

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

WILLIE RIDDICK, :
 :
 Plaintiff : No. 4:CV-06-1095
 :
 vs. : Complaint filed 05/31/06
 :
 DR. MARSHA MODERY, MARVA CERULLO, : (Judge Muir)
 and PRISON HEALTH SERVICES, INC. :
 :
 Defendants :

FILED
MIDDLE DISTRICT OF PENNSYLVANIA, PA

FEB - 2 2007

ORDER

February 2, 2007

CLERK
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THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 31, 2006, Plaintiff Willie Riddick, an inmate at the State Correctional Institution at Frackville, Pennsylvania, initiated this civil rights action by filing a complaint pursuant to 28 U.S.C. § 1983. The three named Defendants are Marsha Modery, M.D.; Marva Cerullo; and Prison Health Services, Inc. Riddick alleges that the manner in which the Defendants treated him for a skin condition has violated his Eighth Amendment constitutional rights.

On August 25, 2006, Defendants Modery and Prison Health Services, Inc., filed a motion to dismiss the claims against them. A brief in support of that motion was filed on September 22, 2006. Although that brief was not timely filed, Riddick has not objected to its untimeliness and we will accept it as having been timely filed.

On September 18, 2006, Defendant Cerullo filed a motion to dismiss the claims against her set forth in Riddick's complaint. A brief in support of that motion was filed on September 26, 2006.

After being granted an extension of time in which to do so, on January 11, 2007, Riddick filed a response (which he inaccurately labeled a "Motion in Opposition") and brief in opposition to each dispositive motion. The time allowed for the Defendants to file reply briefs expired on January 29, 2007, and to this date no Defendant has filed such a brief. The two pending motions to dismiss are ripe for disposition.

All of the Defendants contend that Riddick fails to state any constitutional claim against them because he has not sufficiently alleged that any of them was deliberately indifferent to his serious medical needs. We will address both of those motions in this order because the pivotal issues are the same for each Defendant and both dispositive motions.

When evaluating a motion to dismiss, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Colburn v. Upper Darby Township*, 835 F.2d 663, 665-66 (3d Cir. 1988). The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no

set of facts in support of his claims which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 44-46 (1957). It is also well-settled that *pro se* complaints should be liberally construed. Haines vs. Kerner, 404 U.S. 519, 520 (1972).

Before considering the merits of the two pending motions to dismiss Riddick's complaint, we will discuss the allegations in that pleading. On March 14, 2003, Riddick was transported from the State Correctional Institution at Mahanoy to Good Samaritan Hospital in Pottsville, Pennsylvania, "for an examination by a dermatologist as a result of [a] severe facial rash." (Complaint, p. 2, ¶10) He was diagnosed "as having follicular eczema and prescribed Doxy Cycline, 100 mg pills, Cleocin T-gel and Benzoil Peroxide. The dermatologist requested a follow up visit." (Id.)

Riddick's follow-up visit did not occur until August 1, 2003. Because the prescribed medications were not working, Riddick was prescribed "plexion cleanser, Tazorac cream, and Benzactin" with "specific verbal instructions not to substitute." (Id., ¶20) The dermatologist gave Riddick samples of those medications. Upon his return to the State Correctional Institution at Mahanoy, Riddick was given the samples of his medication until prescriptions could be filled for them.

Riddick was subsequently told that his prescribed medications would not be provided to him because 1) "of their cost," and 2) "they were not on the approved medication list."

(Id., ¶3) Riddick alleges that for approximately a year he was "given numerous substitute medications that did not work, [and] in fact, [they] made [his] problem with [his skin] worse."

(Complaint, p. 3, ¶ 4)

Riddick was released from incarceration on August 23, 2004, and was recommitted on September 22, 2005. On September 23, 2005, Riddick "went to sick call for [his] skin problem and defendant Doctor Modery prescribed selenium sulfide which severely burned [his] face and upper neck." (Id., p. 3, ¶4)

On September 30, 2005, Riddick "submitted a request to Defendant Marva Cerullo requesting the medication prescribed by the Dermatologist, which was working, and was told that [his] skin problem is okay." (Id., ¶5) On October 5, 2005, Riddick "went to sick call and reported that the selenium sulfide was burning [his] skin, which prompted a change in medication to plexion and [he] was given triple antibiotic ointment for the burns." (Id.)

On December 29, 2005, Riddick "reported to sick call to convey that the triple antibiotic ointment was not working ... on [his] burns. At no time did Defendant Modery warn [him] that selenium sulfide would burn [his] skin." (Id., ¶6)

According to Riddick "[t]he named Defendants knew that Plaintiff's condition was responding to plexion cleanser and should have been treated with it and deliberately failed to

provide it for nonmedical reasons." (Id., ¶7) The concluding paragraph of Riddick's "Statement of Claim," states that

[a]s a direct result of the selenium sulfate prescribed, the failure to warn Plaintiff of the risk of burns associated with selenium sulfate treatment and the failure to promptly provide treatment for the burns Plaintiff ... was caused to suffer serious and severe injuries which are permanent in nature and have caused severe crippling physical pain, grievous mental anguish, anxiety, and humiliation which will continue permanently.

((Id., ¶8)

The movants argue that Riddick has not alleged sufficient facts against them to sustain any constitutional claim. A prerequisite for such a claim is that the defendant directed, or knew of or acquiesced in, the deprivation of a plaintiff's constitutional rights; liability may not be imposed under § 1983 on the traditional standards of respondeat superior. *Gay v. Petsock*, 917 F.2d 768, 771 (3d Cir. 1990); *Rode v. Dellarciprete*, 845 F.2d 1195, 1207-08 (3d Cir. 1988); *Capone v. Marinelli*, 868 F.2d 102, 106 (3d Cir. 1989) (citing *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1017, 1082 (3d Cir. 1976)). In Capone, the court noted "that supervisory personnel are only liable for the § 1983 violations of their subordinates if they knew of, participated in or acquiesced in such conduct." Id. at n.7

The specific constitutional claims at issue here are that the Defendants violated Riddick's Eighth Amendment rights when they were deliberately indifferent to Riddick's serious medical needs. The United States Supreme Court has ruled that an

official is deliberately indifferent where "the official acted or failed to act despite knowledge of a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970 (1994).

As a threshold matter it is clear that Riddick has failed to state any claim against Defendant Prison Health Services, Inc., because there is no allegation that it was directly involved in providing medical treatment to Riddick. The only explanation Riddick has provided for naming Prison Health Services, Inc., as a defendant is that it "contracts to provide medical services at [the State Correctional Institution at Mahanoy]." (Complaint, p. 2) Such an allegation is insufficient to hold Prison Health Services, Inc., liable for any of the alleged treatment in this case. Riddick has failed to state any claim against Prison Health Services, Inc., upon which relief may be granted. For that reason we will grant Prison Health Services, Inc.'s, motion to dismiss Riddick's claims against it.

The remaining contentions to consider relate to Defendants Modery and Cerullo, who personally participated in Riddick's treatment to some degree. The Court of Appeals for the Third Circuit has stated that "[i]t is well-settled that claims of negligence or medical malpractice, without some culpable state of mind, do not constitute 'deliberate indifference.'" Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999). In another portion

of that opinion the court explained that a prison official is deliberately indifferent

where the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment.

Id. The United States Supreme Court has ruled that an official is deliberately indifferent where "the official acted or failed to act despite knowledge of a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970 (1994).

The allegations in Riddick's complaint pertaining to Defendant Cerullo are simply that she told Riddick his "skin problem [was] okay" and was merely a rash when he requested her to provide the medications prescribed by the dermatologist. Such a statement by Defendant Cerullo, in and of itself, does not establish a sufficiently culpable state of mind to state an Eighth Amendment claim based on deliberate indifference. Because no other allegations implicate Defendant Cerullo in Riddick's treatment, he has failed to state any claim against her and we will grant Defendant Cerullo's motion to dismiss the claims against her.

With respect to Defendant Dr. Modery, Riddick alleges that she initially prescribed selenium sulfide which burned his skin. However, the complaint further indicates that she promptly prescribed Riddick's medication of choice (i.e., plexion) when

she learned of the effects which the selenium sulfate had on Riddick's skin. Dr. Modery also immediately began treating Riddick's burns.

When all of the allegations regarding Defendant Dr. Modery are considered in their totality, we are of the view that Riddick's complaint again fails to meet the standard for setting forth an Eighth Amendment claim based on medical treatment. Riddick has failed to establish that Defendant Dr. Modery unlawfully withheld any treatment, purposely prescribed a medication which she knew would harm Riddick in any manner, or otherwise acted with deliberate indifference to Riddick's serious medical needs. We will grant Defendant Dr. Modery's motion to dismiss the claims against her.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The motion to dismiss (Document 11) filed by Defendants Dr. Marsha Modery and Prison Health Services, Inc., is granted.
2. The motion to dismiss (Document 16) filed by Defendant Marva Cerullo is granted.
3. The Clerk of Court shall close this file.

4. Any appeal from this order will be deemed frivolous, without probable cause, and not taken in good faith.



MUIR, U.S. District Judge

MM:gja