

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TONY DION JAMES BEACH ARMSTRONG,

Plaintiff,

vs.

JOHN BALDWIN; TERRY MAPES; MIKE LONG;
TRAPPER CARTER; KATRINA CARTER-
LARSON; DONALD PETERS; JEFF BAKER;
CRAIG MALMBERG; JOHN MAYS; FRANK
FILIPPELLI; CHARLES FOSTER; THOMAS
PETERSEN; and MICHELLE GONZALES,

Defendants.

No. 4:08-cv-00424-JEG-CFB

O R D E R

This is an action brought by an inmate, Tony Armstrong, pro se, who alleges that on July 5, 2007, Defendants forced or allowed others to force him to clean up gallons of sewage without personal protective equipment and knowing that he had not been trained as required by policy, causing him to contract infection and injury. Armstrong seeks damages for emotional distress, pain and suffering, future medical costs and mental distress, and he also seeks testing for communicable diseases.

There are several motions pending: Defendants' motion for summary judgment, Armstrong's motion to amend, his motion to proceed in forma pauperis, and his motion for appointment of counsel. Defendants argue they are entitled to summary judgment on five grounds: failure to exhaust administrative remedies, failure to suffer a physical injury, failure to create a triable issue on a constitutional claim, qualified immunity, and failure to state facts establishing respondeat superior liability for Defendants Baldwin, Mapes, and Carter-Larson. For the following reasons, the Court denies in part and grants in part the motion for summary judgment; grants the motion for counsel; denies without prejudice the motion to amend; and denies as moot the request to proceed in forma pauperis.

I. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Myers v. Lutsen

Mtns. Corp., 587 F.3d 891, 893 (8th Cir. 2009); Fed. R. Civ. P. 56(c). “A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party.” Miner v. Local 373, 513 F.3d 854, 860 (8th Cir. 2008) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). To preclude the entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lickteig v. Bus. Men’s Assur. Co. of Am., 61 F.3d 579, 583 (8th Cir. 1995). The nonmoving party must go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Beyerbach v. Sears, 49 F.3d 1324, 1325 (8th Cir. 1995). The quantum of proof that the nonmoving party must produce is not precisely measurable, but it must be “enough evidence so that a reasonable jury could return a verdict for the nonmovant.” Anderson, 477 U.S. at 257. On a motion for summary judgment, the Court views all the facts in the light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences that can be drawn from the facts. E.g., Rakes v. Life Inv. Ins. Co. of Am., 582 F.3d 886, 893 (8th Cir. 2009); Lickteig, 61 F.3d at 583. Even in the absence of a response by the non-moving party, a court should only enter summary judgment “if appropriate.” Fed. R. Civ. P. 56(e)(2).

II. SUMMARY OF MATERIAL FACTS¹

At all times relevant to the complaint, Plaintiff Tony Armstrong was an inmate at the Newton Correctional Facility (NCF). Defendant John Baldwin is Director of the Iowa Department of Corrections (DOC). Defendant Terry Mapes is Warden at NCF. Defendant Katrina Carter-Larson was a unit manager at NCF. Defendants Jeffrey Baker, Donald Peters, Charles Foster, Trapper Carter, and Michael Long are all correctional officers at NCF. Defendants Michelle Gonzales, John Mays, and Thomas Petersen are correctional counselors. Defendant Frank Filippelli was a medical doctor for the DOC. Defendant Craig Malmberg was the Treatment Director at NCF.

¹ As noted supra, the Court accepts facts either not in dispute or in the light most favorable to the Plaintiff.

A. Facts Related to Cleanup

On July 5, 2007, Officer Long worked the 2:00 to 10:00 p.m. shift. At about 3:00 p.m., an inmate reported to Officer Long that he needed a plumber for his toilet. Long called Officer Carter, who investigated and determined that the cell toilet had backed up and overflowed. Long eventually called for inmate cleaners to help clean sewage that backed up from two floor drains approximately 40 feet apart in a common area. Armstrong and several other inmates helped clean up the sewage. The area was two stories high and approximately 30 x 60 feet in dimension. A fire door in the area was open during the clean up. Officer Long instructed the inmates to go to a utility closet and get buckets, mops, and anything else they might need for the cleanup. There were eye goggles in the closet. Armstrong wore rubber gloves but did not wear any other protective equipment during the cleanup. He used mops and a diluted bleach solution to clean the area. At about 8:00 p.m., Officer Baker entered the unit with two inmates who worked in maintenance, and they used a “snake” to search the drain for an obstruction. Eventually, they discovered pieces of cloth in the drain that they believed caused the backup.

The prison has policies that require, among other things, worker training and protective gear when cleaning hazardous chemical and body fluid spills. The record does not indicate who is responsible for training the Defendants. Armstrong received training regarding working with hazardous chemicals. The Iowa OSHA fined the prison \$1500 for failing to provide the inmates protective equipment such as a face shield on July 5, 2007; for exposing inmates to potential viral and bacterial infections from sewage; and for exposing inmates to potential eye injuries from chemicals like bleach.

According to Armstrong’s grievances that are part of the summary judgment record, his “personal shoes were soaked with shit and piss,” so he changed into clean socks and his boots. Defs.’ App. 33. He stated he worked for over eight hours, until 2:30 a.m., and there was fecal matter in the sewage. Long, however, avers the water that initially came up from the drains was clear, though later, after the water was turned off and then back on, bits of fecal matter and toilet paper were in the water that came up from the drains. Armstrong’s grievances indicate that at times the sewage spread completely across the unit, though Long states the sewage initially formed circles of water approximately three to four feet each in diameter.

B. Facts Related to Armstrong's Grievances

Armstrong filed four grievances related to the incident, in which he asked for medical testing and treatment. The Iowa DOC has a formal grievance policy that first requires inmates to try to resolve problems informally before filing a grievance, and the parties do not dispute that Armstrong attempted informal resolution. The grievance process then follows three more steps: grievance, appeal to the warden, and appeal to the central office. The inmate is required to use the prison's forms for the initial grievance and for the appeal. After receiving a grievance, a grievance officer investigates the matter and either provides a written response to the inmate or refers the matter to a grievance committee for consideration. If the inmate is dissatisfied with the decision of the grievance officer or committee, he may appeal to the warden of the facility. If the inmate is still unsatisfied, the final step in the administrative process is to submit an appeal to the "Grievance Appeal Coordinator," who then coordinates with appropriate sources such as officials at the Iowa Department of Corrections central office and responds to the appeal.

The Iowa DOC policy defines a "grievance" as simply "[a] formal, written complaint, utilizing the established procedures filed by an offender." Defs.' App. 16. The policy does not specify what must be included in the grievance or grievance appeal other than using the prison's forms. The grievance form, itself, directs the inmate to state whether the grievance is "Standard" or "Emergency," and it directs inmates to include "Reason," "Description of Problem," and "Action Requested by Offender." Defs.' App. 24. The appeal form directs the inmate to include "Appeal Statement (My basis for appeal – cite specific reasons, new evidence, witnesses, etc.)" and "Action Requested." Defs.' App. 27. There are time limits specified in the grievance policy, and Defendants do not argue Armstrong's grievances were late.

Under "Description of Problem" on Armstrong's first grievance, dated July 31, 2007, he wrote, "I recently was made ill by a bio spill. People trained to clean up weren't cleaning. I was directed to clean up shit and humiliated doing it. Why? Am I nothing? No one? Why did I have to work so many hrs when there was others to switch off. How come my health wasn't even asked after. Where was the follow up. I did the most work and directed others on what to do per guards instructions. Yet I'm sick as a dog. Why?" Defs.' App. 32. Under "Action Requested," he wrote that he needed testing for diseases and was sick, but he did not specifically

ask for compensation for his injuries. He attached four additional pages to his grievance form, in which he stated that his shoes were soaked with urine and feces. He wrote, among other things, that while officers did not laugh outright, there were “a lot of smiles at our misery.” Defs.’ App. 33. He complained of a hoarse voice, irritated throat, and that he had been exposed to bodily fluids and bleach. He wrote that he had recently paid for blood work and had been declared disease free, but he could not afford to pay for testing again yet needed to be tested. Defendant Carter-Larson received Armstrong’s grievance and forwarded it to the appropriate officer. In response, the Grievance Officer said the matter had been turned over to the Iowa OSHA, and the prison would act on IOSHA’s recommendations. Armstrong appealed, stating, “It seems to me only half these issues are addressed.” Defs.’ App. 42. He wrote that he was sick, but the doctor refused to treat him. He again sought testing and treatment, but he did not specifically ask for money. The Warden’s representative responded that Armstrong’s medical needs were reviewed, necessary medical measures were taken, and that if Armstrong had medical needs he should contact Health Services. Armstrong appealed to the Central Office, asking why he was not checked and treated. Under Action Requested, he wrote, “that I receive copies of grievance and that reprimands be issued.” Defs.’ App. 44. The appeal was denied.

Armstrong filed three more grievances related to the spill and his medical treatment for it. Carter-Larson’s role was to forward the grievance to the appropriate officer. It appears that Armstrong did not timely appeal his second grievance to the Warden, as required by policy. Armstrong’s third and fourth grievances were denied as duplicative of his original grievance. He appealed them to the Central Office, which told him he was not being denied medical treatment and needed to kite Medical Services for further treatment. Throughout the process, Armstrong informally complained about his medical care to Unit Manager Carter-Larson, Lt. Peters, and Counselors Petersen and Gonzales.

C. Facts Related to Medical Treatment

Armstrong sought medical treatment for ailments he thought were related to the cleanup. Nearly a month after the clean up, on August 1, 2007, he saw medical staff and complained of a sore throat. Staff reported that his throat was red “with a small amount of lymph node swelling but otherwise negative.” Defs.’ Ex. H, App. 108-09, 111. Two days later, Armstrong saw

Defendant Dr. Filippelli for complaints of a sore throat and facial swelling, but Filippelli could observe no discernable symptoms. Filippelli wrote that Armstrong may have had a viral upper respiratory infection and recommended that he take Tylenol and drink fluids. Filippelli also wrote that Armstrong “appears to suffer from Borderline Personality Disorder. He is inordinately focused on his illness. I listened to his complaints, but when I disagreed with him about what treatment[]s were available, he became agitated and started threatening to call his attorne[y], etc, because we were denying him medical care.” Defs.’ App. 109, 112. Armstrong saw a nurse again on August 8, 2007. Filippelli did not see Armstrong but suggested he contact a dentist to rule out a dental cause for his discomfort. The Nursing Supervisor reported, “There is no medical documentation to support any connection between the July 5, 2007 cleanup and Armstrong’s reported symptoms.” Defs.’ App. 110.

Filippelli next saw Armstrong on October 26, 2007, for what Filippelli diagnosed as a cystic infected hair follicle on Armstrong’s neck but what Armstrong insisted was an infection related to the sewage clean up incident. Filippelli prescribed antibiotics and indicated the lesion might need to be excised. Filippelli saw Armstrong on November 16, 2007, and observed that the lesion had diminished. The record suggests Filippelli was convinced the ailment was an infected hair follicle and unrelated to exposure to sewage. He wrote, “I have acknowledged his concerns about his ‘exposure’ to the sewage and the consequences of this numerous times. His initial complaints in 8/07 one month after his ‘exposure’ were vague and I was not able to verify his concerns about a swollen face. I believed he may have had an upper respiratory illness at the time. Antibiotics are not appropriate for this.” Defs.’ App. 123. Filippelli indicated that Armstrong was initially noncompliant in taking antibiotics for the infected hair follicle, but the lesion was improving and would diminish over time on its own.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under the Prison Litigation Reform Act (PLRA), “No action shall be brought . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Defendants argue Armstrong did not exhaust his administrative remedies before filing suit under section 1983, and therefore he cannot proceed with this action. In particular, Defendants argue that although Armstrong filed and appealed grievances related to the clean up, he did not seek money

damages in his grievances, and his failure to notify prison officials that he wanted compensation for his alleged injuries constitutes a failure to exhaust administrative remedies. Neither the United States Supreme Court nor the Court of Appeals for the Eighth Circuit has ruled whether the PLRA exhaustion rule requires an inmate to request money damages through the grievance procedure even though the inmate asks for other, non-monetary relief through the grievance system and otherwise exhausts its remedies and satisfies its procedural requirements.

The purpose of exhaustion is to give inmates and prison officials an incentive and opportunity to resolve complaints before inmates file federal suit, thus reducing the quantity of suits and improving the quality of those that are filed. See Porter v. Nussle, 534 U.S. 516, 524 (2002); see also Jones v. Bock, 549 U.S. 199, 204 (2007). Exhaustion is mandatory, and the Supreme Court has ruled that an inmate cannot completely bypass administrative remedies and proceed directly to federal court even though the requested relief, for example, money damages, is not available through prison administrative remedies. See Booth v. Churner, 532 U.S. 731, 739-41 (2001). Exhaustion is not per se inadequate because an inmate does not name in a grievance a person who is later sued in court. Jones, 549 U.S. at 219. Exhaustion requires an inmate to comply with the applicable administrative procedural rules, such as deadlines, before filing federal suit. See Woodford v. Ngo, 548 U.S. 81, 95 (2006) (inmate who filed late grievance under prison policy failed to exhaust administrative remedies). Therefore, to determine what Armstrong needed to do to properly exhaust his administrative remedies, this Court looks to the Iowa DOC grievance procedures, themselves. See id. at 90-91; see also Jones, 549 U.S. at 218.

The Iowa DOC grievance policy does not specify what must be included in the grievance or the appeal beyond use of its form. As Defendants point out, the forms are not complicated, and they prompt the inmate to list "Action Requested." They may, however, be so generic as to lack important precision regarding what is required. They do not require the inmate to list money damages or any other particular form of relief, they do not require the inmate to list the names of the persons involved, and they do not prescribe the degree of factual particularity required.

Several courts have examined grievance instructions and ruled generic instructions are insufficient to require detailed pleadings from an inmate. In Strong v. David, 297 F.3d 646, 650

(7th Cir. 2002), the State provided no rule or regulation prescribing the contents or factual particularity of a grievance. The Court of Appeals for the Seventh Circuit held, “When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.” *Id.* The court explained that a prison grievance system *could* require more specificity from prisoners, and the only constraint on prison grievance procedures is the policy underlying section 1983 and section 1997e(a). *Id.* at 649. Thus, for example, “no administrative system may demand that the prisoner specify each remedy later sought in litigation – for [*Booth v. Churner*] holds that § 1997e(a) requires each prisoner to exhaust a *process* and not a *remedy*.” *Id.* at 649-50; *see also Booth*, 532 U.S. at 739 (“one ‘exhausts’ processes, not forms of relief”). Relying on *Strong*, and cases that followed *Strong*, the Court of Appeals for the Ninth Circuit held that a grievance form that instructed the inmate to “[b]riefly describe [the] complaint and a proposed resolution” did not require the inmate to allege the problem resulted from deliberate indifference. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (ultimately ruling the inmate’s grievance did not provide sufficient information to the staff so it could respond appropriately). This Court finds persuasive the reasoning of *Strong* and those courts that follow that approach.

Defendants attempt to contrast Iowa’s grievance procedure with one that the Court of Appeals for the Third Circuit held did not require an inmate to request damages. *See Spruill v. Gillis*, 372 F.3d 218, 233-34 (3d Cir. 2004). In *Spruill*, the grievance system required certain things to be included in the grievance, and it listed other items that “should” or “may” be included. *Id.* at 233. A request for money was something inmates “may” include, and the Court of Appeals determined the language did not require the inmate to identify money damages as relief sought, but rather the prison affirmatively made such a request optional. *Id.* at 233-34. The court further explained the language was part of a regulation that directed inmates regarding the contents of the grievance, not the scope of relief, and the form did not prompt inmates to state the relief sought. *Id.* at 233. The court emphasized that the regulation did not include language that could give rise to procedural default for failure to plead relief properly. It was a

“far cry from, say, a regulation that reads, ‘If the inmate desires compensation or other legal relief normally available from a court, the inmate shall request the relief with specificity in his/her initial grievance.’” *Id.* at 234. Spruill is arguably inapposite to Armstrong’s case because in Spruill the form did not direct inmates to ask for money but rather affirmatively directed inmates a claim for compensation was optional.

Defendants point out that unlike the form in Spruill that included no prompt for action requested, Iowa’s form does include a prompt for “Action Requested.” While true, the Court is unconvinced that the phrase “Action Requested” alerts an inmate proceeding pro se that he must request money damages if the inmate ever intends to seek them. The phrase is more akin to a request for injunctive relief. While slightly more specific than the regulation in Spruill, “Action Requested” is still too generic to put Armstrong on notice that he had to ask for money damages.

Armstrong’s circumstances are unlike those in Booth, where the inmate never appealed his first grievance and went straight to federal court for damages. Booth, 532 U.S. at 735. Armstrong’s case is also unlike that in King v. Iowa Department of Corr., No. 4:07-cv-00405-JAJ (Order of Mar. 17, 2009, Clerk’s No. 39), where the inmate did not pursue the grievance appeal process because his grievance was marked “resolved,” but he later brought suit in federal court for damages. Defendants’ attempts to distinguish Armstrong’s case from that in Spruill are inapposite. Armstrong did not bypass the grievance procedure, but rather he did everything the grievance procedures required. Armstrong’s grievance contained all that was needed to put the prison on notice of his problems related to the July 5, 2007, clean up. He complained that he was exposed to a potential health threat without proper protection, and he asked the prison to address any injury he suffered as a result of that exposure. While it was reasonable that his immediate concern would be his current health and any needed treatment and testing, the prison was on notice that he believed he had been harmed by the exposure. The prison was therefore on notice of the facts of the claim, the persons involved, the nature of the exposure to potential health hazards, and that Armstrong believed he suffered health problems as a result. If Armstrong did in fact suffer a serious medical condition as a result, the prison had what it needed for its investigatory and grievance procedures, regardless of the notice that Armstrong might later seek compensation for any serious injuries which may or may yet result. After

consideration of the specific procedural requirements for Iowa inmates and the purposes underlying the exhaustion requirement, the Court concludes Armstrong complied with and exhausted Iowa's grievance procedure, and he is not precluded by section 1997e(a) from asserting a claim for damages in this federal suit.

Finally, Defendants argue Armstrong did not identify any of the Defendants as wrongdoers in his grievances. Jones forecloses their argument that section 1997e(a) requires Armstrong to name the individuals involved. Jones, 549 U.S. at 219. Iowa's grievance policy and forms include no requirement that inmates identify the persons involved. The Court concludes that Armstrong's failure to list each of the named Defendants in his grievance does not preclude him from seeking relief under 42 U.S.C. § 1997e(a).

IV. PHYSICAL INJURY

Defendants argue that Armstrong's case must be dismissed under 42 U.S.C. § 1997e(e) because he incurred no physical injury. Section 1997e(e) provides that a prisoner may not bring a civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." Contrary to Defendants' argument, section 1997e(e) is not an element of Armstrong's suit but rather a limitation on damages. See Munn v. Toney, 433 F.3d 1087, 1089 (8th Cir. 2006). At a minimum, Armstrong may be entitled to nominal damages for Defendants' alleged Eighth Amendment violations. Id. Defendants' motion for summary judgment based on section 1997e(e) is therefore denied.

V. QUALIFIED IMMUNITY

Defendants move for summary judgment based on qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The doctrine, when applicable, is more than an affirmative defense and protects a defendant from suit; thus it is vital to address qualified immunity as an initial matter. See id. It "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

“Qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant’s alleged misconduct.” Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). This two-step process need not proceed in that particular order, depending upon the circumstances of the case. See Pearson, 129 S. Ct. at 818. Here the appropriate first step in the qualified immunity analysis is whether Armstrong can make out a constitutional violation against the Defendants.

A. Conditions During the Cleanup

The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones. Farmer v. Brennan, 511 U.S. 825, 832 (1994). To establish a claim that prison conditions violated the Eighth Amendment, an inmate must prove both an objective component and a subjective component. Id. at 833-34. To satisfy the objective element, the inmate must show the conditions “deprive inmates of the minimal civilized measure of life’s necessities.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The standards against which a court measures prison conditions are “the evolving standards of decency that mark the progress of a maturing society.” Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). To satisfy the subjective component, the inmate must show the officer was deliberately indifferent, that is, the officer “knows of and disregards an excessive risk to inmate health or safety.” Farmer, 511 U.S. at 835. Therefore, in Armstrong’s case, he must show Defendants were deliberately indifferent to the risk of harm posed by the raw sewage. See Burton v. Armontrout, 975 F.2d 543, 546 (8th Cir. 1992), cert. denied, 508 U.S. 972 (1993).

Analysis of confinement conditions must be based on the totality of the circumstances. Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989). Courts are “especially cautious about condoning conditions that include an inmate’s proximity to human waste,” and the Court of Appeals for the Eighth Circuit has stated that “‘common sense’ suggests that [officers] should have [] knowledge that unprotected contact with human waste can cause disease.” Fruit v. Norris, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (citing other courts). The length of time an inmate is subjected to unsanitary conditions is also a crucial factor. Smith v. Copeland, 87 F.3d

265, 268-69 (8th Cir. 1996). “Conditions such as a filthy cell that may be tolerable for a few days are intolerably cruel for weeks or months.” Id. at 269.

On one hand, the Court of Appeals held it violated the Eighth Amendment to force inmates without protective gear to work ten minutes in a 125 F-degree well containing raw sewage, “in a shower of human excrement.” Fruit, 905 F.2d at 1149, 1151. The Court also found a violation when an inmate was placed in a cell with feces on the walls and a mattress stained with human waste, and he lived in unsanitary conditions for two years. Howard, 887 F.2d at 137. On the other hand, the Court found no violation when an inmate was exposed for four days in his cell to raw sewage from his overflowed toilet. Smith, 87 F.3d at 269. And the Court held prison officials did not violate clearly established law by forcing inmates to clean raw sewage while wearing protective eyewear, gloves, and boots but not coveralls. Good v. Olk-Long, 71 F.3d 314, 315-16 (8th Cir. 1995) (distinguishing Fruit, because inmates were given protective gear). It is notable that the Court in Good did not rule on the constitutional question, itself, but rather on the qualified immunity issue. It held, “we cannot say, *under the circumstances of this case*, that they violated clearly established constitutional law in failing to provide additional equipment. The fact that the prison regulation may have been violated does not, in itself, demonstrate objective bad faith of the employees.” Id. at 316 (emphasis in original). In another sewage cleanup case, the Court refused to award damages when inmates could not show officers knew the sewage was contaminated with AIDS and presented a health risk. Burton, 975 F.2d at 545-46. At the same time, however, the Court upheld injunctive relief ordering the prison to provide protective clothing and to warn of the dangers of working in AIDS-contaminated waste. Id. at 545 & n.2 (requiring “rubber boots, rubber gloves, leather gloves, surgical masks, and face shields in the maintenance and plumbing department”).

1. Material questions of fact remain as to Defendant Long

In Armstrong’s case, there are material, disputed facts on the record as to the length and degree of his exposure to human waste. The Court recognizes “that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries.” Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). Taken in a light most favorable to Armstrong, a reasonable factfinder could determine that Defendant Long

ordered Armstrong to clean up a mixture of raw human waste floating in toilet sewage. Long can reasonably be expected to know that Armstrong's contact with human waste exposed him to disease. The entire cleanup process was done without the benefit of required protective gear except for rubber gloves. There are questions of fact whether Armstrong suffered resulting health problems, including infection. Viewed in the light most favorable to Armstrong, Defendant Long both failed to follow safety guidelines for bio-hazard cleanup and ignored common sense, which suggests a deliberate indifference to Armstrong's health and safety. Accordingly, there is a jury question whether Armstrong has made out an Eighth Amendment violation against Long.

As to Defendant Carter, however, who did not order Long to clean and did not supervise him, the Court concludes no reasonable jury could find that Carter violated Armstrong's Eighth Amendment rights. The Court also concludes that no reasonable jury could find that Defendant Baker, whose only involvement was in clearing the plugged drain and not the cleanup, violated Armstrong's Eighth Amendment rights. Consequently, the Motion for Summary Judgment as to Defendants Carter and Baker will be granted.

2. Armstrong's rights were clearly established

The Court now considers whether Armstrong's Eighth Amendment rights as to Defendant Long were clearly established on July 5, 2007. "Notice of constitutionally impermissible conduct may be provided by the Constitution itself or the decisions of the United States Supreme Court and the lower federal courts. [] Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established." Nelson v. Corr. Med. Servs., 583 F.3d 522, 531 (8th Cir. 2009) (en banc) (quotation marks and citations omitted). Prior, general statements of the law *may* be sufficient to give notice "so long as the prior decisions [give] reasonable warning that the conduct then at issue violated constitutional rights." Hope v. Pelzer, 536 U.S. 730, 740 (2002) (quotation marks and citation omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." Id. at 741.

The general Eighth Amendment standards set forth in 1994 in Farmer were well-known by 2007. A reasonable factfinder could determine from this record that Long, like the officials in

Fruit twenty years ago, could be expected to know “that unprotected contact with human waste could cause disease.” Fruit, 905 F.2d at 1151. The importance of providing protective gear was also emphasized in 1992, when the Court upheld an order to provide gear. Burton, 975 F.2d at 545-46. Three years later, the Court repeated its concern by granting qualified immunity based on the limited facts in that case, where inmates did have protective eyewear, gloves, and boots. Good, 71 F.3d at 316. Armstrong’s right to protection from exposure to human waste was therefore established by court decisions before July 5, 2007.

In addition, those safety concerns are reflected in the prison and IOSHA regulations that were in effect on July 5, 2007. A reasonable factfinder could presume that Long knew of those regulations. See Nelson, 583 F.3d at 533-34 (citing Harlow, 457 U.S. at 818-19 (“a reasonably competent public official should know the law governing his conduct”)). The existing regulations, along with the Supreme Court and lower court caselaw, would have made it clear to a reasonable officer that an inmate should not be made to clean waste for over eight hours with only rubber gloves as protective gear. The Court is not ruling there was an Eighth Amendment violation. The Court is only ruling that, given the clearly established law at the time of the incident, and viewing the summary judgment record in the light most favorable to Armstrong, summary judgment on this issue is not appropriate. The Court will therefore deny the Motion for Summary Judgment based on qualified immunity as to Defendant Long.

B. Medical Care After the Cleanup

An Eighth Amendment claim that prison officials were deliberately indifferent to the medical needs of an inmate also involves both an objective and a subjective component. See generally Farmer, 511 U.S. 825; see also Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997). To succeed on such a claim, Armstrong must demonstrate that (1) he suffered an objectively serious medical need, and (2) the prison officials actually knew of but deliberately disregarded that need. Id.

The determination that a medical need is objectively serious is a factual finding. See id. A serious medical need is “one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.” Johnson v. Busby, 953 F.2d 349, 351 (8th Cir. 1991). “[T]he failure to treat a

medical condition does not constitute punishment within the meaning of the Eighth Amendment unless prison officials knew that the condition created an excessive risk to the inmate's health and then failed to act on that knowledge." Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996). Deliberate indifference may be demonstrated by prison doctors who fail to respond to a prisoner's serious medical needs. Estelle, 429 U.S. at 104-05.

Inmates have no constitutional right to receive a particular or requested course of treatment, and prison doctors remain free to exercise their independent medical judgment. Long, 86 F.3d at 765. Mere negligence is insufficient to rise to a constitutional violation. Estelle, 429 U.S. at 106. In order to succeed on a claim of deliberate indifference to a serious medical need, there must be "verifying medical evidence" that the Defendants ignored an acute or escalating medical need or that the delay in treatment adversely affected the medical condition. Crowley v. Hedgepeth, 109 F.3d 500, 502 (8th Cir. 1997). A prison officer who lacks medical expertise cannot be liable for the medical staff's diagnostic decisions. See Camberos v. Branstad, 73 F.3d 174, 176 (8th Cir. 1995).

1. Further record is needed regarding Defendant Filippelli

Armstrong is proceeding pro se, without the benefit of counsel or funds to secure expert medical review of his complaints against Filippelli. Armstrong complains that he believes he was exposed to disease during the July 5, 2007, cleanup, and the IOSHA citation and penalty indicates that he was exposed to potential viral and bacterial infections. Armstrong states he suffered symptoms that Filippelli brushed off as inconsequential and unrelated to his exposure. Without expert testimony, it will be nearly impossible for Armstrong to assemble "verifying medical evidence" in support of his claim.

Viewing the record liberally and in the light most favorable to Armstrong, who is limited in research and discovery by his status as an inmate, the Court determines there remains a question of fact regarding whether Armstrong could have contracted infection or disease by exposure to viral and bacterial infections during the sewage cleanup. The Court concludes that, in this case, it would be helpful for both Armstrong and the Court for counsel to be appointed so that an adequate record can be prepared on the question of Filippelli's care. E.g., Brown v. Wheatley, 2006 WL 2850549, at *3 (E.D. Mo. Sept. 29, 2006) (Autrey, J.) ("Because of

plaintiff's pro se status, the Court believes that he should be given the opportunity to further develop the record through an extension of discovery."); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam) (construe prisoner complaints using less stringent standards than pleadings drafted by lawyers).² The Court emphasizes that if Armstrong is unable to prove he suffered damages or that Filippelli's acts or omissions caused him injury, then Armstrong would not be entitled to recover damages against Filippelli.

The Court further recognizes that Filippelli's involvement also relates to Armstrong's ongoing request for injunctive relief, namely testing for potential disease contracted during the cleanup. Such a claim for injunctive relief cannot be dismissed based on qualified immunity, which does not apply to claims for equitable relief. Grantham v. Trickey, 21 F.3d 289, 295 (8th Cir. 1994) ("state officials may be sued in their official capacity for equitable relief"). Consequently, the Court cannot dismiss Filippelli as a Defendant.

2. The uninvolved Defendants will be dismissed

Armstrong's remaining complaints about his medical care are against Defendants Peters, Petersen, and Gonzales, all of whom are not medical professionals and who relied on Filippelli's medical diagnosis. They cannot be held liable for relying on Filippelli's expertise. See

² Even if Armstrong were not an inmate, this Court has discretion to deny summary judgment and allow the case to be more fully developed at trial:

[A] federal district court has no discretion to *grant* a motion for summary judgment under Rule 56. However, even if a district judge feels that summary judgment in a given case is technically proper, sound judicial policy and the proper exercise of judicial discretion may prompt him to *deny* the motion and permit the case to be developed fully at trial. The ultimate legal rights of the movant can always be protected in the course of or even after trial. See 10 C. Wright, A. Miller & Kane [Federal Practice and Procedure] § 2728, pp. 552 et seq. A district judge is frequently tempted in these days of crowded dockets to dispose of a case summarily if he feels that the party opposing a motion for summary judgment cannot prevail legally upon trial. However, this court has cautioned that a district judge in order to dispose of a case summarily should not make the case hard by deciding a difficult or doubtful question of law that might not survive factual determinations.

Olberding v. U.S. Dept. of Defense, Dept. of the Army, 564 F. Supp. 907, 908 & n.1 (S.D. Iowa 1982) (Viotor, J.) (quoting Roberts v. Browning d/b/a Browning, Inc., 610 F.2d 528, 536 (8th Cir. 1979)), aff'd, 709 F.2d 621 (8th Cir.1983). As the Court has already noted, even when the nonmoving party fails to respond to a summary judgment motion, the Court should enter summary judgment only "if appropriate." See Fed. R. Civ. P. 56(e)(2).

Camberos, 73 F.3d at 176. The Court will therefore grant Defendants' Motion for Summary Judgment as to Peters, Petersen, and Gonzales.

C. Respondeat Superior

Defendants Baldwin, Mapes, and Carter-Larson argue they were not directly or personally involved in the actions or events Armstrong challenges as unlawful. An official sued under section 1983 "is only liable for his . . . own misconduct" and is not "accountable for the misdeeds of [his] agents" under a theory such as respondeat superior or supervisor liability. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); see also Nelson, 583 F.3d at 535 (quoting Iqbal). An official may be subject to section 1983 liability for inadequately training employees "where (1) the [] hiring and training practices are inadequate; (2) the [supervisor] was deliberately indifferent to the rights of others in adopting them, such that the 'failure to train reflects a deliberate or conscious choice by a municipality,' []; and (3) an alleged deficiency in the [] hiring or training procedures actually caused the plaintiff's injury." Andrews v. Fowler, 98 F.3d 1069, 1076 (8th Cir. 1996) (discussing municipal liability and quoting City of Canton v. Harris, 489 U.S. 378, 389 (1989)).

The record indicates that Armstrong talked informally with Unit Manager Carter-Larson regarding his medical problems, and she passed along his grievances to the appropriate grievance officer. There is also some indication that she may have been present at times during the clean up, but there is not evidence that she supervised the officers and inmates, directed their activities, or was responsible for their training with hazardous materials. There is no evidence on this summary judgment record that Carter-Larson participated or condoned unconstitutional conduct during the events of July 5, 2007; and she cannot be held liable for them under section 1983. The record does not indicate Defendant Baldwin, the DOC Director, was personally involved in Armstrong's case or instituted unconstitutional policies. Therefore, he will also be dismissed. Likewise, Warden Mapes's role, if any, was minimal, and there is little evidence that the superior officers knew about the conduct of their subordinates. There is no evidence to suggest that similar events happened in the past and are an ongoing problem that supervisors condoned. Accordingly, Defendants Baldwin, Mapes, and Carter-Larson cannot be held liable under a theory of respondeat superior. Defendants' Motion for Summary Judgment as to Defendants

Baldwin, Mapes, and Carter-Larson will be granted. The Court further observes that the summary judgment record does not include facts related to Defendants Foster, Mays, and Malmberg; therefore, they will be dismissed, as well.

SUMMARY

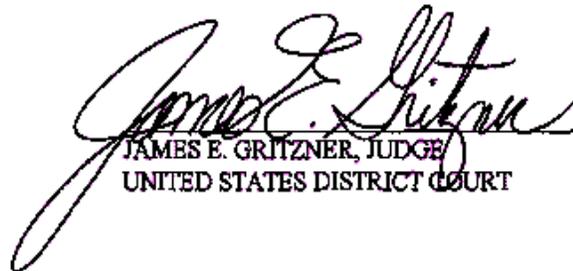
Based upon the foregoing discussion, Defendants' Motion for Summary Judgment (Clerk's No. 18) must be **granted in part and denied in part**. The motion is granted as to Defendants Baldwin, Mapes, Carter-Larsen, Peters, Baker, Malmberg, Foster, Mays, Petersen, and Gonzales; and the above-entitled action is **dismissed as to those Defendants only**. The motion must be **denied** as to Defendants Long and Filippelli. The denial is without prejudice to Defendants Long and Filippelli renewing the motion at a later stage of the proceedings.

Armstrong requests appointment of counsel. The Court has considered the factors set out in Edgington v. Missouri Dept. of Corrections, 52 F.3d 777, 780 (8th Cir. 1995), and has determined that counsel would be of help to Armstrong and the Court. Armstrong's request for counsel (Clerk's No. 34) is **granted**. **The Clerk is directed to appoint as counsel for Armstrong Ms. Angela Campbell, who represented Plaintiff Armstrong in a related suit. By not later than April 16, 2010, counsel shall file an appearance or report why counsel is unable to represent Armstrong.**

Armstrong also moves to amend the complaint to add names of nurses as defendants, and he asks for leave to proceed in forma pauperis. The Court **denies** Armstrong's motion to amend (Clerk's No. 27) without prejudice to counsel renewing the motion if counsel deems it appropriate. Armstrong's motion for leave to proceed in forma pauperis (Clerk's No. 33) is **denied** as moot because he previously was granted leave to proceed in forma pauperis.

IT IS SO ORDERED.

Dated this 26th day of March, 2010.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT