rights under the Eighth Amendment when they participated in the decision to withhold HCV treatment from him because he refuses to enroll in

---

[13] Defendants cite Judge Buchwald's decision in Graham v. Wright as support for the proposition that Wright lacks the requisite personal involvement to be held liable. See Graham v. Wright, No. 01 Civ. 9613(NRB), 2003 WL 22126764, *2 (Sept. 12, 2003). In Graham, Judge Buchwald held that Wright lacked the personal involvement required to be held liable for money damages. Although Judge Buchwald took note of the fact that plaintiff there failed to allege that Wright personally treated him, her holding was based on the fact that plaintiff there actually lacked standing to challenge the Hepatitis C Practice Guidelines. The reason for this was that plaintiff there actually had completed an ASAT program, and was fully eligible to receive treatment for his HCV according to the Practice Guidelines. That case is thus distinguishable from the instant case.

[14] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The Eighth Amendment was made applicable to the States through the Fourteenth Amendment. See Estelle v. Gamble, 429 U.S. 97, 101-02 (1976) (citing Robinson v. California, 370 U.S. 660 (1962)).

an ASAT program.[15, 16] "To establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove 'deliberate indifference to [his] serious medical needs.'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (quoting Estelle, 429 U.S. at 104). This requires that the prisoner prove both that

---

[15] Other courts in this Circuit have considered similar claims by inmates infected with HCV. Many of those claims are distinguishable on their facts from the instant case. See, e.g., Johnson v. Wright, No. 01 Civ. 2122(GWG), 2004 WL 938299 (S.D.N.Y. May 3, 2004) (plaintiff there initially received one form of treatment for his HCV, but was denied a newer form of treatment by Wright pursuant to the March 1999 Guideline because plaintiff there actually tested positive for marijuana within the two-year period prior to his treating physician's request that he begin the new treatment. In addition, approximately two years after the plaintiff there tested positive for marijuana, Wright approved the plaintiff for the newer treatment -- there is no mention in Magistrate Judge Gorenstein's opinion that the plaintiff there ever enrolled in an ASAT program); Pabon v. Wright, No. 99 Civ. 2196(WHP), 2004 WL 628784 (S.D.N.Y. Mar. 29, 2004) (plaintiff there received treatment for his HCV, but complained (1) that he had not been informed about the drug's risks and side effects, and (2) that his treatment had been delayed because defendants required that he undergo a medically advised liver biopsy prior to receiving treatment); McKenna v. Wright, No. 01 Civ. 6571(HB), 2004 WL 102752 (S.D.N.Y. Jan. 21, 2004) (remaining defendants denied qualified immunity on a motion to dismiss); Graham, 2003 WL 22126764 (plaintiff there successfully completed ASAT program, and appeared to be otherwise eligible to receive treatment).

[16] The one case with facts most similar to the instance case is Conti v. Goord, an unpublished summary decision in which the Second Circuit noted that the prisoner there might be able to demonstrate at trial that the policy "manifests 'deliberate indifference,' insofar as it entails denying treatment to prisoners who completed substance-abuse programs in the past and have since displayed no signs of drug or alcohol use." Conti v. Goord, 59 Fed.Appx. 434, 436, 2003 WL 1228044 (2d Cir. Mar. 14, 2003). The plaintiff in Conti, like the plaintiff in this case, was denied treatment because he refused to enroll in an ASAT program notwithstanding his history of drug and alcohol use. Id. at 435. The plaintiff there claimed that he was "demonstrably 'clean' for more than ten years", and he produced evidence to the Second Circuit (but not to the district court) that he had successfully completed an ASAT program in 1991, as well as an Alcoholics Anonymous program in 1992. Id. at 436. The plaintiff there also produced a response by Wright to a grievance submitted by another inmate, in which Wright indicated that that inmate would receive HCV treatment once he could establish that he had been "clean" for six months -- no mention is made of whether enrollment in an ASAT program would also be required. See id. Finally, the plaintiff there produced affidavits from two inmates who presumably also had a history of drug or alcohol use, but who claimed to have been provided with HCV treatment without being required to participate in an ASAT program. See id. The Court does not cite Conti as precedential authority.

his medical condition is objectively serious, and that each defendant acted with the requisite deliberate indifference. See Brock, 315 F.3d at 162.

1. Serious Medical Condition

A condition is considered "sufficiently serious" for Eighth Amendment purposes if it is a "condition of urgency, one that may produce death, degeneration, or extreme pain." Morales v. Mackalm, 278 F.3d 126, 132 (2d Cir. 2002). Factors to be considered in making this decision include "(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain." Brock, 315 F.3d at 162 (internal quotations omitted).

Defendants do not appear to deny, nor could they, that hepatitis C is, in general, a sufficiently serious medical condition for purposes of the Eighth Amendment. See, e.g., Pabon, 2004 WL 628784, at *5 ("It is well-established that Hepatitis C qualifies as a serious medical condition for purposes of an Eighth Amendment analysis."); Verley v. Goord, No. 02 Civ. 1182(PKC)(DF), 2004 WL 562740, at *10, n.11 (S.D.N.Y. Jan. 23, 2004) (Report and Recommendation adopted by order, dated June 2, 2004) (same); McKenna, 2002 WL 338375, at *6 (same).

Defendants argue, however, that when an inmate claims only that his treatment has been delayed, the relevant inquiry should

focus not only on whether the underlying condition is serious, but also on whether the challenged delay or interruption in treatment is objectively serious. See Smith v. Carpenter, 316 F.3d 178, 185-87 (2d Cir. 2003). In this case, defendants argue that plaintiff's treatment has merely been delayed, and that he has offered no evidence, such as "verifying medical evidence" or "expert evidence", to support his claim that his illness has gotten worse during the period in which treatment has been withheld from him. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs' Memo"), dated Jan. 30, 2004, at 12).

Plaintiff's claim in the instant case is distinguishable from the plaintiff's claim in Smith.[17] The plaintiff in this case is not complaining about a delay or interruption in his on-going treatment. Rather, plaintiff has never received any treatment for his illness, nor can he expect to receive any such treatment unless either he agrees to join an ASAT program, or the DOCS decides to provide such treatment notwithstanding plaintiff's failure to participate in such a program. Where, as here, a prisoner "alleges that prison officials have failed to provide general treatment for his medical condition," courts do not "distinguish between a prisoner's underlying 'serious medical condition' and the

[17] In Smith, the plaintiff was HIV-positive, and it was undisputed that he was receiving "appropriate on-going treatment for his condition." Smith, 316 F.3d at 185-86. The basis for Smith's Eighth Amendment claim was that defendants had interrupted his treatment for two short periods of 5 days and 7 days in duration. See id. at 185. The Court held that it was appropriate to consider not just the seriousness of Smith's illness (i.e., HIV), but also the seriousness of the two brief interruptions in Smith's treatment.

circumstances of his 'serious medical need.'" Id. at 185-86. Thus, on the facts of this case, plaintiff has sufficiently established that he has a serious medical condition simply by proving that he has hepatitis C, and that he has not received any treatment for this condition.

2. Deliberate Indifference

Mere negligence, even if it rises to the level of medical malpractice, is insufficient to establish a claim under the Eighth Amendment. See Estelle, 429 U.S. at 105-06. In order to prevail on plaintiff's Eighth Amendment claim, plaintiff must ultimately prove that each defendant "knew of and disregarded [his] serious medical needs." Chance, 143 F.3d at 703 (citing Farmer, 511 U.S. at 837). Actual knowledge of the risk may be proven either by direct evidence, or circumstantial evidence, such as "evidence that the risk was obvious or otherwise must have been known to a defendant." Brock, 315 F.3d at 164 (citing Farmer, 511 U.S. at 842). For the reasons stated below, the Court holds that a reasonable jury could find that defendant Wright knew of and disregarded plaintiff's serious medical needs, because he promulgated ambiguous Practice Guidelines that have been applied to plaintiff in an unconstitutional manner. However, because defendant Koenigsmann was merely charged with applying the Practice Guidelines, a reasonable jury could not conclude that Koenigsmann showed deliberate indifference to plaintiff's serious medical needs.

Defendants argue that plaintiff cannot prove that either was deliberately indifferent, because the decision to condition plaintiff's treatment on his participation in an ASAT program was required by the DOCS Hepatitis C Practice Guidelines. However, the Practice Guidelines do not unambiguously require an inmate like plaintiff to participate in an ASAT program in order to receive treatment for HCV. The March 1999 and December 1999 Practice Guidelines are ambiguous as to who must participate in an ASAT program.[18] Since December 2000, when the active substance abuse criterion was merged with the ASAT criterion, the Practice Guidelines have required inmates with "a substance use history" to satisfy the ASAT requirement, but the Practice Guidelines provide no guidance as to who qualifies as having "a substance use history." The ambiguity of the Practice Guidelines is evidenced by the fact that the ASAT requirement appears to be inconsistently applied.[19]

---

[18] The March 1999 Guideline, which was in place at the time that plaintiff was referred for his first and only liver biopsy, states that one requirement in order to receive treatment is: "10. No evidence of active substance abuse (drugs and/or alcohol) during the past 2 years (check urine toxicology screen if drug use is suspected)." (March 1999 Guideline, 3). A separate requirement is: "11: Successful completion of an ASAT program (the inmate may be enrolled concurrently with hepatitis C treatment if time does not allow for prior completion of the program)." (Id.). The December 1999 Practice Guideline reduced the 2-year bar for evidence of active substance use to a period of 6-months. (See December 1999 Guideline, 3). Although these two versions of the Practice Guidelines could be read as requiring every inmate to enroll in an ASAT program--including those who have never used drugs or alcohol--defendants do not argue that the Practice Guidelines were intended to be applied in this manner.

[19] The Court has already discussed instances in which inmates like plaintiff appear to have been given drug treatment notwithstanding the fact that they did not enroll in an ASAT program. See supra, n. 15 & 16. The fact that plaintiff in this case was referred to a liver specialist in 1999 for a liver biopsy also suggests that the Practice Guidelines have not always been

Defendants interpret the ambiguous provisions in the Practice Guidelines as requiring any inmate who has ever abused drugs and alcohol to enroll in an ASAT program. Thus, although there is no evidence that plaintiff has actively used drugs or alcohol in the past thirteen years, defendants interpret the Guidelines as requiring plaintiff to enroll in an ASAT program before receiving treatment.[20]

There is no medical justification for such a policy in any of the medical reports purportedly relied upon by the DOCS in fashioning its Practice Guidelines. The medical reports all indicate that complications may arise when treatment is given to persons who actively use drugs or alcohol. See National Institutes of Health, Consensus Development Conference Statement, Management of Hepatitis C: 1997 ("1997 NIH Consensus Statement"), dated Mar. 24-26, 1997, at 18 (available at http://consensus.nih.gov/cons/105/105_statement.pdf) (last visited

---

applied consistently. According to defendants, because of plaintiff's "substance use history," it was just as true in 1999 as it is today, that plaintiff was required to enroll in an ASAT program in order to get treatment for his illness. Nonetheless, defendants admit that plaintiff received a liver biopsy in 1999, notwithstanding the fact that plaintiff was not enrolled in an ASAT program at that time. As discussed above, Koeingsmann has since denied plaintiff an updated liver biopsy because of plaintiff's failure to enroll in an ASAT program.

[20] The Court notes that a more logical interpretation of the language in the December 2000 Guideline (which is identical to the current version of the Practice Guidelines) is that no inmate may receive HCV treatment if there is evidence of active substance abuse in the past six months, and that any inmate against whom there is such evidence would be required to enroll in an ASAT program prior to receiving HCV treatment. This interpretation construes the sentence pertaining to inmates with a "substance use history" in conjunction with the immediately previous sentence pertaining to inmates against whom there is evidence of active substance abuse within the past six months. Such an interpretation appears to be reasonable in light of the DOCS' decision to merge those two criteria into a single paragraph in December 2000.

Aug. 4, 2004) ("[T]reatment of patients who are drinking significant amounts of alcohol or who are actively using illicit drugs should be delayed until these habits are discontinued for at least 6 months . . . . Treatment for addiction should be provided before treatment for hepatitis C.") (emphases added); Centers for Disease Control and Prevention, "Recommendations for Prevention and Control of Hepatitis C Virus (HCV) Infection and HCV-Related Chronic Disease" ("CDC Recommendations"), dated October 16, 1998, at 14 ("Treatment of patients who are drinking excessive amounts of alcohol or who are injecting illegal drugs should be delayed until these behaviors have been discontinued for ≥6 months.") (emphases added); G.L. Davis and J.R. Rodrigue, "Treatment of Chronic Hepatitis C in Active Drug Users", New Engl. J. Med., Vol. 354 No. 3, July 19, 2001 (noting that most physicians will withhold antiviral treatment until active drug use has stopped, and stating that consensus statements support resuming treatment for patients for whom treatment has stopped due to active drug use only after the patient has been referred for treatment of the addiction).[21]

The CDC Recommendations, which were issued shortly before the DOCS adopted the first version of the Practice Guidelines,

---

[21] The 2002 NIH Consensus Statement recommends that the treatment of both inmates and active drug and alcohol users be expanded. (See National Institutes of Health, Consensus Development Conference Statement, Management of Hepatitis C: 2002 ("2002 NIH Consensus Statement"), dated Aug. 26, 2002, Defs' Reply Memo, Exh. C (also available at http://consensus.nih.gov/cons/116/hepatitis_c_consensus.pdf) (last visited Sept. 24, 2004), 22 & 25) ("[I]t is recommended that treatment of active injection drug use be considered on a case-by-case basis, and that active injection drug use in and of itself not be used to exclude such patients from antiviral therapy.") (emphases added).

specifically recommend that "[p]ersons who use or inject drugs . . . be advised to stop using and injecting drugs [and] to enter and complete substance-abuse treatment, including relapse-prevention programs." (CDC Recommendations, at 18) (emphasis added). Thus, the CDC recommended in 1998 that persons who were actively drinking excessive amounts of alcohol or were actively injecting drugs be denied treatment for a limited period of time until the behavior ceased, and that those people be encouraged to enter substance-abuse treatment programs, presumably for the purpose of successfully stopping the behavior that is delaying their ability to receive treatment.

A reasonable jury could conclude that defendant Wright promulgated an ambiguous set of Practice Guidelines that resulted in the denial of necessary medical care to plaintiff without any medical justification.[22] A reasonable jury could also conclude that defendant Wright was aware of the risk that the ambiguous Practice Guidelines would be interpreted to condition HCV treatment for a person such as plaintiff on enrollment in an ASAT program, and that

---

[22] In addition to promulgating the Practice Guidelines, the Court notes that plaintiff notified Wright by letter of Koenigsmann's refusal to approve HCV treatment. (See Letter to Dr. Wright, dated Aug. 27, 2002, Plnt's 56.1 Stmt. Exh. 4). Marc Stern, responding on Wright's behalf, wrote: "Your participation in [an ASAT program] is required by our Guidelines and is non-negotiable . . . . While consultants may make other recommendations, ultimately the decisions about your medical care are made by your primary care physicians under the direction of the Facility Health Services Director and not the consultants. We appreciate their recommendations, but they are just that: recommendations." (See Letter to Mr. Morgan, dated Sept. 30, 2002, Plnt's 56.1 Stmt. Exh. 5). Given that plaintiff's primary care physicians made recommendations that were denied by the Facility Health Services Director (i.e., Koenigsmann) because of the Practice Guidelines promulgated by Wright, it is unclear in what way the "ultimate[]" decisions about plaintiff's medical care rested with the primary care physicians and the FHSD.

Wright was aware of the risk that people such as plaintiff would face as a result of such an interpretation. See Brock, 315 F.3d at 165-67. Cf. id. at 164 (stating that actual knowledge of the risk may be proven by circumstantial evidence, such as "evidence that the risk was obvious or otherwise must have been known to a defendant") (citing Farmer, 511 U.S. at 837). Dr. Wright could thus be held liable for the unconstitutional acts that occurred as a result of the ambiguity in the Practice Guidelines that he promulgated.[23]

In contrast, a reasonable jury could not conclude that Koenigsmann was deliberately indifferent to plaintiff's serious medical needs. Even if a jury believed that Koenigsmann, himself medical doctor, was negligent in applying the Practice Guidelines to plaintiff in a medically unsupportable manner, there is no evidence from which a jury could conclude that he did so with knowledge of, and disregard for, plaintiff's serious medical needs.

---

[23] The Court notes that even if defendants were correct that the Practice Guidelines are unambiguous in imposing the requirement that plaintiff enroll in an ASAT program, Wright would still not be entitled to summary judgment. A reasonable jury would nevertheless be able to conclude that plaintiff's constitutional rights were violated as a result of a policy promulgated by Wright that is without medical justification and resulted in deliberate indifference toward plaintiff's serious medical needs. See Brock, 315 F.3d at 165-67 (holding that if a policy, "properly implemented," results in deliberate indifference toward an inmate's medical needs, the plaintiff may be able to prevail on a claim against the person who promulgated the policy). Cf. Domenech, 196 Misc. 2d at 531 (holding that as applied to the plaintiff in that case, the Practice Guidelines' requirement that the plaintiff there participate in an ASAT program "is arbitrary and capricious and results in a deliberate denial of medical attention to his serious medical condition in violation of the Eighth Amendment." The plaintiff in Domenech claimed to be drug- and alcohol-free for over 30 years, and respondents neither alleged, nor presented evidence to suggest, that he was currently using drugs or alcohol, or was likely to relapse. The Court thus concluded that "the ASAT program is irrelevant for this petitioner and cannot, as a matter of law, provide a medical justification for the continued denial of medical treatment.").

D. Qualified Immunity

The doctrine of qualified immunity protects state actors sued in their individual capacity from suits for monetary damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Ford v. McGinnis, 352 F.3d 582, 596 (2d Cir. 2003) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Summary judgment is appropriate:

> only if the court finds that the asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiff[] and with all permissible inferences drawn in [his] favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right.

Ford, 352 F.3d at 597 (citation and internal quotation omitted).

The Eighth Amendment right that plaintiff claims was violated by defendants through their deliberate indifference to his serious medical needs was clearly established throughout the period covered in this suit. See Verley, 2004 WL 562740, at *17; McKenna v. Wright, No. 01 Civ. 6571(HB), 2004 WL 102752, at *7 (S.D.N.Y. Jan. 21, 2004) (citing Estelle, 429 U.S. at 106).

Because the right in question was clearly established, summary judgment may not be granted if a rational jury could conclude, on the evidence presented, that it was not objectively reasonable for Wright to believe that he was acting in a constitutional manner.[24]

[24] Because the Court has concluded that Koenigsmann is entitled to summary judgment with respect to liability, the Court need not consider whether he would otherwise be entitled to qualified immunity. The Court

Viewing the evidence in the light most favorable to plaintiff, and drawing all permissible inferences in plaintiff's favor, the Court cannot conclude that Wright's belief that his acts were constitutional was objectively reasonable as a matter of law.

As explained above, a rational jury could conclude that as a result of the ambiguity in the Practice Guidelines, plaintiff was denied necessary medical care for his serious, chronic illness, without medical justification. A rational jury could also conclude that it was not objectively reasonable for Wright to have believed that it was constitutional to promulgate such ambiguous set of Practice Guidelines that would permit such an interpretation.[25]

III. Conclusion

For the reasons set forth above, the Court grants defendants' motion for summary judgment with respect to defendant Koenigsmann, and denies defendants' motion with respect to defendant Wright. The parties shall submit a joint pretrial order no later than October 29, 2004. The parties are directed to adhere to this Court's Individual Rules governing the form of Joint Pretrial

---

notes, however, that given the ambiguity present in the Practice Guidelines promulgated to Koenigsmann by Wright, no rational jury could fail to conclude that it was objectively reasonable for Koenigsmann to believe that he was acting in a constitutional manner.

[25] Even if the Practice Guidelines were not ambiguous, Wright would still not be entitled to qualified immunity. A rational jury could conclude that it was objectively unreasonable for Wright to believe that it was constitutional to promulgate a regulation that requires prison officials who know of an inmate's serious medical needs to disregard those needs, unless the inmate agrees to participate in an ASAT program. The fact that Wright is a medical doctor who is experienced at supervising the provision of medical services to inmates supports the Court's conclusion that a jury could find his actions objectively unreasonable. See Cuoco v. Moritsugu, 222 F.3d 99, 111 (2d Cir. 2000).

Orders. The Individual Rules are available at

http://www.nysd.uscourts.gov/Individual_Practices/Wood.pdf.

SO ORDERED.

Dated: New York, New York

September 30, 2004

Kimba M. Wood

Kimba M. Wood

United States District Judge

Copies of this Order have been mailed to pro se plaintiff and counsel for defendants.