

2003 WL 22170610

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

Andrew WILLIAMS, Plaintiff,

v.

Brian FISHER, Joseph Smith, John Perilli,
Kimberley Capuano, Phillip Williams,
Thomas Eagan, John MacNamara, Robert
Krusen, John Clark, Enrique Maldonado,
Melvin Goffe and Mr. Abraham, Defendants.

No. 02 Civ. 4558(LMM).

|
Sept. 18, 2003.**Synopsis**

Prison defendants moved to dismiss prisoner's civil rights action alleging deliberate indifference to a serious medical condition and retaliation. The District Court, [McKenna, J.](#), held that: (1) prisoner adequately pled a claim of deliberate indifference to a serious medical condition against members of prison's security personnel; (2) allegations that a prison official failed to follow the orders of outside specialists and prison doctors were sufficient to satisfy the deliberate indifference standard of Eighth Amendment; (3) no section 1983 claim was stated against prison supervisory official since prisoner's allegations were conclusory in nature and failed to show how official was personally involved in the alleged constitutional violation; (4) prisoner stated valid claim of retaliation based on allegations that prison doctor revoked his necessary medical rehabilitative treatment because he filed a grievance against prison security personnel; and (5) qualified immunity would not shield prison defendants from § 1983 liability for deliberate indifference to prisoner's serious medical condition.

Motion granted as to one supervisory official and denied as to remaining defendants.

West Headnotes (8)

[1] Civil Rights

🔑 [Prisons and Jails; Probation and Parole](#)

Prisoner adequately pled a claim of deliberate indifference to a serious medical condition against members of prison's security personnel where he alleged that they deliberately denied and/or delayed the express instructions and orders of various outside orthopedic specialists and prison doctors. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

[1 Cases that cite this headnote](#)

[2] Civil Rights

🔑 [Prisons and Jails; Probation and Parole](#)

Prisoner adequately pled a claim of deliberate indifference to a serious medical condition against prison physician's assistant where he alleged that assistant failed to follow a doctor's prescribed orders. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

[1 Cases that cite this headnote](#)

[3] Civil Rights

🔑 [Prisons and Jails; Probation and Parole](#)

Prisoner adequately pled a claim of deliberate indifference to a serious medical condition against corrections officer who allegedly disregarded prisoner's medical elevator pass as well as the instructions of prisoner's physical therapist. [U.S.C.A. Const.Amend. 8](#); [42 U.S.C.A. § 1983](#).

[Cases that cite this headnote](#)

[4] Prisons

🔑 [Particular Conditions and Treatments](#)

Sentencing and Punishment

🔑 [Medical Care and Treatment](#)

Allegations that a prison official failed to follow the orders of outside specialists and prison doctors were sufficient to satisfy the deliberate indifference standard of Eighth Amendment. [U.S.C.A. Const.Amend. 8](#).

[1 Cases that cite this headnote](#)

[5] Civil Rights

🔑 [Prisons and Jails; Probation and Parole](#)

No § 1983 claim was stated against prison supervisory official since prisoner's allegations were conclusory in nature and failed to show how official was personally involved in the alleged constitutional violation resulting from failure to honor prisoner's medical passes; only allegation regarding the actions of supervisory official was that he wrote general memoranda to the prison staff concerning the creation of unofficial policies and the honoring of inmate medical passes, and there were no allegations that supervisory official himself was aware of prisoner's personal claims. [42 U.S.C.A. § 1983](#).

[4 Cases that cite this headnote](#)

[6] [Civil Rights](#)

🔑 [Prisons and Jails; Probation and Parole](#)

Prisoner's allegations stated § 1983 claim against prison supervisory official since prisoner sufficiently alleged personal involvement of official in the alleged constitutional violation resulting from failure to honor prisoner's medical passes and failure to follow the orders of outside specialists and prison doctors; official allegedly investigated prisoner's grievance against the members of security personnel and responded in their favor, and changed or tried to change the orders of prison doctor, the outside orthopedic specialists and several of the physical therapists. [42 U.S.C.A. § 1983](#).

[6 Cases that cite this headnote](#)

[7] [Civil Rights](#)

🔑 [Prisons and Jails; Probation and Parole](#)

Prisoner stated valid claim of retaliation under § 1983 based on allegations that prison doctor revoked his necessary medical rehabilitative treatment because he filed a grievance against prison security personnel; allegations showed a causal connection between the constitutionally protected activity of filing a grievance and the adverse action. [42 U.S.C.A. § 1983](#).

[5 Cases that cite this headnote](#)

[8] [Civil Rights](#)

🔑 [Prisons, Jails, and Their Officers; Parole and Probation Officers](#)

Qualified immunity would not shield prison defendants from § 1983 liability for deliberate indifference to prisoner's serious medical condition. [U.S.C.A. Const. Amend. 8](#); [42 U.S.C.A. § 1983](#).

[3 Cases that cite this headnote](#)

MEMORANDUM AND ORDER

MCKENNA, J.

*1 Andrew Williams (“Plaintiff”) an inmate at Sing Sing Correctional Facility (“Sing Sing”), brings this pro se civil rights action pursuant to [42 U.S.C. § 1983](#) against Defendants Brian Fisher (Superintendent), Joseph Smith (First Deputy Superintendent), John Perilli (Facility Health Service Director), Kimberly Capuano (Nurse Administrator), Phillip Williams (Physicians Assistant), Thomas Eagan (Grievance Director), John MacNamara (Sergeant), Robert Krusen (Sergeant), John Clark (Corrections Officer), Enrique Maldonado (Corrections Officer), Melvin Goffe (Corrections Officer) and Mr. Abraham (Physical Therapist) for reckless and deliberate indifference to his serious medical needs in violation of his constitutional rights under the Eighth Amendment. Plaintiff seeks injunctive relief as well as compensatory and punitive damages from each of the named Defendants.

Defendants filed a motion to dismiss the Amended Complaint pursuant to [Federal Rules of Civil Procedure 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#) on the grounds that: (1) Plaintiff has failed to state a claim against all Defendants of deliberate indifference to serious medical needs upon which relief can be granted; (2) Plaintiff has failed to allege the personal involvement of Defendants Fisher and Eagan in the alleged constitutional violation; (3) Plaintiff has failed to establish a claim of retaliation against Defendant Perilli; and 4) all Defendants are entitled to qualified immunity.

Statement of Facts ¹

On September 12, 1996 Plaintiff fell down a flight of stairs injuring his back. (Am. Compl. at 1). On January 25, 1997 an MRI was taken of Plaintiff's lumbar spine and the results revealed that Plaintiff had a central and bilateral disc herniation of the L5-S1, slightly larger on the left which reaches the SAC and the S1 nerve root. (*Id.* at 1-2). The MRI also revealed that at L4-5 there was a left foraminal and extra-foraminal disc herniation compromising the left nerve root. (*Id.* at 2). In addition to the disc herniation, Plaintiff also suffers from [degenerative disc disease](#) and [hip bursitis](#). (*Id.*)

In December 1997, Plaintiff underwent surgery for his spinal injuries. (*Id.*) The surgery relieved the needle sensation Plaintiff had been experiencing, but Plaintiff continued to suffer from: (a) pain and spasms of the lumbosacral spine; (b) radiation of pain and spasms from the lumbar spine and hip down to the left leg and foot; (c) radiation of pain and spasms from the thoracic spine; and (d) pain radiating down his left arm causing numbness and needle sensation to his left thumb. (*Id.*) In addition, prior to the surgery Plaintiff was diagnosed with cervical spine herniation which occasionally causes him problems. (*Id.*) Due to his back injuries, Plaintiff has difficulty bending and twisting, is unable to move or lift heavy objects, and is unable to sit or stand for long periods of time. (*Id.*)

Plaintiff was referred to an outside orthopedic specialist, Dr. Galeno, and his assistant, at St. Agnes Hospital for treatment. (*Id.*) Dr. Galeno ordered or recommended that Plaintiff receive daily hot morning showers as part of a home therapeutic program to reduce pain and spasms and to facilitate bending and stretching. (*Id.*) The reason "morning" showers were ordered was because this is the time of day Plaintiff is in the most pain and has the greatest difficulty functioning. (Pl. Opp. Br. at 3). The same daily morning heat treatment was ordered or recommended by Dr. Holder, another physician at St. Agnes Hospital, as well as by several physical therapists. (Am. Compl. at 2).

*2 On April 30, 1999, Plaintiff was issued his first medical pass to receive daily morning heat treatment, by Dr. Lofton, the former Facility Health Service Director at Sing Sing. (*Id.*) Dr. Lofton approved the treatment program on three additional occasions from July 8, 1999-September 14, 1999. (*Id.*) Subsequently, when Dr. Perilli

took over as the Facility Health Service Director at Sing Sing, he also approved the daily morning heat treatment on four separate occasions from November 16, 1999-August 5, 2000. (*Id.*)

Defendants Goffe, Maldonado, Krusen, ² MacNamara and Smith

Plaintiff alleges that members of the prison's security personnel, specifically Defendants Goffe, Maldonado, Krusen, MacNamara and Smith, repeatedly refused to comply with his medical passes denying him his daily morning heat treatment in violation of his constitutional rights. (*Id.*) Plaintiff states that he first presented his medical pass to Galley Officers Goffe and Maldonado in April of 1999. (*Id.*) These Officers told Plaintiff that he could not have his daily morning heat treatment because there was a block policy requiring inmate showers be given only on the 3 p.m. to 11 p.m. shift. ³ (*Id.*)

After Officers Goffe and Maldonado refused to honor Plaintiff's medical pass for morning showers, Plaintiff raised the issue with Defendants Krusen and MacNamara. (*Id.* at 2-3) They both concurred with the Galley Officers that the existing block policy allowed inmate showers only during the 3 p.m. to 11 p.m. shift. (*Id.*) Subsequently, Plaintiff filed a grievance with Sing Sing's grievance committee regarding Defendants' noncompliance with his medical pass for daily morning heat treatment. (*Id.* at 3).

In response to Plaintiff's grievance, Defendant Eagan, a director at the central review committee in Albany, called Sing Sing to conduct an investigation. (*Id.*) Defendants Krusen and MacNamara communicated the existing block policy regarding inmate showers to Defendant Eagan. (*Id.*) Eagan also spoke with Defendant Smith, who communicated the same information concerning the block policy, and who additionally stated that there was no medical determination as to why Plaintiff needed morning showers. (*Id.*) Consequently, Eagan denied Plaintiff's grievance, stating that there was no requirement for Plaintiff to receive a morning daily shower and that what the doctor meant by "AM" was during the day and not a specific time. (*Id.* (citing grievance no: 30163-99)). Plaintiff asserts that Dr. Perilli and Dr. Halko (treating physician) specifically wrote "AM only (morning)" on the order to clarify that morning showers were necessary. (*Id.*) Additionally, Plaintiff asserts that his medical records

clearly indicate the reason, time and purpose for the treatment. (*Id.*)

In addition to the medical pass for daily morning heat treatment, Plaintiff was also issued bus, elevator, cane, flats and feed-up passes. (*Id.* at 5). At the same time Plaintiff presented his daily morning heat treatment pass to Goffe and Maldonado, Plaintiff also presented his feed-up and flats pass.⁴ (*Id.*) While Defendants Goffe and Maldonado refused to honor Plaintiff's pass for daily morning heat treatment, they told him they would work on his feed-up and flats passes. (*Id.*)

*3 The feed-up pass was honored about a month and a half after it was issued. (*Id.* at 5) However, it took approximately eighteen months to move Plaintiff to the flats, despite the fact that Plaintiff received flats passes every two to three months and made several requests to Defendants Goffe, Maldonado and Krusen. (*Id.* at 5-6). Plaintiff claims that when he continued to ask to be moved to the flats, Defendants Goffe and Maldonado told him, "the more you ask the longer you will wait." (Pl. Opp. Br. at 5). Plaintiff was finally moved to the flats in October of 2000. (Am. Compl. at 4). Plaintiff was told by Defendant Krusen that there had been a delay because all of the cells on the flats were occupied. (*Id.* at 6). However, Plaintiff asserts that other prisoners were being moved to the flats daily. (Pl. Opp. Br. at 5). Plaintiff claims that the Officers and Sergeants' acted with deliberate indifference to Plaintiff's serious medical condition by denying him his daily morning heat treatment and delaying his move to the flats. (Am. Compl. at 6).

Defendant Perilli

From November 16, 1999-August 5, 2000, Dr. Perilli and Dr. Halko approved Plaintiff's recommended daily morning heat treatment on four separate occasions. (*Id.* at 2). After Plaintiff filed a grievance against members of security for refusing to comply with his medical pass, a meeting was held with Dr. Perilli and members of security.⁵ (*Id.* at 3). After discovering Plaintiff had filed a grievance against these individuals, Dr. Perilli became reluctant to continue ordering the treatment, despite the fact that he had been issuing Plaintiff his medical passes for almost a year. (*Id.*) Plaintiff claims that Dr. Perilli told him that the security staff wanted him to reduce the number of medical passes issued to the inmate population and that he was revoking Plaintiff's medical pass to

comply with the security personnel's protocol. (*Id.*) After Dr. Perilli rescinded Plaintiff's medical pass, Plaintiff filed a grievance against him. (*Id.*) This grievance was denied by Defendant Fisher and the central review committee in Albany. (*Id.* (citing grievance no: 33781)).

In October of 2000, Plaintiff was moved to the flats where he received his daily morning heat treatment for one month. (*Id.* at 4). After receiving the treatment, Plaintiff's condition improved. (*Id.* at 5 (citing Plaintiff's medical chart dated 11/3/00)). On November 20, 2000 and May 1, 2001, Dr. Perilli noted in Plaintiff's medical chart that there was no medical indication for the daily morning heat treatment and that the outside specialist's orders or recommendations were simply received by him for appreciation.⁶ (*Id.* at 3). Plaintiff's pass was revoked despite the fact that Plaintiff's condition had improved after receiving the daily morning heat treatment for one month. (*Id.* at 4). Plaintiff claims that Dr. Perilli's revocation of Plaintiff's medical pass was deliberately indifferent to Plaintiff's serious medical condition and was done in retaliation for Plaintiff filing a grievance against members of security.

Defendant Williams

*4 On March 31, 2000, Dr. Halko wrote a prescription for plaintiff to receive his daily morning heat treatment. (*Id.* at 5). Plaintiff asserts that the physicians assistant, Defendant Williams, cancelled Dr. Halko's order and wrote "not indicated." (*Id.*) Plaintiff asserts Defendant Williams acted with deliberate indifference to Plaintiff's serious medical needs.

Defendant Clark

On or about April 15, 2000, Plaintiff began receiving physical therapy for his back injuries at Fishkill Correctional Facility ("Fishkill"). (*Id.* at 6). On one occasion, Plaintiff arrived at Fishkill and the escorting Officer, Defendant Clark, informed Plaintiff that he had to walk up six flights of stairs to the treatment unit because the elevator was out of service. (*Id.*) Plaintiff walked up the stairs with difficulty and while waiting on the medical unit to be called, Plaintiff viewed people exiting the elevator. (*Id.*) Plaintiff and the transportation officers inquired about the functioning of the elevator and realized Officer Clark's statement concerning the elevator was false. (*Id.*) Plaintiff brought this issue to the attention of his physical therapist, Mr. Karlo, who at the end of the therapy session

requested Defendant Clark use the elevator to transport the Plaintiff back down the stairs. (*Id.*) At this time, Plaintiff also presented his Sing Sing medical elevator pass to Defendant Clark. (*Id.*)

Despite Mr. Karlo's request and Plaintiff's medical elevator pass, which Officer Clark stated was not valid at Fishkill, Plaintiff was not allowed to take the elevator and had to walk down the six flights of stairs. (*Id.* at 7). Transportation Officers Brown and McCall issued reports concerning the incident.⁷ (*Id.* (citing To-Forms, grievance no: 31413)). Despite Plaintiff's difficulty with the stairs, the medical staff at Sing Sing continued to send him to Fishkill for therapy. (*Id.*) However, after a brief period of time Plaintiff had to stop attending the therapy sessions because he was unable to climb the stairs.⁸ (*Id.* (citing medical chart dated 12/18/00 and 12/19/00)).

Plaintiff asserts that Defendant Clark's refusal to comply with the physical therapist's order to use the elevator and his refusal to honor Plaintiff's elevator pass demonstrated reckless and deliberate indifference to Plaintiff's serious medical needs.

Defendant Abraham⁹

Upon returning to Fishkill for therapy, Plaintiff began seeing the new physical therapist, Mr. Abraham. (*Id.* at 7). Plaintiff noticed changes had taken place at the hospital and although prescribed, Plaintiff was no longer allowed to use the exercise machines, practice stretching techniques or receive massages. (*Id.*) Plaintiff alleges that he informed Dr. Halko and Dr. Galeno of the changes in his therapy program and they both reiterated to Plaintiff that he should be able to use the machines, practice the exercise techniques and receive massages. (*Id.*) Plaintiff claims that when he relayed this information to Mr. Abraham, Mr. Abraham stated that he did not touch inmates and that the only treatment given at Fishkill was heat and electric shock. (*Id.*) Because Mr. Abraham refused to comply with the outside orthopedic specialist's recommendations, Plaintiff filed a grievance against him. (*Id.* at 7-8).

*5 Plaintiff asserts that Mr. Abraham demonstrated reckless and deliberate indifference to Plaintiff's serious medical needs by: (1) not complying with the outside orthopedic specialist's recommendations, (2) refusing to massage Plaintiff according to doctor's orders, (3) not

allowing Plaintiff to practice any muscle strengthening exercises, and (4) not allowing Plaintiff to use the muscle strengthening machines. Moreover, according to Plaintiff, Mr. Abraham did not instruct him in any rehabilitative treatment. (*Id.* at 8).

Defendants Eagan and Capuano

Plaintiff alleges that in September of 1999 he filed a grievance against various members of Sing Sing's security personnel for their noncompliance with the medical passes he had been issued for daily morning heat treatment. (*Id.* at 4). Defendant Eagan, a member of the central review committee in Albany, called Sing Sing to investigate Plaintiff's grievance. (*Id.*) According to Plaintiff's medical chart dated December 23, 1999, Nurse Administrator Capuano told Eagan that Plaintiff did not need the recommended daily morning heat treatment. (*Id.*)

Eagan answered Plaintiff's grievance stating that there was no requirement for Plaintiff to receive the daily morning heat treatment and that "it [was] noted that the grievant's medical records now indicate that the heat treatment can be given at any time." (*Id.*) Plaintiff also alleges that Defendants Capuano and Eagan actually changed or tried to change the orders of Dr. Halko, the outside orthopedic specialists, and several other physical therapists. (*Id.*)

Pursuant to the investigation of Plaintiff's grievance against Defendant Abraham, Plaintiff claims that Defendant Capuano told the grievance committee that the orthopedic specialist recommended only heat and muscle strengthening. (*Id.* at 8). However, Plaintiff asserts that the outside orthopedic specialist specifically recommended "physical therapy with heat, massages and muscle strengthening exercises." (*Id.*) Plaintiff claims that Defendant Capuano intentionally gave inaccurate information to the grievance committee to undermine Plaintiff's treatment. (*Id.*) Plaintiff further alleges that he submitted a Freedom of Information Law ("FOIL") request to Defendant Capuano to have his medical records presented at the grievance hearing, but the records were withheld. (*Id.*) Consequently, Plaintiff filed a grievance against Defendant Capuano for noncompliance with Plaintiff's FOIL request. (*Id.* (citing grievance no: 35831-02)). Plaintiff asserts that the withholding of Plaintiff's medical records prevented the grievance department from making an accurate assessment concerning Plaintiff's treatment.

Defendant Fisher

Plaintiff alleges that there have been ongoing problems at Sing Sing with prison officials devising their own rules and not following the institution's policies and procedures. (Pl. Opp. Br. at 9). In response to inmate complaints, Defendant Fisher issued several memoranda instructing employees to discontinue this practice. (*Id.*) Plaintiff claims that after he filed a grievance against the security personnel for noncompliance with his medical passes, Defendant Fisher was put on notice of the alleged constitutional violations through an appeal process, but he failed to remedy the situation. (*Id.*) Additionally, Plaintiff alleges that Defendant Fisher failed to supervise subordinates. (*Id.*)

Injury

*6 Plaintiff claims that he continues to suffer from pain and spasms of the thoracic and lumbar spine. (Am. Comp. at 8). The pain Plaintiff suffers in his lower scapula, hip, left foot, left arm and left thumb are new developments. (*Id.*) On June 11, 2001, a second MRI was taken of Plaintiff's lumbar spine which showed a [herniated disc](#) in Plaintiff's left foramen of L4-5 that was not indicated on the previous MRI taken in 2000. (*Id.* at 8-9). Plaintiff no longer has to climb stairs to receive therapy and he has been moved to the flats, although it took a year and a half for prison officials to accomplish the move. (*Id.* at 9). Plaintiff still is not receiving the recommended daily morning heat treatment as part of his home therapeutic program. (*Id.*)

Legal Standard

On a motion to dismiss for failure to state a claim upon which relief can be granted under [Rule 12\(b\)\(6\)](#), the court must accept as true all allegations set forth in the complaint and draw all positive inferences in favor of the pleader. See [Johnson v. Wright](#), 234 F.Supp.2d 352, 358 (S.D.N.Y.2002). A case should be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Chance v. Armstrong](#), 143 F.3d 698, 701 (2d Cir.1998) (quoting [Conley v. Gibson](#), 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "At the [Rule 12\(b\)\(6\)](#) stage, 'the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on

the face of the pleading that a recovery is very remote and unlikely but that is not the test.'" [Sims v. Artuz](#), 230 F.3d 14, 20 (2d Cir.2000) (quoting [Chance](#), 143 F.3d at 701). Furthermore, since the Plaintiff is proceeding pro se his submissions should be judged on a more lenient standard than that accorded to formal pleadings drafted by lawyers. See [Johnson](#), 234 F.Supp.2d at 359 ("Since most pro se plaintiffs lack familiarity with the formalities of pleading requirements, [a court] must construe pro se complaints liberally, applying a more flexible standard to evaluate their sufficiency." (quoting [Lerman v. Bd. of Elections](#), 232 F.3d 135, 139-49 (2d Cir.2000)); see also [McNeil v. United States](#), 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993).

Discussion

A plaintiff has a civil cause of action under [§ 1983](#) against:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

[42 U.S.C. § 1983](#).

Plaintiff brings this action under [§ 1983](#) alleging Defendants acted with deliberate indifference to his serious medical needs in violation of his rights under the Eighth Amendment.

I. Deliberate Indifference

*7 The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes, which includes punishments that "involve the unnecessary and wanton infliction of pain." [Gregg v. Georgia](#), 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Supreme Court has held

that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ prescribed by the Eighth Amendment” and “states a cause of action under § 1983.” *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (citation omitted). “This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care, or intentionally interfering with the treatment once prescribed.” *Id.* The Second Circuit has interpreted the deliberate indifference standard to consist of both an objective and subjective prong. See *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir.1996).

1. *Serious Medical Need*

Under the objective prong of the deliberate indifference standard, the alleged deprivation must be sufficiently serious, “a condition of urgency, one that may produce death, degeneration or extreme pain.” *Chance*, 143 F.3d at 702 (quoting *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994)). At this time, for the purpose of Defendants' motion to dismiss, Defendants do not dispute that Plaintiff has pled an objectively serious injury. (Def. Mem. at 9). Therefore, the only question is whether Plaintiff has satisfied the subjective prong of the deliberate indifference analysis.

2. *Defendants' State of Mind*

Under the subjective prong, an official must act with a “ ‘sufficiently culpable state of mind’ in depriving the prisoner of adequate medical treatment.” *Johnson*, 234 F.Supp.2d at 360 (quoting *Hathaway*, 99 F.3d at 553). “An official acts with the requisite deliberate indifference when that official ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’ ” *Chance*, 143 F.3d at 702 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Therefore, “the subjective element of deliberate indifference entails something more than mere negligence ... [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Hathaway*, 99 F.3d at 553 (quoting *Farmer*, 511 U.S. at 835).

Allegations that prison officials denied or delayed recommended treatment by medical professionals may be sufficient to satisfy the deliberate indifference standard. See *Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir.1987) (“Prison officials are more than merely negligent if they deliberately defy the express instructions of a prisoner's doctor.”); see also *Johnson*, 234 F.Supp.2d at 361 (“Prison officials may not ‘substitute their judgments for a medical professional's prescription.’ ”) (quoting *Zentmyer v. Kendall County*, 220 F.3d 805, 812 (7th Cir.2000)); *Wandell v. Koenigsmann*, No. 99 Civ. 8652, 2000 U.S. Dist. LEXIS 10466, at *7 (S.D.N.Y. July 27, 2000) (“Proof of deliberate indifference may be found where a prison official or employee ‘intentionally denies or delay[s] access to medical care or intentionally interferes with the treatment once prescribed.’ ”) (quoting *Estelle*, 429 U.S. at 104-05)).

A. Defendants Goffe, Maldonado, Krusen, MacNamara and Smith

*8 [1] Plaintiff alleges that he was issued valid medical passes on numerous occasions by members of Sing Sing's medical staff (Dr. Lofton, Dr. Perilli and Dr. Halko) endorsing the outside orthopedic specialists' order or recommendation that Plaintiff receive daily morning showers for his spinal injury as part of a home therapeutic program. Plaintiff claims that for over a year and a half, he presented these medical passes to Defendants Goffe, Maldonado, Krusen, MacNamara and Smith, who consistently refused to follow doctor's orders and allow Plaintiff “AM” showers.

During the same time period, Plaintiff alleges that Defendants were presented with flats passes ordering that Plaintiff be moved from the fourth floor of the prison to the first floor, so he would no longer have to climb stairs to reach his cell. Despite being issued passes every two to three months and making numerous requests to these named Defendants, Plaintiff alleges that his flats passes were not honored for a year and a half. See *Hernandez v. Keane*, No. 00-0347, 2003 U.S.App. LEXIS 17066, at * 18 (2d Cir. Aug. 20, 2003) (stating that in *Hathaway*, 37 F.3d at 67, the court held “that a prolonged delay in treatment could support an inference of deliberate indifference”).

Because Plaintiff has adequately pled that Defendants Goffe, Maldonado, Krusen, MacNamara and Smith deliberately denied and/or delayed the express instructions

and orders of various outside orthopedic specialists and prison doctors, he has adequately pled a claim of deliberate indifference to a serious medical condition sufficient to survive a motion to dismiss. *See Gill*, 824 F.2d 192. Thus, Defendants' motion to dismiss the Amended Complaint against Defendants Goffe, Maldonado, Krusen, MacNamara and Smith is denied.

B. Defendant Williams

[2] Plaintiff alleges that on March 31, 2000, Dr. Halko wrote a prescription for Plaintiff to receive daily morning heat treatment. Plaintiff asserts that the physician's assistant, Defendant Williams, cancelled Dr. Halko's order and wrote "not indicated." Plaintiff asserts Defendant Williams' actions were deliberately indifferent to Plaintiff's serious medical needs. Once again, courts have held that the failure to follow a doctor's prescribed orders constitutes denial of adequate medical care. *See Gill*, 824 F.2d at 195. Therefore, Defendants' motion to dismiss the Amended Complaint against Defendant Williams is denied.

C. Defendant Clark

[3] On or about April 15, 2000, Defendant Clark, an officer at Fishkill, was presented with Plaintiff's Sing Sing elevator pass and was told by Plaintiff's treating physical therapist, Mr. Karlo, that Plaintiff should be allowed to take the elevator to and from the therapy unit on the sixth floor. According to Plaintiff's allegations, Defendant Clark disregarded Plaintiff's pass as well as the instructions from his physical therapist to use the elevator. Because Defendant Clark disregarded Plaintiff's medical elevator pass as well as the instructions of Plaintiff's physical therapist, Defendants' motion to dismiss the Amended Complaint against Defendant Clark is denied.

D. Defendant Eagan and Capuano

*9 [4] Plaintiff alleges that he filed a grievance in September of 1999 against various members of Sing Sing's security personnel. Defendant Eagan began an investigation of Plaintiff's grievance and received information from the Nurse Administrator, Defendant Capuano, in December of 1999 that Plaintiff did not need the daily morning heat treatment. This information was communicated to Defendant Eagan despite the fact that the treatment had been ordered or recommended by various specialists at St. Agnes Hospital and by doctors

on Sing Sing's medical staff since April 1999. Defendant Eagan's response to the grievance was that there was no requirement that Plaintiff receive the treatment in the morning. Additionally, Plaintiff claims that Defendants Eagan and Capuano changed or tried to change the orders of Dr. Halko and the outside orthopedic specialists.

Subsequently, in response to Plaintiff's grievance filed against Mr. Abraham for failure to follow the orders of the outside orthopedic specialists, Plaintiff alleges that Defendant Capuano gave the grievance committee false information concerning the treatment that had been ordered by the specialists and then failed to respond to Plaintiff's FOIL request to have his medical records produced during his grievance hearing. Because allegations that a prison official failed to follow the orders of outside specialists and prison doctors are sufficient to satisfy the deliberate indifference standard, Defendant's motion to dismiss Plaintiff's Amended Complaint against Defendants Eagan and Capuano is denied.

II. Personal Involvement and § 1983

To state a claim under § 1983, a plaintiff must allege the personal involvement of each defendant in the alleged constitutional violation. *See Woods v. Goord*, No. 01 Civ. 3255, 2002 U.S. Dist. LEXIS 7157, at * 22 (S.D.N.Y. April 24, 2002). Personal liability cannot be imposed on a state official on the basis of respondeat superior. *See Hernandez*, 2003 U.S.App. LEXIS 17066 at *14-15. Therefore, the Plaintiff must plead that the defendant had direct involvement in or responsibility for the alleged misconduct. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). A supervisory official may be personally involved in a § 1983 violation where:

- (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.*

A. Defendant Fisher

[5] The allegations set forth in Plaintiff's Amended Complaint against Defendant Fisher are conclusory in nature and fail to show how Defendant Fisher was personally involved in the alleged constitutional violation. The only allegation regarding the actions of Defendant Fisher is that he wrote general memoranda to the prison staff concerning the creation of unofficial policies and the honoring of inmate medical passes. (Pl. Opp. Br. at 9-10). There are no allegations that Defendant Fisher himself was aware of Plaintiff's personal claims. Moreover, it is unclear whether Defendant Fisher ever received any of Plaintiff's grievances personally, but even if he had received Plaintiff's grievances during the appeal process, allegations that a supervisor ignored an inmate's grievance letter of protest is insufficient to find that a supervisor is personally involved in an alleged constitutional violation. *See Zaire v. Artuz*, No. 99 Civ. 9817, 2003 U.S. Dist. LEXIS 1386, at *20-21 (S.D.N.Y. Feb. 4, 2003); *see also Walker v. Pataro*, No. 99 Civ. 4607, 2002 U.S. Dist. LEXIS 7067, at *42 (S.D.N.Y. April 23, 2002) ("where a supervisory official like the Commissioner of Corrections or a prison Superintendent receives letters or similar complaints from an inmate and does not personally respond, the supervisor is not personally involved and hence not liable"). Accordingly, Defendants' motion to dismiss the Amended Complaint against Defendant Fisher is granted.

B. Defendant Eagan

*10 [6] "On the other hand, where a supervisory official receives and acts on a prisoner's grievance (or substantially reviews and responds to some other form of inmate complaint), personal involvement will be found under the second Colon prong: 'the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong.'" *Walker*, 2002 U.S. Dist. LEXIS 7067 at *44 (quoting *Colon*, 58 F.3d at 873). Plaintiff alleges that Defendant Eagan investigated Plaintiff's grievance against the members of security and responded that there was no requirement that Plaintiff receive showers in the morning and that what the doctor meant by "AM" was

just sometime during the day. Plaintiff also alleges that Defendant Eagan changed or tried to change the orders of Dr. Halko, the outside orthopedic specialists and several of the physical therapists. These allegations plead the personal involvement of Defendant Eagan sufficiently to survive a motion to dismiss. Accordingly, the motion to dismiss for lack of personal involvement of Defendant Eagan is denied.

III. Retaliation

[7] The Second Circuit has held that prison officials may not retaliate against prisoners for exercising their constitutional rights. *See Colon*, 58 F.3d at 872 (citing *Franco v. Kelly*, 854 F.2d 584, 589 (2d Cir.1988)). However, because of the ease of fabricating a claim of retaliation, the Second Circuit requires the court to handle such claims with particular care. *See Davis v. Goord*, No. 01-0116, 2003 U.S.App. LEXIS 13030, at *13 (2d Cir. Feb. 10 2003). In order to survive a motion to dismiss on a First Amendment claim for retaliation, the Plaintiff must plead "non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected, (2) that defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Morales v. Mackalm*, 278 F.3d 126, 131 (2d Cir.2002)(quoting *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir.2001)).

1. Protected Conduct

The law is clear that the filing of a grievance is a constitutionally protected activity. *See Davis*, 2003 U.S.App. LEXIS 13030 at *13. Accordingly, Plaintiff has sufficiently pled the first element of a claim for retaliation.

2. Adverse Action

The second prong requires Plaintiff to adequately allege that a prison official subjected him to an adverse action. "To adequately plead an adverse action, a plaintiff must allege that defendants subjected him to 'conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'" *Morales*, 278 F.3d at 131 (citing *Dawes*, 239 F.3d at 493). Plaintiff alleges that after he filed a grievance against the members of security, the security personnel had a meeting with Dr. Perilli and told him to cut down on the number of medical passes issued to inmates. After discovering Plaintiff had filed this grievance, Dr. Perilli told Plaintiff

that he was reluctant to continue ordering the daily morning heat treatment. Plaintiff alleges that although Dr. Perilli had been approving Plaintiff's treatment for almost a year, he rescinded Plaintiff's medical pass, stating to Plaintiff that he had to go along with the security personnel's protocol.

*11 Allegations that Dr. Perilli revoked Plaintiff's necessary medical rehabilitative treatment because he filed a grievance are sufficient to satisfy the second element of a retaliation claim. Plaintiff should have the opportunity to develop facts that would demonstrate that the revocation of necessary rehabilitative treatment would deter a reasonable inmate from pursuing grievances.

3. Causal Connection Between Protected Speech and Adverse Action

"In order to satisfy the causation requirement, allegations must be 'sufficient to support the inference that the speech played a substantial part in the adverse action.'" *Davis*, 2003 U.S. Dist. LEXIS 13030 at *18 (quoting *Daves*, 239 F.3d at 492). Plaintiff alleges that Dr. Perilli revoked his medical pass after participating in a meeting with security personnel and discovering Plaintiff had filed a grievance against them.

A prison doctor has the right to determine what medical treatment is appropriate for a particular inmate and "[a] difference of opinion between a prisoner and prison officials regarding medical treatment does not, as a matter of law, constitute deliberate indifference." *Sonds v. St. Barnabas Hospital*, 151 F.Supp.2d 303, 311 (S.D.N.Y.2001)(citing *Chance*, 143 F.3d at 703). Therefore, even if Plaintiff disagreed, had Dr. Perilli decided that in his medical opinion daily morning heat treatment was no longer appropriate to treat Plaintiff's condition, these actions would not support a claim for deliberate indifference to a serious medical condition. *See Id.* However, Plaintiff has alleged that Dr. Perilli revoked Plaintiff's medical pass because Plaintiff filed a grievance against members of security. These allegations show a causal connection between the constitutionally protected activity and the adverse action and are sufficient to state a claim for retaliation. *See Walker v. Pataro*, 2002 U.S. Dist. LEXIS 7067 at * 19 (" 'a claim for relief may be stated under § 1983 if otherwise routine administrative decisions are made in retaliation for the exercise of constitutionally protected rights'" (quoting

Gill, 824 F.2d at 194)). Thus, Defendants' motion to dismiss Plaintiff's claim for retaliation against Dr. Perilli is denied.

IV. Qualified Immunity

[8] Defendants argue that should the court find that the Plaintiff states a claim under § 1983 they are nonetheless entitled to qualified immunity because their actions were objectively reasonable. (Def. Mem. at 19). Qualified immunity "shields public officials from liability for their discretionary acts that do 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hathaway*, 37 F.3d at 67 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

" 'Although qualified immunity is typically addressed at the summary judgment stage of the case, the defense may be raised and considered on a motion to dismiss. The motion will be granted if the complaint fails to allege the violation of a clearly established constitutional right.'" *See Woods*, 2002 U.S. Dist. LEXIS 7157 at * 35. Here, Plaintiff has alleged a constitutional violation for deliberate indifference to his serious medical condition against Defendants Smith, Perilli, Capuano, Williams, Eagan, MacNamara, Krusen, Clark, Maldonado and Goffe. Because at this time the Court finds Plaintiff's allegations sufficiently allege that Defendants acted with deliberate indifference to Plaintiff's serious medical condition in violation of Plaintiff's Eighth Amendment rights, qualified immunity will not shield these defendants from § 1983 liability at this stage.

Conclusion

*12 For the foregoing reasons, the Defendants' motion to dismiss the Amended Complaint is granted as to Defendant Fisher and denied as to Defendants Smith, Perilli, Capuano, Williams, Eagan, MacNamara, Krusen, Clark, Maldonado and Goffe.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2003 WL 22170610

Footnotes

- 1 The facts set forth below were taken from Plaintiff's Amended Complaint and Memorandum of Law in Reply to The Defendants' Motion to Dismiss the Complaint ("Pl.Opp.Br."). Ordinarily, "a court may not look outside the pleadings when reviewing a [Rule 12\(b\)\(6\)](#) motion to dismiss. However, the mandate to read the papers of pro se litigants generously makes it appropriate to consider plaintiff's additional materials, such as his opposition memorandum." *Burgess v. Goord*, No. 98 Civ.2077, 1999 U.S. Dist LEXIS 611, at *2 n. 1 (S.D.N.Y. Jan. 26, 1999)(quoting *Gadson v. Goord*, No. 96 Civ. 7455, 1997 U.S. Dist. LEXIS 18131, at *2 n. 2 (S.D.N.Y. Nov. 17, 1997); see also *Johnson v. Wright*, [234 F.Supp.2d 352, 356 \(S.D.N.Y.2002\)](#) (considering pro se prisoner's factual allegations in brief as supplementing the complaint when ruling on a motion to dismiss), *Thompson v. State of N.Y.*, No. 99 Civ. 9875, 2001 U.S. Dist. LEXIS 9450, at *4 n. 1 (S.D.N.Y. Mar. 15, 2001)(relying on pro se plaintiff's factual allegations included in his memorandum of law as well as the facts alleged in his complaint).
- 2 Housing Sergeant Robert Krusen has been named as a Defendant in the caption of the Amended Complaint and is discussed therein. However, Defendants' contend that he has not been served with the summons and Amended Complaint or requested representation pursuant to [Public Officers Law § 17](#). See Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 1 n.1 ("Def.Mem."). However, Plaintiff has provided an acknowledgment of receipt of summons and complaint signed by Sergeant Robert Krusen. Because Defendant Krusen is similarly situated to Defendants Goffe, Maldonado, MacNamara and Smith, the Court has presumed that the same arguments contained in Defendants' motion to dismiss would have been made on his behalf had he sought representation. Accordingly, the Court has addressed the claims asserted against Defendant Krusen in its Memorandum and Order.
- 3 Plaintiff asserts that he was already entitled to receive a 10 minute shower during the 3 p.m.-11 p.m. shift as treatment for a chronic skin disorder. (Pl. Opp. Br. at 7). Plaintiff claims that he was denied his morning shower because Defendants did not want to give him two showers a day. (*Id.*) Additionally, Plaintiff claims that there was no such block policy prohibiting morning showers, and if there was, it was unofficial. (*Id.*)
- 4 Apparently, a feed-up pass allows an inmate to be fed his meals in his cell and a flats pass allows an inmate to be transferred to the first floor of the prison. At that time, Plaintiff resided on the fourth floor.
- 5 Plaintiff alleges that subsequent to this meeting, after discovering that Plaintiff had filed a grievance, Dr. Perilli revoked Plaintiff's medical pass. (Am. Compl. at 3). Although it is unclear in exactly what time frame these events occurred, the court is obligated to construe Plaintiff's complaint liberally in a light most favorable to the plaintiff. Therefore, for the purpose of deciding Defendants' motion to dismiss, the Court presumes all these events unfolded around the same time period.
- 6 There is a discrepancy between Plaintiff's claims that Dr. Perilli wrote in his medical chart on November 20, 2000 and May 1, 2000 that there was no medical indication for the treatment and the assertions on page 2 of the Amended Complaint that Dr. Perilli approved the heat treatment on various occasions up until August 5, 2000. For purposes of Defendants' motion to dismiss, the Court presumes Plaintiff made a typographical error and meant to write that Dr. Perilli made these entries to his medical chart on November 20, 2000 and May 1, 2001.
- 7 Prior to this incident, Officer Clark made Plaintiff walk up the stairs on several occasions, but Plaintiff was unaware that the elevator was functioning. Am. Compl. at 7.
- 8 Between the time Plaintiff stopped going to therapy at Fishkill and prior to the new hospital opening at Fishkill, Plaintiff briefly attended physical therapy sessions at Greenhaven Correctional Facility.
- 9 Mr. Abraham has been named in the caption of the Amended Complaint and discussed therein, but apparently he has not been served with the summons and Amended Complaint. (Def. Mem. at 1 n.1.) Further, the Plaintiff has not provided any proof that service of process has been accomplished. Therefore, while the allegations concerning Mr. Abraham's actions are discussed in the statement of facts, he is not addressed by Defendants' motion to dismiss and therefore, not addressed by this Memorandum and Order.