IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 7, 2019
Lyle W. Cayce
Clerk

No. 18-40644
Summary Calendar

JACKIE LEE BOYD,

Plaintiff-Appellant

v.

CAROL MONROE; LANA BRUNETT; GWENDOLYN FULLER; SARAH COOK; CHAD MOORE,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:17-CV-649

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Jackie Lee Boyd, Texas prisoner # 1263639, appeals the district court's dismissal of his 42 U.S.C. § 1983 civil suit for failure to state a claim upon which relief could be granted. In his complaint, Boyd alleged that the defendants were deliberately indifferent to his serious medical needs because they refused to escort him to the infirmary on several occasions to receive his

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

anti-depression medications and, as a result, he had suicidal thoughts and tried to hang himself. Boyd's motions to supplement his brief and to place his brief under seal are GRANTED.

We review the dismissal of a complaint for failure to state a claim de novo. *Rogers v. Boatright*, 709 F.3d 403, 407 (5th Cir. 2013). Boyd does not challenge the district court's determination that the defendants could not be liable under the doctrine of vicarious liability or respondeat superior. Accordingly, Boyd has abandoned his claims to the extent they rely on the theory of vicarious liability. *See Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Regarding his deliberate indifference claims, Boyd does not allege facts that establish that prison officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Texas Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (internal quotation marks and citation omitted). Boyd's allegations that he did not receive all the prescribed doses of his medications, at most, demonstrate negligence. *See Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006); *Hall v. Thomas*, 190 F.3d 693, 697 (5th Cir. 1999); *Mayweather v. Foti*, 958 F.2d 91, 91-92 (5th Cir. 1992). Mere negligence is not sufficient to support a claim for deliberate indifference. *See Gobert*, 463 F.3d at 346.

Boyd complains that the district court relied on inaccurate information in dismissing his complaint. However, the court explicitly stated that it would not consider those statements that Boyd represented were erroneous. Thus, contrary to Boyd's assertion, the district court did not rely on any untrue information. Accordingly, the district court properly determined that Boyd failed to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The district court's dismissal of Boyd's § 1983 complaint pursuant to 28 U.S.C. § 1915A counts as a strike for purposes of § 1915(g). *See Brown v. Megg,* 857 F.3d 287, 290-92 (5th Cir. 2017); *Adepegba v. Hammons,* 103 F.3d 383, 385-87 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson,* 135 S. Ct. 1759, 1762-63 (2015). Boyd is CAUTIONED that if he accumulates three strikes, he will not be able to proceed in forma pauperis in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

AFFIRMED; MOTIONS GRANTED; SANCTION WARNING ISSUED.

Date filed

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18-40644

JACKIE LEE BOYD,

Plaintiff - Appellant

v.

CAROL MONROE; LANA BRUNETT; GWENDOLYN FULLER; SARAH COOK; CHAD MOORE,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

Before JOLLY, COSTA, and HO, Circuit Judges. the

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Gregg Costa

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JACKIE LEE BOYD, #1263639	§	
VS.	§	CIVIL ACTION NO. 6:17cv649
CAROL MONROE, ET AL.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Jackie Lee Boyd, an inmate previously confined at the Michael Unit of the Texas prison system, proceeding *pro se* and *in forma pauperis,* brings this civil rights lawsuit pursuant to 42 U.S.C. § 1983. He is suing Warden Carol Monroe, Nurse Lana Brunett, Lt. Gwendolyn Fuller, Lt. Sarah Cook and Lt. Chad Moore. The complaint was referred for findings of fact, conclusions of law, and recommendations for the disposition of the lawsuit.

Plaintiff's Claims

Plaintiff filed the original complaint on November 15, 2017. He was confined in administrative segregation at the Michael Unit at the time he filed the lawsuit. He complains that he was not escorted to the infirmary on numerous occasions to receive his depression medication. He attached a list of the following medications: carbamazepine, diphenhydramine, trifluoperazine, and venlafaxine. Because he did not receive his medication, he had thoughts of suicide and tried to hang himself on October 11, 2016. He is suing Lieutenants Fuller, Cook and Moore for failing to escort him to the infirmary. He is suing Warden Monroe because she is the supervisor of the employees who failed to escort him. He is suing Nurse Brunett because she did not respond to her letters.

Martinez Report

On April 6, 2018, pursuant to an order of the Court, the Office of the Attorney General of Texas ("OAG") filed a report (Dkt. #18) addressing Plaintiff's claims, in accordance with *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978) (cited with approval in *Parker v. Carpenter*, 978 F.2d 190, 191-92 (5th Cir. 1992)). The report consists of relevant portions of Plaintiff's TDCJ medical records, an affidavit of no record from the University of Texas Medical Branch at Galveston, Plaintiff's medication compliance records, and an affidavit from Dr. Joseph V. Penn.

Dr. Penn states in his affidavit that he is a board certified psychiatrist and licensed to practice in the State of Texas. He notes that Plaintiff complains that he was denied an escort to the infirmary or was delayed in being escorted on the following dates: October 2-3, 11-12, 2016; November 4, 14, 16-17, 19, 2016; December 3, 12-14, 22, 2016; and March 14-15, 2017. He states that he personally reviewed the medication compliance records pertaining to Plaintiff. The medication compliance records reveal that he was prescribed Venlafaxine (an antidepressant medication), Trifluoperazine (an antipsychotic medication), Benadryl (an anticholinergic medication used to treat muscle stiffness side effects potentially caused by Trifluoperazine), and Carbamazepine (an antiseizure medication that is also used to treat bipolar disorder). He asserts that the medication compliance records reveal that Plaintiff received a majority of his prescribed psychotropic medications on all days.

The *Martinez* Report notes that Plaintiff states that he tried to hang himself on October 11, 2016. His primary complaint is that he missed doses of 200mg of Carbamazapine 3x daily, which led to the attempted suicide, but the medication compliance reports reveal that he received Carbamazapine 75% of the time between October 2016 to March 2017. Moreover, during the specific time period involved of the attempted suicide, he received the drug 87.78% of the time between September 22, 2016 and October 22, 2016.

Dr. Penn further notes that in addition to the medication administered by nursing staff, the record shows that he was regularly monitored by a team of psychiatric providers and qualified mental health professionals at his past and current units of assignment.

Dr. Penn finally observes that Plaintiff is housed in administrative segregation; thus, he must be escorted to the medical department by security personnel. Medical staff members do not and cannot participate in the process of escorting offenders to the medical department.

The Court has conducted an independent review of the records attached to the *Martinez* Report. The records reveal that Plaintiff was seen by Nurse Charles McCombs on September 24, 2016. *See* Exhibit A, page 0118. Plaintiff expressed concern that his Carbamazepine prescription was going to expire on October 22, 2016, and he wanted to see a provider to get the medication renewed. *Id.* Plaintiff was thus scheduled to see a provider for medication renewal. *Id.* On September 27, 2016, a blood test was drawn, and his Carbamazepine level was 7.7 ug/mL which was within the normal therapeutic range of 4-12 ug/mL. *Id.* at 0081. The medication compliance records reveal that he received the medication at least twice every day from October 1 through October 22, 2016. Exhibit C, pages 0307-0309. His prescription for Carbamazepine was renewed for one year on October 24, 2016. Exhibit A, page 0107. Dr. Shrode saw Plaintiff on October 26, 2016 and advised him that his prescription had been renewed for one year. *Id.* at 0046.

The medical records also include the following psychiatric nursing protocol comments on October 12, 2016:

> Security escorted pt to clinic after security found pt in his cell with a noose around his neck. Pt was crying, stating he was hearing voices and that he was sick. No ligature marks around neck. Trachea midline. Pt stated, "I don't want to live anymore." Called on-call mental health. Received verbal telephone orders from Ms. Meharry at 0524 to initiate crisis management. Called Skyview and spoke to Ms. Adams. No beds available per Lt. Hendrick. Pt placed on waiting list. Notified Lt. Benton. Pt escorted from clinic by Sgt. Lewis and CO Scott for CDO. Pt to be housed in 12 B-18.

Exhibit A, page 0114. On the day that he was discovered with a noose around his neck, he received his Carbamazepine medication three times as prescribed. Exhibit C, page 0308. In a clinic note, dated October 12, 2016, Nurse Chapman noted that Plaintiff stated that he was hearing voices telling him to hurt himself. Exhibit A, page 0109. She observed that he was alert and his answers were appropriate, he responds easily and regularly, he speaks softly, he got up off the floor to talk to her, and that there was no acute distress. *Id.* Her plan was to remain at the cell until mental health personnel arrived. *Id.*

Plaintiff's Response

Plaintiff filed two responses (Dkt. ##22,27). In his initial response, he asserts that the Court should see additional records and affidavits and that he should be interviewed. In the second response, he stresses that he needs his medication and he missed doses because security personnel did not escort him to the infirmary. He complains that Dr. Penn's affidavit includes the erroneous statement that the records do not show that he demonstrated "emotional crisis or distress, self-harm, suicide attempts." *See* Dr. Penn's affidavit, page 4. Dr. Penn also erroneously stated that Plaintiff did not require crisis management or suicide watch precautions. *Id.* Plaintiff's complaints about the affidavit are *apropos*, and the Court will disregard those statements made by Dr. Penn.

Discussion and Analysis

Plaintiff complains about the medical care that has been provided to him. Deliberate indifference to a prisoner's serious medical needs constitutes an Eighth Amendment violation and states a cause of action under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. 97, 105-07 (1976). In *Farmer v. Brennan*, 511 U.S. 825, 835 (1994), the Supreme Court noted that deliberate indifference involves more than just mere negligence. The Court concluded that "a prison official cannot be found

liable under the Eighth Amendment . . . unless the 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." *Id.* at 837.

The Fifth Circuit discussed the high standard involved in showing deliberate indifference as follows:

> Deliberate indifference is an extremely high standard to meet. It is indisputable that an incorrect diagnosis by medical personnel does not suffice to state a claim for deliberate indifference. *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). Rather, the plaintiff must show that the officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* Furthermore the decision whether to provide additional treatment "is a classic example of a matter for medical judgment." *Estelle*, 429 U.S. at 107. And, the "failure to alleviate a significant risk that [the official] should have perceived, but did not" is insufficient to show deliberate indifference. *Farmer*, 511 U.S. at 838.

Domino v. Texas Dep't of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001). A "delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference, which results in substantial harm." *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993). "Deliberate indifference is not established when 'medical records indicate that [the plaintiff] was afforded extensive medical care by prison officials[.]'" *Brauner v. Coody*, 793 F.3d 493, 500 (5th Cir. 2015) (citing *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997)).

With respect to missed doses, the Fifth Circuit made the following observation: "The treatment may not have been the best that money could buy, and occasionally, a dose of medication may have been forgotten, but these deficiencies were minimal, they do not show an unreasonable standard of care, and they fall short of establishing deliberate indifference by the prison authorities." *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992). The Court subsequently rejected a deliberate indifference

claim where an inmate claimed medical staff failed to administer 180 doses of his medication over a one year period. *Hall v. Thomas*, 190 F.3d 693,697 (5th Cir. 1999). The Fifth Circuit has also found that the "occasional expiration of prescriptions . . . was constitutionally insignificant." *Stockwell v. Kanan*, 442 F. App'x 911, 914 (5th Cir. 2011).

In the present case, the records reveal that prison authorities were responsive to Plaintiff's medical needs. His drugs, including Carbamazepine, were administered on a regular basis. Security personnel occasionally failed to transport him to the infirmary, but he received his medication most of the time and received all three doses on the day that he was found with a noose around his neck. Much like the situation in *Mayweather*, the facts as alleged and developed do not show an unreasonable standard of care and fall short of establishing deliberate indifference by prison authorities.

With respect to the day that Plaintiff was found with a noose around his neck, neither security personnel nor medical personnel were deliberately indifferent to his health or safety. Security personnel discovered him and escorted him to the clinic. Medical personnel examined him and did not see any indication of harm. There were no ligature marks around his neck. Although he was crying, which is not unusual with depression, the nurse observed that he was alert and his answers were appropriate, he responded easily and regularly, he spoke softly, he got up off the floor to talk to her, and that there was no acute distress. *Id.* Her plan was to remain at the cell with him until mental health personnel arrived. *Id.* The facts as alleged and developed do not support an inference of deliberate indifference.

The Court further notes that Plaintiff has not alleged facts showing that the people named as defendants were deliberately indifferent to his serious medical needs. In order to successfully plead

a cause of action in a civil rights case, a plaintiff must ordinarily articulate a set of facts that illustrates a defendant's participation in the alleged wrong. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). None of these individuals participated in any alleged act of misconduct. It appears that Plaintiff sued them because of their supervisory roles, but the doctrine of *respondeat superior* does not apply in § 1983 actions. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). Under 42 U.S.C. § 1983, supervisory officials are not liable for subordinates' actions on any vicarious liability theory. A supervisor may be held liable if either of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. *Thompkins v. Belt*, 828 F.2d 298, 303-304 (5th Cir. 1987). Neither condition is satisfied.

The Supreme Court recently held that the term supervisory liability in the context of a § 1983 lawsuit is a "misnomer" since "[e]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). The Court rejected an argument that government officials may be held liable merely because they had knowledge or acquiesced in their subordinate's misconduct. *Id.* Citing *Iqbal*, the Fifth Circuit accordingly held that a prison supervisor was not liable since he was not personally involved in an incident. *Sterns v. Epps*, 464 F. App'x 388, 393 (5th Cir. 2012). It was reiterated that § 1983 does not create supervisory or respondeat superior liability. *Id.* at 394.

In conclusion, the facts of this case do not support an inference of deliberate indifference. The facts as alleged and developed fail to state a claim upon which relief may be granted and are frivolous in that they lack any basis in law and fact. The lawsuit should be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Recommendation

It is therefore recommended that the lawsuit be dismissed with prejudice pursuant to 28 U.S.C. § 1915A(b)(1).

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 29th day of May, 2018.

K. Nicole Mitchell

K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JACKIE LEE BOYD, #1263639	§	
VS.	§	CIVIL ACTION NO. 6:17cv649
CAROL MONROE, ET AL.	§	

FINAL JUDGMENT

The Court having considered Plaintiff's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that Plaintiff take nothing by his suit and that the complaint is **DISMISSED** with prejudice.

SIGNED this the **15** day of **June, 2018.**

Thad Heartfield
United States District Judge