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

Edward MCKENNA Plaintiff
v.
Lester N. WRIGHT, et al. Defendants.

No. 01 Civ. 6571(HB). | Jan. 21, 2004.

Synopsis

Background: State prisoner brought § 1983 action against prison officials, seeking order requiring officials to provide prisoner with medical treatment for his hepatitis C virus and cirrhosis, declaring that officials violated Eighth Amendment and Fourteenth Amendment rights, enjoining defendants from conditioning medical care on non-medical criteria, requiring defendant to pay damages, attorney fees and costs. Officials moved for summary judgment, on grounds of qualified immunity.

Holdings: The District Court, Baer, J., held that:

[1] prisoner exhausted his administrative remedies prior to filing his § 1983 action;

[2] receipt by non-medical supervisory official of letters requesting follow up medical care was insufficient to impute personal involvement to official;

[3] allegation was sufficient to establish deputy superintendent's personal involvement;

[4]allegation was sufficient to establish superintendent's personal involvement; and

[5] officials were not entitled to qualified immunity.

Motion granted in part, and denied in part.

West Headnotes (6)

[1] **Civil Rights**
Criminal law enforcement; prisons

State prisoner exhausted his administrative remedies prior to filing his § 1983 action against prison officials, in connection with officials' alleged failure to provide prisoner with appropriate medical treatment for hepatitis C; prisoner filed complaint with state Commission of Corrections Medical Review Board, filed a grievance complaint with the prison administrators, and appealed the denial of his grievance. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[2] **Civil Rights**
Criminal law enforcement; prisons

Receipt by non-medical supervisory prison official of letters written by state prisoner with hepatitis C requesting follow up medical care was insufficient to impute personal involvement to official, for purpose of prisoner's § 1983 action for failure to provide adequate medical treatment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[3] **Civil Rights**
Criminal law enforcement; prisons

State prisoner's allegation against deputy superintendent of prison, that he personally denied prisoner's requests for medical treatment related to his hepatitis C virus through the denial of grievance for lack of medical care, was sufficient to establish deputy superintendent's personal involvement in the alleged failure to provide prisoner with adequate medical treatment for his hepatitis C, as required for § 1983 claim against deputy superintendent. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[4] **Civil Rights**
Criminal law enforcement; prisons

State prisoner's allegation against prison superintendent, that superintendent failed to address or rectify the denial of prisoner's medical treatment for hepatitis C when he denied prisoner's appeal of the denial of his grievance related to inadequate medical treatment, was sufficient to establish superintendent's personal involvement, for purpose of prisoner's § 1983 claim related to failure to provide medical treatment for prisoner's hepatitis C virus. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[5] **Civil Rights**
Prisons, jails, and their officers; parole and probation officers

Prison officials were not entitled to qualified immunity from liability in state prisoner's § 1983 action for deliberate indifference to his serious medical needs, in connection with prisoner's alleged failure to receive medical treatment for his hepatitis C, where prisoner's allegations as pled demonstrated that prisoner's knew or reasonably should have known that they were violating plaintiff's clearly established Eighth Amendment rights. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[6] **Constitutional Law**
Constitutional Rights in General
Constitutional Law
Relationship to Other Constitutional Provisions; Incorporation

Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Opinion

OPINION & ORDER

BAER, J.

***1** Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") to dismiss plaintiff Edward McKenna's ("plaintiff" or "McKenna") § 1983 claims for violations of the Eight and Fourteenth Amendments, on the basis that some defendants lack the requisite personal involvement and all are protected by qualified immunity. For the foregoing reasons, defendants' motion is granted-in-part and denied-in-part.

I. BACKGROUND

A. Factual Background

1. ***McKenna's Medical History***
McKenna, now fifty-seven, began serving his current sentence at the New York Department of Correctional Services' ("DOCS") Green Haven Correctional Facility ("Green Haven") on February 27, 1990. Amended Complaint ("Am.Compl.") ¶ 52. When McKenna entered Green Haven, he informed the relevant DOCS personnel that he "had a history of intravenous drug use, had been diagnosed with a sexually transmitted disease ("STD"), had served in the Vietnam War and had spent prior time in prison. Such information was also recorded in McKenna's medical records." Id ¶¶ 53–54. The DOCS Hepatitis C Primary Case Practice Guidelines ("DOCS Guidelines") states that such factors place inmates at a heightened risk for the Hepatitis C Virus ("HCV").[1] Id. ¶ 53. However, McKenna was not tested for HCV when he entered Green Haven. Id. ¶ 55. In 1994, some four years later, even after McKenna's routine blood test results "reflected known and medically accepted indicia of HCV—his blood platelets were low and his liver enzymes were high," DOCS personnel failed to test McKenna for HCV. Id. ¶¶ 56. Three years later, in 1997, when blood tests revealed that his platelets were even lower and his liver enzymes were even more elevated, McKenna still was not tested for HCV. Id. ¶ 57. In June 1998, McKenna was transferred to a different DOCS facility, Woodbourne Correctional Facility ("WFC"). Despite the fact that it was DOCS' policy to test all patients for HCV when they entered a new facilities, McKenna was not tested. Id. ¶ 60.

Finally, the plaintiff was finally tested for HCV on or around June 6, 1999. Id. ¶ 61. Following that exam, on or about July 19, 1999, Dr. Mervat Makram, a physician at the Health Care Unit at WCF, informed McKenna that he had HCV. Id. ¶ 62. Before embarking on a treatment regimen, the plaintiff told Dr. Makram that he wished to study its side effects. Dr. Makram did not mention the benefits of early treatment or refer McKenna to a specialist. Id. ¶¶ 62–64. Dr. Makram never followed-up to find out McKenna's decision. Id. ¶ 62. On or about September 16, 1999, after suffering from abdominal pain since 1996, McKenna was finally seen by Dr. Frank Lancellotti, at the Health Care Unit at WCF. Id. ¶ 65. During this visit, McKenna informed Dr. Lancellotti that he wanted treatment for his HCV. Id. ¶ 70. Dr. Lancellotti denied McKenna the treatment because pursuant to a DOCS policy, "inmates are ineligible for HCV treatment if they are not necessarily going to be incarcerated for at least twelve (12) months from the day treatment begins." Id. ¶ 71. However, DOCS Guideline also state that "[i]nmates who will not predictably complete a course of treatment should receive a baseline evaluation and be referred to medical follow-up and treatment upon release." Id. While McKenna was not scheduled for release for another four years, he was due before the parole board in just under one year. Id. ¶ 74–75. McKenna was denied parole on or about August 29, 2000. Id. ¶ 80.

***2** Instead of investigating whether McKenna's pain was due to his HCV, Dr. Lancellotti treated McKenna with Ranitidine, an ulcer medication.[2] Id. ¶ 66. As prescribed, McKenna continued to take Ranitidine for two years and six months, during which time his pain did not diminish. Id. ¶ 68. On or about April 23, 2001, when he was finally tested for ulcers, it turned out he did not have any. Id. ¶ 69. On or about December 11, 2000, McKenna again met with Dr. Lancellotti, requested HCV treatment, and was denied—this time based on a DOCS policy which required that HCV treatment recipients first complete an Alcohol and Substance Abuse Treatment Program ("ASAT"). However, DOCS had earlier deemed McKenna ineligible for participation in an ASAT due to his medical condition. Id. ¶¶ 81–82. Dr. Lancellotti referred McKenna to the Albany Medical Center ("AMC"). Id. ¶ 83. On or about January 10, 2001, after McKenna received a CAT Scan at AMC, he was diagnosed as having a condition "compatible with cirrhosis."[3] Id. ¶ 84. McKenna learned of this diagnosis on or about February 2, 2001 from Dr. Lancellotti, who informed McKenna that he had likely suffered from cirrhosis since June 1999, and told him that he would refer him to a liver specialist at AMC. Id. ¶ 85.

On or about March 19, 2001, McKenna was seen by Dr. Benedict, a gastroenterologist at Coxsackie Regional Medical Unit ("CRMU"), who told McKenna to return for a follow-up visit in three to four weeks so that he could evaluate McKenna's esophageal varices, a complication of cirrhosis. Id. ¶ ¶ 86–87. McKenna saw Dr. Maliakkal at AMC on or about April 23, 2001, when he received an Endoscopy procedure for the varices, and was told to return in four to six weeks to discuss drug treatment for his HCV. Id. ¶ 88. Seven weeks later, after not receiving this follow-up visit, McKenna wrote to Dr. Wright, the Associate Commissioner and Chief Medical Officer at DOCS, and on or about July 5, 2001, forwarded a copy of this letter to DOCS Commissioners Glenn S. Goord and Anthony Annucci. Id. ¶ 90. McKenna did not receive a response until August 3, 2001, when Dr. Wright wrote to explain the failure to follow Dr. Maliakkal's orders, and stated that "it is unlikely that you will be a candidate for Hepatitis C treatment because of special treatment concerns related to your cirrhosis." Id. ¶ 99. In the interim period, during which McKenna had not received a response, on or about July 25, 2001, John Beck and Madeline deLone, attorneys from the Legal Aid Society Prisoners' Rights Project ("LASPRP") sent a letter to Dr. Makram, requesting that McKenna receive his prescribed follow-up visit. On this same day, Dr. Makram met with McKenna and informed him that "his cirrhosis of the liver was decompensated[4] and that his earlier request for treatment was denied on June 1, 2001 based on the status of his liver" despite the fact that no liver biopsy had been performed. Dr. Makram explained that because Dr. Wright had denied McKenna treatment for HCV, there was no need for him to return to AMC. When McKenna expressed concern that he could experience internal bleeding, Dr. Makram explained that "if he hemorrhaged, he would be taken to the emergency room." Id. ¶ 92. On or about August 7, 2001, McKenna wrote to Goord to reiterate his need for a follow-up visit with Dr. Maliakkal because of his risk of hemorrhaging. Dr. Wright responded on or about October 5, 2001, and explained that because McKenna's HCV was at an advanced stage, he was not a candidate for HCV drug treatment. Id. ¶¶ 100–101. On or about June 19, 2002, Beck wrote to Wright, urging him to reconsider the decision to deny McKenna drug treatment, and requested that McKenna see a gastroenterologist and that Beck receive copies of McKenna's medical documentation. Id. ¶ 102. On or about October 1, 2002, Beck wrote to Dr. Wright and Dr. Makram, reiterating these requests. Id. ¶ 103.

***3** Armed with the knowledge that his condition was decompensated, on or about December 17, 2001, McKenna wrote to Dr. Wright to request that he be seen by a liver specialist to determine whether a liver transplant would be possible. Id. ¶ 94. When McKenna received no response, Beck wrote to Dr. Wright, reiterating McKenna's request, and on April 26, 2002, Dr. Wright responded, stating that McKenna's cirrhosis was actually compensated. "He also wrote that McKenna was both too sick to be treated for HCV and too well to be considered for a liver transplant." Id. ¶¶ 95–96. In

October 2002, Dr. John E. Cunningham, the Acting Regional Director at DOCS, denied HCV treatment to McKenna because he was not enrolled in an ASAT. Id. ¶ 104. McKenna explained to Dr. Cunningham that he had been drug-free for thirty-six years and alcohol-free from twenty-four years, and had already completed programs similar to the ASAT affiliated with the facility. Id. ¶¶ 105–106. Despite the fact that McKenna had already been diagnosed as "medically unassignable", meaning that he was too ill to participate, he began the ASAT program on or about December 16, 2002, solely to become eligible for HCV treatment. Id. ¶ 107. During this time, McKenna suffered from "chronic fatigue, weakness, extreme breathing difficulty, dizziness, blurred vision, disorientation, and abdominal pain that was aggravated by prolonged sitting." Id. ¶ 108. On or about January 7, 2003, Beck wrote to Dr. Makram, requesting that McKenna receive HCV treatment since he was now enrolled in an ASAT. Id. ¶ 110. McKenna was approved for HCV drug therapy on or about January 17, 2003. Id. ¶ 111. McKenna wrote to Dr. Cunningham on or about January 29, 2003, because he still had not begun treatment. McKenna had a video conference through Telemeet with Dr. Rodgers of AMC on or about February 3, 2003, during which Dr. Rodgers recommended that McKenna begin a forty-eight week course of Peg–Interferon plus Ribavirin. Id. ¶ 113. McKenna received his first round of treatment on or about February 7, 2003, but his treatment was discontinued soon thereafter because he experienced side-effects. Id. ¶ 114. McKenna has not received an in-person evaluation by a specialist since April 2001. Id. ¶ 115.

2. ***Administrative Remedies***

[1] McKenna has exhausted the administrative remedies available to him. On or about February 12, 2001, he filed a complaint with the New York State Commission of Corrections Medical Review Board ("CMRB"), alleging that the DOCS' Guidelines provisions requiring that inmates complete an ASAT program and be in such a position that they will definitely remain incarcerated for at least twelve months in order to be eligible for HCV treatment, were unconstitutional. Id. ¶ 118. McKenna filed a grievance complaint, WB–11519–01, on or about February 14, 2001, with regard to the delay and denial of his HCV treatment. Id. ¶ 119. Deputy Superintendent for Administration at WCF, T.J. Miller, denied McKenna's grievance on or about February 16, 2001 because "the delays McKenna experienced in receiving medical treatment were not critical in the view of the medical community." Id. ¶ 120. The Inmate Grievance Resolution Committee ("IGRC") issued a response to McKenna's grievance, after a hearing, suggesting that "the HCV policy should be looked into and possibly revised so that patients diagnosed with HCV could receive immediate treatment." Id. ¶ 121. McKenna appealed this determination to John P. Keane, the Superintendent of WCF, and specifically addressed the failure by the IGRC to address his personal denial and delay of treatment. Id. ¶ 122. Keane responded on or about March 7, 2001, stating that "the punitive and compensatory damages that McKenna had requested in his appeal were beyond the scope of the grievance program. Id. ¶ 123. McKenna appealed Keane's decision to the Central Office Review Committee ("CORC") on or about March 8, 2001. McKenna sought review of the denial and delay of his treatment and of the DOCS' Guidelines. The CORC denied his appeal on or about April 11, 2001. Id. ¶ 124.

B. Procedural History

***4** McKenna filed his complaint *pro se* on July 19, 2001. On November 16, 2001, he moved pursuant to Fed.R.Civ.P. 65 for a permanent injunction, enjoining his delay of medical treatment by a specialist. On March 5, 2002, Judge Knapp denied plaintiff's motion. On July 29, 2003, the matter was reassigned to this Court. Plaintiff filed an amended complaint, with the assistance of *pro bono* counsel, on August 21, 2003, seeking an Order (a) requiring defendants to provide McKenna with medical treatment for his HCV, including treatment by a specialist in HCV and cirrhosis, (b) declaring that defendants violated his Eight Amendment rights, (c) declaring that defendants violated his Fourteenth Amendment right to substantive due process, (d) enjoining defendants from conditioning medical care on non-medical criteria, (e) requiring defendants to pay compensatory damages of no less than $3,000,000, (f) requiring defendants to pay punitive damages of no less than $3,000,000, (g) requiring defendants to pay plaintiff's attorneys' fees and costs; and (h) providing any further relief that this Court deems fair and equitable. Defendants filed the instant motion to dismiss on October 3, 2003, and submitted the motion fully-briefed on November 3, 2003.

II. DISCUSSION

A. Standard of Review

In adjudicating a 12(b) motion to dismiss, all well-pled factual allegations are taken as true, and all reasonable inferences are construed in favor of the plaintiff. *Leeds v. Meltz,* 85 F.3d 51, 52 (2d Cir.1996). Dismissal of the complaint is appropriate only when it appears that the plaintiff cannot prove a set of facts "in support of his claim which would entitle him to relief." *Gant v. Wallingford Bd. of Educ.,* 69 F.3d 669, 673 (2d Cir.1995). The Court's role is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Sims v. Artuz,*

230 F.3d 14, 20 (2d Cir.2000), quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc.,* 748 F.2d 774, 779 (2d Cir.1984). However, "complaints based on civil rights statutes must include specific allegations of facts showing a violation of rights 'instead of a litany of general conclusions that shock but have no meaning." ' *Morales v. Santor,* 94 Civ. 217, 1995 U.S. Dist. LEXIS 19021, at *4 (N.D.N.Y. Dec. 4, 1995), quoting *Barr v. Abrams,* 810 F.2d 358, 363 (2d Cir.1987).

B. Personal Involvement

"An individual defendant is not liable under § 1983 absent personal involvement." *Rivera v. Goord,* 253 F.Supp.2d 735, 747 (S.D.N.Y.2003), citing *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). And, personal liability may not be imposed on a state official pursuant to a theory of respondeat superior. *See Black v. Coughlin II,* 76 F.3d 72, 74 (2d Cir.1996). Therefore, the plaintiff must assert that "the defendant had some direct [or personal] involvement in or responsibility for the misconduct." *Woods v. Goord, et al.,* 01 Civ. 3255, 2002 U.S. Dist. LEXIS 7157, at *22 (S.D.N.Y. April 23, 2002), quoting *Thompson v. New York,* 99 Civ. 9875, 2001 WL 936432, at *6 (S.D.N.Y. Mar. 15, 2001). In this Circuit, for purposes of asserting a § 1983 violation, the personal involvement of a supervisory official may be established when:

> ***5** (1) the [official] participated directly in the alleged constitutional violation, (2) the [official], after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the [official] created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the [official] was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the [official] exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.

Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir.2001), citing *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995).

1. ***Non–Medical Supervisory Defendants***

The amended complaint asserts claims against four non-medical supervisory defendants, Goord, Keane, Raymond Cunningham, and Miller.

a. Goord

[2] Plaintiff has failed to assert sufficient facts to establish the personal involvement of defendant Goord. The only direct claims asserted against Goord are that (1) on or about July 5, 2001, McKenna sent him a copy of a letter that he had previously sent to Dr. Wright, which stated his desire to be seen again by Dr. Maliakkal (Am.Compl.¶ 90), that (2) McKenna wrote a letter directly to Goord on August 7, 2001, reiterating this request (id.¶ 100), and finally that (3) on or about October 5, 2001, Dr. Wright (not Goord) responded to McKenna's August 7 letter (id.¶ 101). This involvement is clearly inadequate as the mere "[r]eceipt of letters or grievances [ ] is insufficient to impute personal involvement." *Woods v. Goord, et al.,* 2002 U.S. Dist. LEXIS 7157, at *24 (citations omitted); *Atkins et al. v. County of Orange, et al.,* 251 F.Supp.2d 1225, 1234 (S.D.N.Y.2003) ("if mere receipt of a letter or similar complaint were enough, without more, to constitute personal involvement, it would result in liability merely for being a supervisor, which is contrary to the black-letter law that § 1983 does not impose respondeat superior liability."), citing *Johnson v. Wright,* 234 F.Supp.2d 352, 363 (S.D.N.Y.2002). Further, "referring medical complaint letters to lower-ranked prison supervisors [ ] [also] does not constitute personal involvement." *Woods,* 2002 U.S. Dist. LEXIS 7157, at *25. Therefore, plaintiff's position that Goord is personally liable for "his failure to ensure" that Dr. Wright properly resolved McKenna's grievance (Am.Compl.¶ 126), is merely an end-run around the legal standard and fails to establish Goord's personal involvement. Because plaintiff makes no further allegations as to Goord's involvement, plaintiff's claims against Goord are dismissed.

b. Miller

[3] Plaintiff has sufficiently established the requisite personal involvement of defendant Miller. Plaintiff asserts that Miller "personal[ly] deni[ed][ ] McKenna's HCV treatment" (Am.Compl.¶ 129), through his denial of plaintiff's February 14, 2001 grievance, in which he stated that "the delays McKenna experienced in receiving medical treatment were not critical in the view of the medical community." Id. ¶¶ 119–120. While some Courts in this district have recently held that "where a supervisory official receives and acts on a prisoner's grievance ... personal involvement will be found under the second *Colon* prong" (*Williams v. Fisher, et al.,* 02 Civ. 4558, 2003 U.S. Dist. LEXIS 16442, at *31 (S.D.N.Y. Sept. 17, 2003); *see also Atkins,* 251 F.Supp.2d at 1234)), others have found personal involvement in such

circumstances only when the supervisor's response is detailed and specific (s *ee Woods,* 2002 U.S. Dist. LEXIS 7157, at *3031 (no personal involvement is established when defendant merely responded to plaintiff's letter but personal involvement attaches when defendant "responded in such a way as to suggest notice of the 'duration and extent of plaintiff's condition." '), citing *Rashid v. Hussain,* 95 Civ. 676, 1997 WL 642549, at *3 (N.D.N.Y. Oct.15, 1997)).

***6** Even under the more restrictive interpretation of *Colon,* Miller's personal involvement is apparent. While Miller's actual *response*[5] does not exude familiarity with the details of McKenna's situation,[6] since plaintiff's grievance, from which Miller based his determination, provides the full contextual background of McKenna's medical travails, the fact that Miller chose not to discuss the facts of McKenna's history in his response is irrelevant. Further, the seriousness of McKenna's illness, the grave consequences associated with delay of treatment, and the tortuous path that McKenna has traversed in his attempt to secure treatment—all of which were before Miller in McKenna's grievance—suffice to establish Miller's personal involvement through his denial of McKenna's grievance.

c. Keane

[4] Plaintiff has asserted sufficient claims against Keane to establish, at least at this stage, Keane's personal involvement in the alleged constitutional violations suffered by McKenna. Plaintiff asserts that Keane failed "to address or rectify the denial of McKenna's HCV treatment" (Am.Compl.¶ 127) when he handled plaintiff's appeal from the IGRC's February 22, 2001 decision on his grievance. Notably, although too late to assist McKenna, the IGRC credited McKenna's assertions by "suggest[ing] that the HCV policy should be looked into and possibly revised so that patients diagnosed with HCV could receive immediate treatment." Id. ¶ 121. McKenna appealed the IGRC's failure specifically to address "the denial and delay of medical treatment that McKenna had experienced" (id.¶ 122) and indeed was continuing to experience. After his review of the IGRC's decision, Keane affirmed and noted to McKenna that "the punitive and compensatory damages that [he] had requested in his appeal were beyond the scope of the grievance program." Id. ¶ 123. The fact that Keane viewed his role as limited to that of determining whether McKenna could be recompensed monetarily for his allegedly unconstitutional treatment through the grievance mechanism does not serve to make him unfamiliar with McKenna's underlying contentions, about which he had or should have read.

While some Courts in this district have interpreted the second *Colon* factor ("the [official], after being informed of the violation through a report or appeal, failed to remedy the wrong") to require more than the mere affirmance of a grievance denial (*see Joyner v. Greiner,* 195 F.Supp.2d 500, 506 (S.D.N.Y.2002) ("The fact that Superintendent Greiner affirmed the denial of plaintiff's grievance–which is all that is alleged against him–is insufficient to establish personal involvement ..."), citing *Scott v. Scully,* 93 Civ. 8777, 1997 U.S. Dist. LEXIS 12966, at *11 (S.D.N.Y.1997); *Villante v. N.Y. State Dep't of Corr. Servs., et al.,* 96 Civ. 1484, 2001 U.S. Dist. LEXIS 25208, at *17 (N.D.N.Y. Oct. 25, 2001), Report and Recommendation adopted at 2002 U.S. Dist. LEXIS 26279 (N.D.N.Y. Mar. 28, 2002)),[7] the Second Circuit and other courts in this district have found sufficient personal involvement in such situations (*see Williams v. Smith, et al.,* 781 F.2d 319, 324 (2d Cir.1986); *Wright v. Smith, et al.,* 21 F.3d 496, 502 (S.D.N.Y.1994). Further, Keane did not merely affirm, but rather affirmed with a comment that evidenced a familiarity with McKenna's situation. Therefore, as the amended complaint pleads that Keane was "informed of the wrong" through McKenna's appeal and "failed to remedy the wrong", it is sufficient as to Keane's involvement at least for now.

d. Raymond Cunningham

***7** Plaintiff's assertions against defendant Raymond J. Cunningham, the Superintendent of WCF, while not at this early stage replete with factual support, provide the potential to establish Raymond Cunningham's personal involvement. Plaintiff asserts that Raymond Cunningham "knew of and disregarded McKenna's serious medical needs, evincing deliberate indifference to those needs" by "upholding the denial of McKenna's HCV treatment." Am. Compl. ¶ 128. While not exactly a model of clarity, this language could be interpreted as sufficient to establish Raymond Cunningham's personal involvement in McKenna's case, as required for § 1983 liability.[8] If after discovery, defendant continues to believe that Raymond Cunningham was not sufficiently involved, he has ample opportunity to demonstrate and support that belief in a dispositive motion.

C. Qualified Immunity

"The doctrine of qualified immunity protects state actors sued in their individual capacity from suits for monetary damages where 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ' *Baskerville v. Blot,* 224 F.Supp.2d 723, 737 (S.D.N.Y.2002), quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "Even where [ ] a plaintiff's federal rights are well-established, qualified immunity is still available to an official if it was 'objectively reasonable for the public official to believe that his acts did not violate those rights." ' *Woods,* 2002 U.S. Dist.

LEXIS 7157, at *35, quoting *Kaminsky v. Rosenblum,* 929 F.2d 922, 925 (2d. Cir.1991). Therefore, state officials are shielded by qualified immunity if either "(a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Johnson v. Newburgh Enlarged Sch. Dist.,* 239 F.3d 246, 250 (2d Cir.2001), quoting *Salim v. Proulx,* 93 F.3d 86, 89 (2d Cir.1996). While "the use of an 'objective reasonableness' standard permits qualified immunity claims to be decided as a matter of law" (*Cartier v. Lussier,* 955 F.2d 841, 844 (2d Cir.1992)), the determination "usually depends on the facts of the case ... making dismissal at the pleading stage inappropriate" (*Woods,* 2002 U.S. Dist. LEXIS 7157, at *35) (citations omitted)).

It has already been determined that plaintiff's claims against supervisory defendant Goord must be dismissed for failure to assert his personal involvement in the alleged constitutional violations. As to the remaining seven defendants, supervisory officials Miller, Raymond Cunningham, and Keane, and doctors Wright, Lancellotti, Makram, and John Cunninghman, defendants argue that all are protected by qualified immunity. While defendants do not contest that it is clearly established that inadequate medical care may comprise an Eighth Amendment violation when prison officials are deliberately indifferent to an inmate's serious medical needs, nor could they (*see Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), *reh'g denied,* 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785 (1977)), they assert that defendants acted in an objectively reasonable manner in either directly or indirectly denying medical treatment to the plaintiff. While defendants may be correct, at this stage, the Court need only determine whether the allegations in the amended complaint, read in the light most favorable to plaintiff, demonstrate as a matter of law that defendants acted in an objectively reasonable manner in denying treatment to plaintiff. Defendants have failed to make this showing.

***8** [5] Defendants base their claim that it was objectively reasonable for these defendants to deny treatment on the fact that the denial was consonant with the HCV Guidelines (Def. Mem. at 16–18) and that non-medical officials may refrain from interfering with the medical treatment of inmates (Reply at 8). However, because plaintiff has asserted that the HCV Guidelines themselves are facially unconstitutional (Am.Compl.¶ 48), and that defendants' applied certain provisions of the HCV Guidelines in a purposeful effort to deny McKenna treatment "based on a series of ever-changing pretextual reasons" (id.¶ ¶ 5, 79, 81, 98), including but not limited to "pecuniary" motivations (id.¶ 8), defendants' argument misses the mark. Rather than demonstrate that the amended complaint is insufficient, defendants argue the ultimate determination to be made in this case. It is clear both from the lack of protestations to the contrary by defendants and this Court's independent review of the amended complaint that the allegations against these defendants, as pled, leave open the potential that they knew or reasonably should have known that they were violating plaintiff's clearly established Eighth Amendment rights.[9] As per the record currently before the Court, defendants have not established qualified immunity as a matter of law.

D. Fourteenth Amendment Claim

[6] As no one contests that McKenna's constitutional claim is covered by the Eighth Amendment, the substantive due process claim under the Fourteenth Amendment, based upon the same set of facts, should be dismissed. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Velez v. Levy,* 274 F.Supp.2d 444, 454 (S.D.N.Y.2003), quoting *Albright v. Oliver,* 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). "If a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *U.S. v. Lanier,* 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), citing *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).[10] Therefore, plaintiff's Fourteenth Amendment substantive due process claim is dismissed as against all defendants.[11]

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted-in-part and denied-in-part. All of plaintiffs' claims against defendant Goord as well as plaintiff's substantive due process claim under the Fourteenth Amendment against all defendants are dismissed. The clerk of the Court is requested to close this motion and any outstanding motions.

IT IS SO ORDERED.

Footnotes

1 HCV "is the most common chronic blood-borne virus in the United States. Am. Compl. ¶ 28.

2 "According to the Physicians Desk Reference, Zantac [the non-generic form of Ranitidine] is metabolized in the liver; accordingly, physicians should use caution before recommending it to patients with hepatic dysfunction—i.e., liver ailments such as HCV ." Am. Compl. ¶ 67.

3 "Cirrhosis is a condition in which scar tissue in the liver replaces the healthy tissue, blocking blood flow and preventing normal liver function." Am. Compl. ¶ 38.

4 "Compensated cirrhosis is characterized as not being accompanied by jaundice, ascites (an abnormal accumulation of fluid in the abdomen), vericeal bleeding and hemorrhaging (the result of increased blood pressure in the portal vein caused by liver disease, which dilates veins in the walls of the esophagus and sometimes the stomach), or hepatic encephalopathy (personality changes, intellectual impairment, and a depressed level of consciousness that results from liver failure). Decompensated cirrhosis, on the other hand, is characterized as being accompanied by one or more of these complications." Am. Compl. ¶ 38.

5 As plaintiff pled as to Miller's response, and therefore referenced his response in the amended complaint, it is appropriate to consider the response, which is attached to defendants' moving papers. *See Cortec Indus. Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d. Cir.1991).

6 Miller's response reiterated the stated medical rationale for the challenged provisions of the Protocol ("Protection of society from mutation of virus due to incomplete treatment" and "Limited efficacy of the treatment if the delays are not [incomprehensible]") and expressly relied on "the view of the medical community." (Knudsen Decl. Exh. C, at 10). However, it would provide too easy a loophole if the law prohibited liability so long as supervisors reiterated the stated medical rationale, no matter how blatantly abhorrent the rationale happened to be.

7 Although *Burgess* appears at first blush to present contra authority, the plaintiff in Burgess pled more than the mere affirmance of a grievance. *See Burgess v. Goord, et al.,* 98 Civ.2077, 1999 U.S. Dist. LEXIS 611, at 13–14 (S.D.N.Y. Jan. 26, 1999) (holding that Superintendent Keane's knowledge may be imputed both from plaintiff's appeal of his grievance to Keane and Keane's earlier statement regarding plaintiff's ability to take the stairs, "evinc[ing] his awareness of the situation."). Further, Judge Scheindlin criticized her *Burgess* holding in *Woods v. Goord,* when she noted, with regard to *Burgess,* that the "statement of law" that "courts have found personal involvement of a supervisory official where a plaintiff has sent letters or orally informed the official of an ongoing constitutional violation" is "now against the weight of authority." *Woods,* 2002 U.S. Dist. LEXIS 7157, at *26 n. 14.

8 For example, Raymond Cunningham may have been partially responsible for drafting the targeted provisions of the HCV Guidelines. While plaintiff asserts in his opposition papers that all of "the Supervisory Defendants *likely* played a part in creating and enforcing the Guidelines to prevent Mr. McKenna from receiving treatment" and that "evidence obtained through discovery will *likely* demonstrate that one or more of these three Defendants [Keane, Miller, or Raymond Cunningham] were responsible for permitting the continuance of the policies and practices that are alleged to have violated the Constitution" (Pl. Opp. at 11) (emphasis added), this specific claim is not pled in the amended complaint and therefore is not among the claims analyzed to determine if plaintiff's pleading is sufficient. *See Bolt Elec. v. City of New York,* 53 F.3d 465, 471–72 (2d Cir.1995). In any event, because this assertion is both indirect and hypothetical, plaintiff is encouraged to seek discovery on this issue.

9 Even at the summary judgment stage, dismissal of claims against a defendant on grounds of qualified immunity is appropriate only if "... the evidence is such that, even when it is viewed in the light most favorable to the plaintiff [ ] and with all permissible inferences drawn in [his] favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right." *Ford v. McGinnis, et al.,* No. 02–0205, 2003 U.S.App. LEXIS 25224, at *42 (2d Cir. Dec. 15, 2003) (quotations omitted).

10 The case introduced by plaintiff for the first time at oral argument, *Langley v. Coughlin, et al.,* 715 F.Supp. 522, 538 (S.D.N.Y.1989), does not overturn this well-established rule. Rather, *Langley* discusses the relative standards of inadequate medical treatment under the Eighth and Fourteenth Amendments, finds that the "due process standard appears to be identical to the Eighth Amendment test for denial of medical care", and cites one scenario (habilitative training to people involuntarily confined) where due process provides a standard "to be applied when the individual is not claiming denial of all access to such services, but rather contends that the care provided was glaringly inadequate." *Id.* As that is not the posture of this case, and neither plaintiff nor defendant argued that McKenna's claims fall outside the confines of the Eighth Amendment, *Langley* provides no reason to depart from the tradition of dismissing a substantive due process claim that is more aptly pled under a specific Amendment.

11 It should be noted that since personal involvement is a prerequisite to liability under Section 1983, under which both plaintiff's Eighth and Fourteenth Amendment claims lie, plaintiffs would fare no better under a Fourteenth Amendment analysis with regard to Goord.