

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BENJAMIN LEE (#114229)

VERSUS

CIVIL ACTION

SGT. JOHNNY WEST , ET AL

NUMBER 09-65-RET-DLD

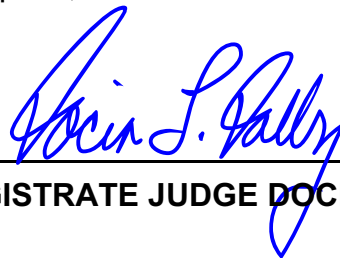
NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within ten days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in Baton Rouge, Louisiana, on April 8, 2009.



MAGISTRATE JUDGE DOCIA L. DALBY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BENJAMIN LEE (#114229)

VERSUS

CIVIL ACTION

SGT. JOHNNY WEST , ET AL

NUMBER 09-65-RET-DLD

MAGISTRATE JUDGE'S REPORT

Before the court is the defendants' Motion to Dismiss. Record document numbers 9 and 11.¹ The motion is not opposed.

Pro se plaintiff, an inmate confined at Louisiana State Penitentiary, Angola, Louisiana, filed this action pursuant to 42 U.S.C. § 1983 against Sgt. Johnny West, Maj. Daniel Davis, Sgt. Scott Adams and Sgt. Michael McGee. Plaintiff alleged that the defendants were deliberately indifferent to his serious medical needs in violation of his constitutional rights.

Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted under to Rule 12(b), Fed.R. Civ. P.

Subsection (c)(1) of 42 U.S.C. § 1997e provides the following:

(c) Dismissal.--(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from

¹ Defendants' second motion to dismiss filed on April 1, is identical to the motion to dismiss filed on March 16.

a defendant who is immune from such relief.

Under Rule 8(a)(2), Fed.R.Civ.P., a complaint must only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Erickson v. Pardus*, 551 U.S. 89, —, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the ... claim is and the ground upon which it rests.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)).² Complaints need not anticipate, and attempt to plead around, potential affirmative defenses. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572 (1980).

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court “must accept as true all of the factual allegations contained in the complaint.” *Erickson*, 127 S.Ct. at 2200; see also *Twombly*, 127 S.Ct. at 1965. “A document filed *pro se* is to be liberally construed ... and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson*, 127 S.Ct. at 2200 (citations omitted).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 127 S.Ct. at 1974. “Factual

² *Twombly* held that in some cases a plaintiff must plead particular facts in his complaint. 127 S.Ct. at 1965. In *Erickson*, decided two weeks after *Twombly*, the Supreme Court clarified *Twombly* by holding that a prisoner bringing a § 1983 claim against prison officials is not required to state specific facts in his complaint; *Erickson*, 127 S.Ct. at 2200, and *Twombly* itself, 127 S.Ct. at 1973 n.6., suggests that the holding in *Twombly* may be limited to cases likely to produce “sprawling, costly, and hugely time-consuming” litigation. This case involves a § 1983 claim with a narrow range of factual disputes, not a complex suit likely to produce sprawling discovery. Accordingly, this case is governed by the Supreme Court’s decision in *Erickson*.

allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965 (quotation marks, citations, and footnote omitted).

Defendants argued that they are entitled to Eleventh Amendment immunity insofar as the plaintiff sued them in their official capacity.

The distinction between personal and official capacity suits was clarified by the U.S. Supreme Court in *Hafer v. Melo, et al*, 502 U.S. 21, 112 S.Ct. 358 (1991). A suit against a state official in his official capacity is treated as a suit against the state. *Id.*, 502 U.S. at 25, 112 S.Ct. at 361, *citing Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). Because the real party in interest in an official-capacity suit is the governmental entity and not the named individual, the “entity’s `policy or custom’ must have played a part in the violation of federal law.” *Graham, supra*, at 166, 105 S.Ct. at 3105.

Personal capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under of color of state law. A showing that the official, acting under color of state law, caused the deprivation of a federal right is enough to establish personal liability in a § 1983 action. *Hafer*, 502 U.S. at 25, 112 S.Ct. at 362.

Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989), makes it clear that the distinction between official-capacity suits and personal-capacity suits is more than a “mere pleading device.” An officer sued in his personal capacity comes to court as an individual. However, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official capacity actions for prospective relief are not treated as actions against the state. *Will*, 491 U.S. at 71, 109 S.Ct. at 2311, n. 10, *quoting Kentucky v. Graham*, 473 U.S. at 167, 105 S.Ct. at 3106, n.

14.

Therefore, the plaintiff may recover money damages against the defendants insofar as the defendants were sued in their individual capacity for actions taken by them under color of state law which caused the deprivation of the plaintiff's constitutional rights. Insofar as the plaintiff sought prospective injunctive relief against the defendants in their official capacity, his official capacity claim is also actionable under § 1983.

Plaintiff alleged that on March 3, 2008, he was scheduled for outpatient dialysis treatment at Earl K. Long Hospital in Baton Rouge. Plaintiff alleged that Sgt. West advised the plaintiff that he could not wear a sweatshirt on the trip. Plaintiff alleged that he told Sgt. West that he suffers from Lupus and has a medical duty status permitting him to wear the sweatshirt because of his illness. Plaintiff alleged that the defendants prepared a refusal form and failed to transport him to the hospital for his scheduled treatment. Plaintiff alleged that his kidney function worsened because he did not receive the scheduled treatment.

To prevail on an Eighth Amendment claim for deprivation of medical care a prisoner must prove that the care was denied and that the denial constituted "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976); *Johnson v. Treen*, 759 F.2d 1236 (5th Cir. 1985). Whether the plaintiff received the treatment he felt he should have is not the issue. *Estelle v. Gamble, supra*; *Woodall v. Foti*, 648 F.2d 268 (5th Cir. 1981). Unsuccessful medical treatment does not give rise to a Section 1983 cause of action. *Varnado v. Lynaugh*, 920 F.2d 320 (5th Cir. 1991), *Johnson v. Treen, supra*. Negligence, neglect or medical malpractice does not rise to the level of a constitutional violation. *Varnado, supra*.

Applying the notice pleading standard dictated by *Erickson* and *Twombly*, and giving

the plaintiff the benefit of the inferences to which he is entitled at the pleadings stage, his allegations that the defendants were deliberately indifferent to his serious medical needs are sufficient to state a claim upon which relief can be granted.

Defendants moved to dismiss the plaintiff's claims for declaratory and injunctive relief on the grounds that the plaintiff lacks standing to seek a declaratory judgment or injunctive relief.

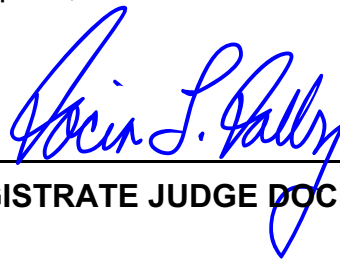
A review of the complaint showed that the plaintiff did not seek declaratory or injunctive relief.

Defendants argued that the plaintiff cannot recover punitive damages from them. Defendants are wrong. Plaintiff may recover punitive damages from the defendants sued in their individual capacity, providing he proves that they acted with malice or willfulness or with callous and reckless indifference to the safety or rights of the plaintiff. *Campbell v. Miles*, 228 F.3d 409 (2000); *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994). Plaintiff's allegations are sufficient to meet this standard.

RECOMMENDATION

It is the recommendation of the magistrate judge that the defendants' motion to dismiss be denied.

Signed in Baton Rouge, Louisiana, on April 8, 2009.



MAGISTRATE JUDGE DOCIA L. DALBY