1998 WL 391143
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United States District Court, S.D. New York.

Elizabeth THOMAS, Plaintiff,
v.
Commissioner Philip COOMBE Jr., et, al., [1] Defendants.

No. 95 Civ. 10342(HB).
|
July 13, 1998.

***Opinion and Order***

BAER, J. [2]

***1** Defendants move to dismiss plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

## I. Background

*A. Procedural History*

Plaintiff is a prisoner in the custody of the New York State Department of Correctional Services ("DOCS") and is currently incarcerated at Albion Correctional Facility ("Albion"). The incidents alleged in her Second Amended Complaint, however, primarily occurred while she was incarcerated at the Bedford Hills Correctional Facility ("Bedford Hills"). This is the defendants' second 12(b)(6) motion to dismiss. [3] In January 1998, I denied defendants Coombe, Lord, Beckel, Laba, O'Conner, Irwin, Griffin and Krum's first 12(b)(6) motion to dismiss and granted plaintiff injunctive relief pertaining to the provision of medical treatment. [4] The defendants make many of the same arguments in their second motion to dismiss. Since this Court does not adhere to the doctrine of if at first you don't succeed, try, try again, I remain unpersuaded that a complete dismissal is warranted. [5] The defendants based the first motion to dismiss on plaintiff's Amended Complaint filed in March 1996. Plaintiff submitted a Second Amended Complaint on February 6, 1998, and it is this Complaint the present motion to dismiss addresses.

*B. Statement of Facts*

Plaintiff's Second Amended Complaint added two more defendants—Tom Parise, Food Administrator at Bedford Hills and Dr. Fernandez, Director of Health Services at Albion. However, the claims made by the plaintiff are essentially the same. Plaintiff alleges that defendants violated the Eighth Amendment prohibition against cruel and unusual punishment. She brings this suit for related damages under 42 U.S.C. § 1983. Plaintiff claims, initially, that she informed Tom Parise, the Food Administrator in charge of the mess hall at Bedford Hills, of her back condition, but was told to continue her duties, including heavy lifting. (Compl. pp. 2–3) She further alleges that officials ignored the orders of the medical department at Bedford Hills that she be restricted to light duty until she was transferred out of the mess hall. (Compl. p. 3)

Plaintiff's allegations though, primarily focus on the treatment she received after suffering an injury to her foot and lower back on July 30, 1995 while working in the mess hall at Bedford Hills. (Compl. p. 3) Plaintiff claims that Officers Laba and Irwin waited over an hour and fifteen minutes after she notified them of her injury before calling for an escort to take her to medical personnel. (Compl. p. 3) Upon returning to her housing unit, Sergeant Beckel ordered plaintiff to report back to work or face disciplinary action despite being informed that plaintiff was suffering from extreme pain in her foot and lower back. (Compl. p. 4) According to the plaintiff, Sergeant Beckel then ordered plaintiff to wear shower shoes when she was unable to put on her mandatory work boots. (Compl. p. 4)

***2** On July 31, plaintiff was seen by Nurse Meyers who told Officer O'Conner that plaintiff could wear her work boots. (Compl. p. 4) When plaintiff could not comply with an order to wear her boots given swelling in her foot, she was placed in keep-lock status. While under keep-lock status, officials on three occasions allegedly failed to provide an escort so plaintiff could attend her emergency medical appointment with Dr. Griffin. (Compl. p. 4) Eventually, Plaintiff saw Dr. Griffin and was referred to an outside orthopedic specialist, Dr. Galleno, who informed prison officials that plaintiff's condition was fast degenerating. (Compl. p. 4) Plaintiff alleges that officials at Bedford Hills, including Dr. Griffin, failed to provide the therapy and medication prescribed by Dr. Galleno, which resulted in disc degeneration in her back, ultimately requiring surgery. (Compl. p. 4) Plaintiff claims she was

  

taken for therapy only twice, and officials ignored the therapist's prescribed treatment. (Compl. p. 4) In addition, she alleges that officials at Bedford Hills failed to arrange for a consultation with a doctor for a second opinion when surgery was finally scheduled. (Compl. p. 4) Plaintiff claims that when officials at Bedford Hills did eventually provide her with a second opinion and physical therapy, they failed to provide the medical records necessary for effective treatment. (Compl. p. 5) Finally, plaintiff asserts that Dr. Fernandez, Medical Director at Albion, denied plaintiff a medical exam upon her arrival at Albion, while at the same time removing the restriction that she not engage in heavy lifting. (Compl. p. 6) Plaintiff alleges that Dr. Fernandez refused to provide the medication and therapy prescribed by specialists or reschedule surgery. (Compl. p. 6)

## II. Discussion

Defendants move to dismiss on the ground that plaintiff failed to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). A court will only grant a 12(b)(6) motion when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him [or her] to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). When deciding a 12(b)(6) motion, a court "must accept as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." *Hamilton Chapter of Alpha Delta Phi v. Hamilton College,* 128 F.3d 59, 63 (2d Cir.1997). The court will liberally construe the Complaint of a *pro se* litigant. *See Graziano v. U.S.,* 83 F.3d 587, 589 (2d Cir.1996).

### *A. The Eleventh Amendment*

The defendants argue that this Court lacks subject matter jurisdiction because the plaintiff is suing New York and the Eleventh Amendment bars suits against a state in federal court. The Eleventh Amendment of the Constitution states that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment bars a suit against a state by one of its citizens absent a waiver of immunity by the state. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Immunity under the Eleventh Amendment applies to actions against state officials who are sued in their official capacity where the state is the real party in interest. *See Farid v. Smith,* 850 F.2d 917, 921 (2d Cir .1988). Thus, suits for monetary damages against state officials in their official capacity are barred under the Eleventh Amendment. *See Ying Jing Gan v. City of New York,* 996 F.2d 522, 529 (2d Cir .1993). *Dube v. State University of New York,* 900 F.2d 587, 595 (2d Cir.1990).

***3** With respect to § 1983 actions, the Supreme Court has ruled that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). However, in *Hafer v. Melo,* 502 U.S. 21, 30–31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) the Supreme Court held that state officials can be sued in their individual capacity under § 1983, and reaffirmed that the Eleventh Amendment does not protect state officials accused of depriving an individual of federal rights under the color of state law. Additionally, when a defendant is being sued in an official capacity for alleged constitutional violations, a federal court may award prospective injunctive relief that governs an official's future conduct. *See Edelman v. Jordan,* 415 U.S. 651, 663–64, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Plaintiff is suing defendants in their official and individual capacity. Since plaintiff is seeking monetary damages rather than injunctive relief, the claims against defendants in their official capacity must be dismissed under the Eleventh Amendment. However, defendants have no Eleventh Amendment immunity with respect to claims brought against them in their individual capacity. *See Ying Jing Gan,* 996 F.2d at 529. Therefore, the Eleventh Amendment does not prohibit plaintiff from pursuing her § 1983 claims against all the defendants individually.

### *B. The Eighth Amendment*

The defendants assert that the plaintiff fails to state a valid claim under the Eighth Amendment. In order to establish a violation of the Eighth Amendment, plaintiff must demonstrate that defendants acted with deliberate indifference to her serious medical needs. *See Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In other words, a serious deprivation must occur and defendants must act with "a sufficiently culpable state of mind." *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct.

2321, 115 L.Ed.2d 271 (1991). In my first opinion, I ruled that plaintiff had alleged a sufficiently serious deprivation of medical needs pertaining to her back condition. *See Thomas v. Coombe,* 1998 WL 20000 at *2 (S.D.N.Y. Jan.20, 1998). Thus, the only new issue raised by the defendants is whether plaintiff alleged facts that could lead to a conclusion that the prison guards at Bedford Hills as well as Dr. Fernandez and Tom Parise acted with deliberate indifference. [6]

"[T]he deliberate indifference standard requires the plaintiff to prove that the prison officials knew of and disregarded the plaintiffs serious medical needs." *See Chance v. Armstrong,* 143 F.3d 698, 1998 WL 228075 at *5 (2d Cir. May 7, 1998). In *Koehl v. Dalsheim,* the district court dismissed a *pro se* inmate's claim that prison officials unconstitutionally deprived him of his medically prescribed tinted eye-glasses and the medical attention he needed for his eye condition. 85 F.3d 86, 87 (2d Cir.1996). On appeal, the Second Circuit reversed the dismissal and concluded that the claim against the prison officials who confiscated the eye-glasses should proceed since plaintiff could potentially produce evidence that these officials were aware of the serious medical need for the eye-glasses. *Id.* at 88.

***4** Here, with the exception of Officer O'Conner, plaintiff repeatedly declares in her Complaint that she informed the prison guards of her medical condition and that she was in extreme pain. (Compl. pp. 2–6) Therefore, consistent with *Koehl,* I find that the plaintiff adequately states a claim that Sergeant Beckel, Officer Laba and Officer Irwin acted with deliberate indifference. Accordingly, I deny the motion to dismiss with respect to these defendants. Conversely, the plaintiff does not allege facts that could lead to the conclusion that Officer O'Conner had knowledge of her serious medical condition. Rather, she simply claims that Officer O'Conner was informed by Nurse Meyer that "plaintiff could still wear her work boot." (Compl. p. 4) That is not a sufficient basis to draw an inference of knowledge. Consequently, the motion to dismiss Officer O'Conner is granted.

The allegations against Dr. Fernandez and Tom Parise, however, adequately plead deliberate indifference to the plaintiffs medical needs. With respect to Dr. Fernandez, the plaintiff alleges that he refused to provide the medication and therapy prescribed by specialists, reschedule surgery and that he improperly removed the heavy lifting restriction. (Compl. p. 6) As to defendant Parise, the plaintiff claims that she informed him of her back condition and her inability to work, but was nonetheless told to continue her mess hall duties, including heavy lifting. (Compl. pp. 2–3) Given the alleged severity of plaintiff's back condition, the conduct engaged in, if true, permits the inference that Dr. Fernandez and Parise acted with deliberate indifference. *See, e.g., Chance,* 143 F.3d 698, 1998 WL 228075 at *5 (allegation that physician recommended unnecessary dental treatment based on monetary incentives rather than medical considerations stated Eighth Amendment claim). Accordingly, the motion to dismiss is also denied with respect to Parise and Dr. Fernandez.

*C Qualified Immunity*

As a general matter, "the defense of qualified immunity cannot support the grant of a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted." *Green v. Maraio,* 722 F.2d 1013, 1018 (2d Cir.1983) (citation omitted). [7] There are two prongs to the qualified immunity defense. First, "[a] government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Jermosen v. Smith,* 945 F.2d 547, 550 (2d Cir.1991) (citations and internal quotations omitted). Second, even where the law is clearly established an official will still be entitled to qualified immunity "if it was objectively reasonable for [the government actor] to believe that his actions were lawful at the time of the challenged act." *Doe v.. Marsh,* 105 F.3d 106, 109–10 (2d Cir.1997) (citations and internal quotations omitted).

***5** In the instant case, it is clearly established that inadequate medical care can give rise to an Eighth Amendment constitutional violation where prison officials are deliberately indifferent to an inmate's serious medical needs. *See Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Hathaway v. Coughlin,* 37 F.3d 63, 66 (2d Cir.1994). Sergeant Beckel, Officer Laba and Officer Irwin argue in conclusory fashion, nonetheless, that their actions were objectively reasonable since they were allegedly within DOCS regulations. The defendants, unfortunately, fail to specify in their papers the particular DOCS regulations that led to or authorized their conduct. Notwithstanding this omission, a dismissal

  

of the claims on the basis of qualified immunity would in any event be premature since I have held that sufficient allegations exist to support a claim that these prison guards were deliberately indifferent to the plaintiffs serious medical condition. *See Hathaway,* 37 F.3d at 69 ("Assuming that [defendant] was deliberately indifferent to [inmate's] serious medical needs, he is not entitled to qualified immunity because it would not be objectively reasonable for him to believe that his conduct did not violate [the inmate's] rights."). Consequently, the motion to dismiss on the basis of qualified immunity is denied.

*D. Personal Involvement under § 1983*

With respect to defendants Coombe, Lord and Krum, the Attorney General argues that they lack the requisite personal involvement to be liable under 42 U.S.C. § 1983, which provides a cause of action for damages against an individual who deprives another person of her constitutional rights under the color of state law. In order to prevail in a § 1983 claim for damages, defendants must have personal involvement in the alleged deprivation of an individual's constitutional rights. *See Bass v. Jackson,* 790 F.2d 260, 263 (2d Cir.1986). Liability under § 1983 may not be based on the doctrine of respondent superior or vicarious liability. *See Godson v. Goord,* 1997 WL 714878, at *9 (S.D.N.Y. Nov.17,1997); *Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Personal involvement may exist where a defendant: (1) directly participates in the alleged events; (2) fails to rectify a constitutional violation after learning of the situation; (3) creates or allows to continue a policy of unconstitutional practices; or (4) commits gross negligence in overseeing the subordinates responsible for the constitutional violation. *See Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994).

Defendants Coombe, Lord, and Krum argue that they were not personally involved. Plaintiff does not make any specific factual allegations against Commissioner Coombe and Superintendent Lord beyond stating they failed to carry out their duties or rectify the violations once they became aware of them. (Compl. p. 1) It is not enough to allege that officials failed to carry out the duties of their office without defining these duties or how each defendant failed to meet them. *See Beaman v. Coombe,* 1997 WL 538833, at *3 (S.D.N.Y. Aug.29, 1997). With respect to Nurse Krum, plaintiff alleges that the "supervising staff nurse was made aware of the problems [of staff] failing to follow protocols." (Compl. pp. 5–6) Plaintiff also alleges that Nurse Krum did not attempt to rectify the unconstitutional actions of the nursing staff. (Compl. p. 6) Further, plaintiff states that she "used the grievance committee and wrote letters to the supervising officials [complaining] of inadequate medical treatment," but does not name Coombe, Krum or Lord. (Compl. p. 6)

***6** I will assume that plaintiff wrote letters to defendants Coombe, Lord, and Krum because a court must liberally construe the complaint of a *pro se* litigant. However, the fact that an official ignored a letter alleging unconstitutional conduct is not enough to establish personal involvement. *See Gayle v. Lucas,* 1998 WL 148416, at *4 (S.D.N.Y. Mar.30, 1998); *Higgins v. Coombe,* 1997 WL 328623, at *11 (S.D.N.Y. Jun.16, 1997). Furthermore, a plaintiff cannot bring a § 1983 claim against individuals based solely on their supervisory capacity or the fact that they held high positions of authority. *See Hernandez v. Artuz,* 1996 WL 631707, at *2 (S.D.N.Y. Oct.30, 1996); *Black v. Coughlin,* 76 F.3d 72, 74 (2d Cir.1996). Therefore, the claims against Commissioner Coombe, Nurse Krum, and Superintendent Lord must be dismissed since none of the defendants were personally involved in the alleged constitutional violations.

*E. Transfer of Venue under § 1404(a)*

Dr. Fernandez, Director of Health Services at Albion, moves for a transfer of venue under 28 U.S.C. § 1404(a). As an initial matter, I am unclear as to where defendant wants this case transferred. The defendant elaborates at some length on how it would be more convenient to litigate the case in the Western District of New York, but concludes by asking this Court to transfer the case to the Northern District of New York.

Under § 1404(a), a district court "[f]or the convenience of parties and witnesses [and] in the interest of justice ... may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). District courts have broad discretion in deciding whether to transfer a case based on notions of convenience and fairness. *See In Re Cuyahoga Equipment Co.,* 980 F.2d 110, 117 (2d Cir.1992). A district court may consider several factors in deciding whether a § 1404 transfer would promote the interests of justice and the convenience of the parties and witnesses: (1) the existence of a forum selection clause; (2) the locus of events giving rise to the action; (3) convenience of the parties; (4) convenience

  

of the witnesses; (5) relative ease of access to proof; (6) availability of process to compel witnesses to testify at trial; (7) weight accorded to the plaintiff's choice of forum; (8) forum's familiarity with the governing law; (9) trial efficiency; and (10) the interest of justice. *See Ramada Franchise Systems, Inc. v. Cusack Develop., Inc.,* 1997 WL 304885, at *2 (S.D.N.Y. Jun.6, 1997). The moving party has the burden of establishing that these factors compel a change of forum. *Id.* Furthermore, a plaintiff's choice of forum is generally accorded substantial weight. *See Brown v. Dow Corning Corp.,* 1996 WL 257614, at *2 (S.D.N.Y. May 15, 1996).

Dr. Fernandez's main argument for having the case severed and transferred is that venue in the Southern District of New York would severely inconvenience him and potential witnesses from Albion, who are based in Orleans County, located in the Western District of New York. Indeed, the location of witnesses is an important factor for a court to consider when deciding a transfer of venue motion. *See 800–Flowers, Inc. v. Intercontinental Florist, Inc.,* 860 F.Supp. 128, 134 (S.D.N.Y.1994). However, plaintiff alleges that officials at Bedford Hills, as well as Dr. Fernandez at Albion, failed to provide treatment prescribed by specialists for her back condition. If the case was severed the medical testimony regarding plaintiff's back condition would have to be repeated at Dr. Fernandez's separate trial. Certain witnesses would potentially have to testify at two trials in two different locations. Furthermore, plaintiff is proceeding *pro se,* and severance would put the burden on her of preparing for two trials. Thus, severance and transfer of the case against Dr. Fernandez would neither promote trial efficiency, nor the interest of justice. The defendant fails to make an argument that overcomes the great weight to which plaintiff's choice of forum is entitled. *See Clarkson v. Coughlin,* 783 F.Supp. 789, 800 (S.D.N.Y.1992). Accordingly, the motion to sever the case and transfer venue with respect to Dr. Fernandez is denied.

### III. Conclusion

***7** For the reasons discussed above, the motion to dismiss is GRANTED with respect to defendants Coombe, Lord, Krum and O'Conner. The motion is DENIED with respect to all other named defendants. The motion to sever the case and transfer the action against Dr. Fernandez is DENIED. The trial will begin on July 22, 1998 at 9:30 a .m.

**SO ORDERED**

**All Citations**

Not Reported in F.Supp., 1998 WL 391143

Footnotes

1 Plaintiff has also named the following individuals as defendants: Elaine Lord, Superintendent of Bedford Hills Correctional Facility ("Bedford Hills"), Sergeant R. Beckel from Bedford Hills, Officers Laba, O'Conner, and Irwin from Bedford Hills, Dr. Barbara Griffin, Director of the Medical Department at Bedford Hills, Tom Parise, Food Administrator at Bedford Hills, Lee Krum, Supervising Nurse at Bedford Hills, and Dr. Fernandez, Director of Health Services at the Albion Correctional Facility.

2 Carolyn Hahn, a second year student at the Georgetown University Law Center, assisted in the research and preparation of this decision.

3 Defendants are all represented by the Attorney General's office. The Attorney General failed to name Dr. Griffin as a defendant he represented, but I will assume she is represented by the Attorney General since Dr. Griffin is a state employee.

4 There is no longer any dispute with respect to the medical treatment that is the subject of the injunctive relief initially granted in this Court's previous decision.

5 In my first opinion, I ruled that plaintiff's Eighth Amendment claim should not be dismissed on the ground that she failed to establish deliberate indifference to serious medical needs. *See Thomas v. Coombe,* 1998 WL 20000, at *2–3 (S.D.N.Y. Jan.28, 1998). I also rejected defendants' argument that the case should be dismissed on qualified immunity grounds. *Id.* at *3. I denied defendant Coombe and defendant Krum's motion to dismiss and granted plaintiff leave to amend her Complaint. *Id.* at *3–4. Plaintiff, however, failed to amend her Complaint with respect to these defendants.

  

6 Dr. Griffin, the Director of the Medical Department at Bedford Hills featured prominently in the plaintiff's Complaint, does not raise any novel arguments. I address the validity of the claims against defendants Coombe, Lord and Krum in section II.D of the decision.

7 However, such a motion may be granted where the complaint itself establishes the circumstances required for a finding of qualified immunity. *Id.* at 1019. That is not the case in this instance.