

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

FRANCISCO DELGADILLO-PEREZ,

Plaintiff,

v.

Case No. 20C0021

JOHN BRETZEL, RYAN HINTZ,
JENNIFER KACYON,

Defendants.

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT**

Introduction

This case concerns whether the Defendants, John Bretzel, Ryan Hintz, and Jennifer Kacyon violated Plaintiff Francisco Delgadillo-Perez's rights under the Eighth Amendment by acting with deliberate indifference to his medical needs on August 14-15, 2019.¹ Specifically, Delgadillo-Perez alleges that Bretzel provided him with a medication that was not intended for him on August 14, 2019, and that each of the Defendants failed to take appropriate steps afterward.² The Court permitted Delgadillo-Perez to proceed on Eighth Amendment deliberate indifference claims against the Defendants.³

¹ See dkt. 9.

² Dkt. 1 at 3.

³ Dkt. 9:4-5.

For the reasons outlined below, the Defendants are entitled to summary judgment on each of Delgadillo-Perez's claims.

Brief Statement of Facts

The Defendants incorporate by reference the Defendants' Proposed Findings of Fact (DPFOF).

Parties

Plaintiff Delgadillo-Perez is currently incarcerated at Waupun Correctional Institution (Waupun), where he was located at all times relevant to this case.⁴ Defendants Bretzel, Hintz, and Kacyon were a Correctional Officer, a Correctional Sergeant, and a Nurse Clinician II in the Health Services Unit (HSU), respectively, at Waupun, at all times relevant to this case.^{5,6,7}

August 14, 2019

On August 14, 2019, Bretzel conducted his assigned job duties and delivered medication to patients in the North-West Cell Hall on the High J-Range at Waupun.⁸ Bretzel could not use Electronic Medical Records (EMR), which is used to verify medication administration with patient ID cards, as there was no WiFi available.⁹ Bretzel was instructed by his sergeant to do cell-front medication administration and reverted to a paper system to deliver medications.¹⁰ The patients' daily Medication

⁴ DPFOF ¶ 1.

⁵ DPFOF ¶ 2.

⁶ DPFOF ¶ 4.

⁷ DPFOF ¶ 6.

⁸ DPFOF ¶ 32.

⁹ DPFOF ¶¶ 9, 33.

¹⁰ DPFOF ¶¶ 34-35.

Administration Records were printed and he delivered medication directly to the patients' cells, documenting medication compliance on the paper records.¹¹

Bretzel arrived at J-cell 47 at approximately 9:15 p.m. which housed Delgadillo-Perez and his cellmate, Simms.¹² Bretzel retrieved Inmate Simms's medication, Mirtazapine 15-mg, and stated, "Simms Meds".¹³ At the time, Bretzel did not know the identity of Simms.¹⁴ One of the patients stepped to the cell door front.¹⁵ Bretzel visually displayed the medication card to whom he believed to be Simms and verbally stated the medication and the patient at the cell front acknowledged it was his medication by shaking his head "yes."¹⁶ Bretzel then placed one (1) Mirtazapine 15-mg pill into the hand of the patient at the cell front in plain view.¹⁷ After taking the medication Delgadillo-Perez asked Bretzel, "what did you just give me?"¹⁸ Bretzel said, "your medication," and showed Delgadillo-Perez the medication package for the second time.¹⁹ The patient then stated that it was not his medication and that he was Delgadillo-Perez, not Simms.²⁰ Simms remained in the back of the cell during this entire interaction.²¹ Bretzel told Delgadillo-Perez that he would contact the HSU and Delgadillo-Perez said he would like to see a nurse.²² Bretzel notified Hintz that

¹¹ DPFOF ¶ 35.

¹² DPFOF ¶ 37.

¹³ DPFOF ¶¶ 39-40.

¹⁴ DPFOF ¶ 41.

¹⁵ DPFOF ¶ 42.

¹⁶ DPFOF ¶ 43.

¹⁷ DPFOF ¶ 44.

¹⁸ DPFOF ¶ 45.

¹⁹ DPFOF ¶ 46.

²⁰ DPFOF ¶ 47.

²¹ DPFOF ¶ 48.

²² DPFOF ¶¶ 49-50.

Delgadillo-Perez had taken the wrong medication Hintz directed him to call the HSU and write an incident report.²³ Bretzel then called the HSU and explained what had happened.²⁴

Shortly before Kacyon's shift ended, she received a call from Bretzel that Delgadillo-Perez was administered one tablet of Mirtazapine 15-mg, which was not his medication.²⁵ Kacyon reviewed Delgadillo-Perez's EMR to review his medication list, allergies, diagnosis, and to check for any possible medication contraindications.²⁶ Kacyon did not identify any contraindications.²⁷ Kacyon then went to meet with Delgadillo-Perez at his cell.²⁸ Delgadillo-Perez was alert, his speech was clear, gait was steady, and his vitals were normal, but he did report dizziness.²⁹ Kacyon conducted a medical assessment and took Delgadillo-Perez's vitals and medically cleared him to remain in the cell.³⁰

Kacyon educated Delgadillo-Perez on what symptoms he may experience having taken Mirtazapine such as feeling more tired and/or groggy.³¹ Kacyon also instructed him to provide for his safety if the dizziness continued. If he felt dizzy, she told him to sit down on the lower bunk or lay down if he needed. She told him not to walk in his cell if he was dizzy so that he would not fall and injure himself. Delgadillo-Perez confirmed that he was assigned a low bunk and that he was going to bed at

²³ DPFOF ¶ 51.

²⁴ DPFOF ¶ 52.

²⁵ DPFOF ¶ 53.

²⁶ DPFOF ¶ 54.

²⁷ DPFOF ¶ 54.

²⁸ DPFOF ¶¶ 55-56.

²⁹ DPFOF ¶ 57.

³⁰ DPFOF ¶ 58.

³¹ DPFOF ¶ 59.

that time.³² Kacyon instructed Delgadillo-Perez to report any new or worsening symptoms to HSU. She also informed him that a follow up appointment would be scheduled in the morning, to which he agreed.³³ Kacyon did not advise security staff to monitor Delgadillo-Perez or advise them to watch him for any symptoms per compliance with the Health Insurance Portability and Accountability Act (HIPAA).³⁴ Scheduled rounds were conducted every hour after 6 p.m. on Delgadillo-Perez's unit, at which time he could ask staff during their rounds to see HSU prior to his scheduled follow up appointment.³⁵

After Kacyon left Delgadillo-Perez's cell she then called the on-call doctor, Dr. Hoffmann, and left two voicemail messages informing him of Delgadillo-Perez's situation.³⁶ For continuity of care, Kacyon gave verbal shift report to the next shift (3rd shift) nurse on duty, C. Dunham. Nurse Dunham was updated on the administration of Mirtazapine to Delgadillo-Perez and the expectation of a return call from the on-call doctor, Dr. Hoffmann.³⁷ Kacyon scheduled a nurse visit for Delgadillo-Perez for the morning of August 15, 2019, completed a medication occurrence report, and also notified the pharmacy staff of the incident.³⁸

³² DPFOF ¶ 60.

³³ DPFOF ¶ 61.

³⁴ FOF ¶¶ 68-69.

³⁵ DPFOF ¶¶ 68, 71.

³⁶ DPFOF ¶ 72.

³⁷ DPFOF ¶ 73

³⁸ DPFOF ¶¶ 74, 91-92.

As Bretzel and Hintz's shifts ended, Hintz notified the oncoming third shift staff that Delgadillo-Perez took the wrong medication and that he would notify staff if he experienced any symptoms.³⁹

August 15, 2019

On August 15, 2019, sometime after 4:00 a.m., Nurse Dunham was called to cell hall by security reporting that Delgadillo-Perez was "not waking up."⁴⁰ Correctional Officer Overlein reported to Dunham that Delgadillo-Perez woke up at 4:00 a.m. for work. He was talkative and appeared to be fine and started to get ready for work. Then later, Delgadillo-Perez's cellmate reported to Overlein that Delgadillo-Perez would not wake up.⁴¹ Dunham went to Delgadillo-Perez's cell where she found him lying on his right side. His respiration was noted to be regular with rate shallow. He was observed squeezing his eyelids, but that his pupils were equal, round, and reactive to light and accommodation. His heart sounds displayed regular rate and rhythm.⁴² Dunham instructed Delgadillo-Perez that she was there to help him, but he needed to talk. He opened his eyes wide and asked "what?" He was instructed that he was okay and that he would be seen later in the HSU and that he did not have to go to work that day.⁴³

Delgadillo-Perez was seen in the HSU at approximately 10:30 a.m. on August 15, 2019.⁴⁴ Delgadillo-Perez reported that he did not remember anything after taking

³⁹ DPFOF ¶ 77.

⁴⁰ DPFOF ¶ 83.

⁴¹ DPFOF ¶ 84.

⁴² DPFOF ¶ 85.

⁴³ DPFOF ¶ 86.

⁴⁴ DPFOF ¶ 87.

the medication on August 14, 2019.⁴⁵ Delgadillo-Perez appeared tired and groggy to HSU RN Haseleu, who advised him to drink plenty of water to help flush any medication out of his system and to rest. He was given the day off from work so he was able to rest. RN Haseleu explained to Delgadillo-Perez that the medication he took is used, in some cases, to help people sleep and that is probably the reason he was tired. He was advised to inform the HSU if anything changed.⁴⁶

Legal Standard

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and when the moving party is entitled to a judgment as a matter of law. The moving party seeking summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citation omitted). “[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 338 n.3.

There is a genuine issue of material fact only if any of the disputed facts might affect the outcome of the case. *First Ind. Bank v. Baker*, 957 F.2d 506, 507-08 (7th Cir. 1992). A dispute concerning facts that are not material to a determinative issue

⁴⁵ DPFOF ¶ 88.

⁴⁶ DPFOF ¶ 89.

does not preclude summary judgment. *Donald v. Polk Cty.*, 836 F.2d 376, 379 (7th Cir. 1988). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party is “entitled to a judgment as a matter of law” when the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corp.*, 477 U.S. at 338 n.4. If the nonmoving party “cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.” *Id.* at 331.

Argument

I. Defendants are entitled to summary judgment on Delgadillo-Perez’s Eighth Amendment deliberate indifference claim.

The Court should grant summary judgment in the Defendants’ favor because Delgadillo-Perez’s medical condition was not objectively serious. However, even if it was, the undisputable facts show that none of the Defendants acted with deliberate indifference.

A. Overview of the law.

The Eighth Amendment prohibits cruel and unusual punishment, and it imposes on states, through the Fourteenth Amendment, the duty to provide medical care to prisoners. *Williams v. Liefer*, 491 F.3d 710, 714 (7th Cir. 2007). Prison officials

who are deliberately indifferent to an inmate's serious medical needs violate the Constitution. *Id.*

To prove deliberate indifference to a serious medical need, Delgadillo-Perez must meet an objective standard and a subjective standard. *Dunigan v. Winnebago Cty.*, 165 F.3d 587, 590 (7th Cir. 1999). First, Delgadillo-Perez must prove he suffers from an objectively serious medical need. *Id.* Second, he must prove that Defendants acted with a culpable state of mind, which is deliberate indifference. *Id.* at 591. *Collins v. Seeman*, 462 F.3d 757, 760 (7th Cir. 2006).

Delgadillo-Perez must show that his condition was serious, an objective standard. *Collins*, 462 F.3d 757, 760 (7th Cir. 2006). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, *Gutierrez v. Peters*, 111 F.3d 1364, 1367-73 (7th Cir. 1997), "significantly affects an individual's daily activities," *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, *Cooper v. Casey*, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). However, even a diagnosed medical condition does not necessarily establish a serious medical need; no matter how serious the condition, a plaintiff must show that the failure to treat the condition caused him injury or a serious risk of injury. *Jackson v. Pollion*, 733 F.3d 786, 789-90 (7th Cir. 2013).

Delgadillo-Perez must also show that the Defendants had sufficiently culpable state of mind, a subjective standard. *Id.* Deliberate indifference is a high standard.

To state a claim of deliberate indifference, “a prisoner must allege that a prison official recklessly or intentionally disregarded a substantial risk of serious harm.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brady v. Aldridge*, 493 F. App’x 790, 791-92 (7th Cir. 2012). Ordinary negligence, and even gross negligence, in the tort sense are not enough. *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991); *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 428 (7th Cir. 1991). It is “obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the [Eighth Amendment].” *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Additionally, “an inmate has no claim ‘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.’” *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008) (quoting *Farmer*, 511 U.S. at 837). Even if a defendant failed to alleviate a significant risk of harm that she should have perceived, there is no liability without actual knowledge. *Whiting v. Marathon Cty. Sheriff’s Dep’t*, 382 F.3d 700, 704 (7th Cir. 2004).

B. Delgadillo-Perez’s temporary dizziness/tiredness was not an objectively serious medical condition.

As a threshold matter, Delgadillo-Perez cannot satisfy the first element of a deliberate indifference claim: Delgadillo-Perez’s temporary dizziness/drowsiness was not a serious medical condition. Although taking an improper medication has the potential to cause a serious injury, there is no evidence in the record that shows Delgadillo-Perez suffered any serious injury. No matter how serious the condition,

Delgadillo-Perez must show that the failure to treat the condition caused him injury or a serious risk of injury. *See Jackson*, 733 F.3d 789–90. Delgadillo-Perez cannot do so.

In his complaint Delgadillo-Perez states that he fell into a “coma-like state,” which placed “his health, and his very life, in jeopardy, as he was exposed to the dangers of both physical and sexual assaults with no means to protect himself.”⁴⁷ But Delgadillo-Perez’s description seems nothing more than hyperbole and speculation. Taking one 15-mg dose of Mirtazapine does not cause a loss of consciousness, but may make someone feel sleepy.⁴⁸ The objective facts show that Delgadillo-Perez felt dizzy, sleepy, had difficulty waking up, and he was permitted to miss work for one day.⁴⁹ When Kacyon learned that Delgadillo-Perez felt dizzy, she ensured that he had a low bunk restriction and that he planned on sleeping and provided instructions for him to avoid falling as a result of his dizziness.⁵⁰ Kacyon also reviewed Delgadillo-Perez’s medical records and ensured that he would not have any allergies or contraindications from taking the Mirtazapine.⁵¹ Further, Delgadillo-Perez’s cell was locked at 9 pm, so he was not going to moving outside of his cell or exposed to other inmates who could enter his cell.⁵²

It is undisputed that Delgadillo-Perez received a single dose of Mirtazapine 15-mg by mistake. However, Delgadillo-Perez received prompt medical treatment and

⁴⁷ Dkt. 1 at ¶ 20.

⁴⁸ DPFOF ¶¶ 64-65.

⁴⁹ DPFOF ¶¶ 86-89.

⁵⁰ DPFOF ¶¶ 60, 67.

⁵¹ DPFOF ¶ 54.

⁵² DPFOF ¶ 63.

cannot show a failure to treat his condition that resulted in the serious risk of injury. Accordingly, Delgadillo-Perez's lawsuit against the Defendants must be dismissed. *See Jackson*, 733 F.3d 789–90.

C. Defendants were not deliberately indifferent to Delgadillo-Perez's health and safety.

Although the undisputable facts show that Delgadillo-Perez did not suffer a serious medical condition from taking a single Mirtazapine 15-mg pill, assuming, *arguendo*, the Court finds Delgadillo-Perez's medical condition was objectively serious, the undisputable facts show that none of the Defendants acted with deliberate indifference to Delgadillo-Perez after he mistakenly received the Mirtazapine.

1. Nurse Kacyon was not deliberately indifferent.

There is no evidence that Kacyon acted with deliberate indifference in providing treatment to Delgadillo-Perez on August 14, 2019. While Delgadillo-Perez states in his complaint that he believes Kacyon should have instructed others, including the correctional staff, regarding what symptoms he might experience from taking the Mirtazapine, Kacyon's decision not to discuss Delgadillo-Perez's personal medical information with others was based upon her professional judgment and training.^{53,54} Kacyon viewed Delgadillo-Perez's medical records and determined he was not at risk for any medication contraindications.⁵⁵ Kacyon also visited and

⁵³ *See* dkt. 1 at ¶ 14.

⁵⁴ DPFOF ¶¶ 68-69.

⁵⁵ DPFOF ¶ 54.

evaluated Delgadillo-Perez and determined that he was safe to remain in his cell.⁵⁶ Kacyon determined that Delgadillo-Perez was not at risk of falling, as he was going to bed and he had a low bunk restriction.⁵⁷ Kacyon also provided basic, common sense instructions to Delgadillo-Perez regarding how to avoid injury if he became dizzy.⁵⁸ Kacyon scheduled Delgadillo-Perez for a follow-up appointment in the HSU the very next day and determined that Delgadillo-Perez's condition did not require any emergency intervention.⁵⁹ Kacyon also contacted the on-call doctor, leaving two voicemails, and informed the nurse replacing her on the next shift of Delgadillo-Perez's situation and to expect a return call from the on-call doctor.⁶⁰

Based on the undisputable facts, Delgadillo-Perez is unable to show that Kacyon "recklessly or intentionally disregarded a substantial risk of serious harm." *Estelle*, 429 U.S. at 104; *Brady*, 493 F. App'x at 791-92. To the contrary, the undisputable facts show that Kacyon responded promptly to the report that Delgadillo-Perez mistakenly took a Mirtazapine 15-mg pill and provided appropriate checks for his safety and his aftercare. Accordingly, the Court should find that Kacyon did not treat Delgadillo-Perez with deliberate indifference.

2. Bretzel and Hintz were not deliberately indifferent.

Bretzel and Hintz were not deliberately indifferent to a risk of serious harm to Delgadillo-Perez. It is undisputed that Bretzel administered Delgadillo-Perez a

⁵⁶ DPFOF ¶¶ 56-58.

⁵⁷ DPFOF ¶¶ 60, 67.

⁵⁸ DPFOF ¶ 60.

⁵⁹ DPFOF ¶¶ 62, 74.

⁶⁰ DPFOF ¶¶ 72-73.

medication that was not prescribed for him on August 14, 2019. However, this was based on a mistake that occurred due to a combination of Bretzel's inability to use WiFi to access electronic medical records and Delgadillo-Perez responding when his cellmate's name was called and verifying the medication during the administration. Mistakes do not amount to deliberate indifference as an inadvertent mistake or error in good faith does not violate the Eighth Amendment. *See Whitley*, 475 U.S. at 319. "Administering the wrong medication may well pose a substantial risk of harm, depending on the circumstances. However, '[o]ne isolated mistake [related to medication] does not allow a plausible inference of deliberate indifference.'" *Robbins v. Waupun Corr. Inst.*, No. 16-CV-1128, 2016 WL 5921822, at *3 (E.D. Wis. Oct. 11, 2016); *Richmond v. Dart*, No. 12 C 0954, 2012 WL 567245, at *2 (N.D. Ill. Feb. 17, 2012); *see also Ehrenberg v. Wisconsin Dept. of Corrections*, No. 10 C 1022, 2010 WL 5089484 (E.D. Wis. Dec. 7, 2010); *Kirkwood v. Sirin*, No. 06-C-139, 2006 WL 587698, at *3 (E.D. Wis. Mar. 9, 2006).

Once Bretzel realized his clear mistake, he promptly notified his supervisor, Hintz, and contacted the HSU.⁶¹ Based on Bretzel's call to the HSU, Kacyon was able to review Delgadillo-Perez's records for any contraindications and to meet with Delgadillo-Perez to discuss the situation.⁶² Neither Bretzel nor Hintz were provided any instructions from Kacyon or any other health professionals to keep a special watch over Delgadillo-Perez or to watch for any specific symptoms.⁶³ And despite

⁶¹ DPFOF ¶¶ 51-52.

⁶² DPFOF ¶¶ 53-67.

⁶³ DPFOF ¶ 68.

their shifts concluding shortly after the incident, Hintz notified the oncoming shift's staff that Delgadillo-Perez had taken the wrong medication and that he would notify staff if had any issues.⁶⁴

Bretzel and Hintz are not medical providers with medical training, so they followed appropriate protocol and immediately informed the HSU of Delgadillo-Perez's situation, where Kacyon and other HSU personnel could use their medical training and knowledge of the patient's medical history to properly address the concern. Although Delgadillo-Perez may wish that Bretzel and Hintz did more to monitor his condition (though he does not explain how this would have made a difference), they did what they could within their power and training by promptly informing the HSU and informing the next shift what happened in case Delgadillo-Perez needed to contact anyone to see the HSU again. "Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job." *Burks v. Raemisch*, 555 F.3d 592, 594-96. (7th Cir. 2009).

Additionally, Bretzel and Hintz are entitled to summary judgment on Delgadillo-Perez's claim of deliberate indifference because neither of them was the cause-in-fact of his injury. "Section 1983 is a tort statute, which means that the defendant must breach a duty owed to the plaintiff, who must suffer a cognizable legal harm." *Wille v. Pugh*, No. 13-CV-1024-PP, 2016 WL 4384728, at *4 (E.D. Wis. Aug. 16, 2016) (internal citations omitted); *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996). The cause-in-fact inquiry is summarized as follows:

⁶⁴ DPFOF ¶¶ 75-81.

The test of cause-in-fact is whether the negligence was a “substantial factor” in producing the injury. “The phrase, ‘substantial factor,’ denotes that the conduct has such an effect in producing the injury as to lead a reasonable person to regard it as a cause, using that word in the popular sense. There may be several substantial factors in any given case.” To prove that a tortfeasor's negligence was a substantial factor in producing a plaintiff's injuries, *it must be shown that there was an “unbroken sequence of events” where the negligence of the tortfeasor was actively operating at the time of the accident* which produced the plaintiff's injury.

Cefalu v. Cont'l W. Ins. Co., 2005 WI App 187, ¶ 11, 285 Wis. 2d 766 (citations omitted, emphasis added). Here, any mistake by Bretzel was complete once Delgadillo-Perez had possession of the medication. Delgadillo-Perez was under an obligation to check his medication and failed to do so.⁶⁵

Bretzel made a mistake by administering Delgadillo-Perez a Mirtazapine 15-mg pill on August 14, 2019. But neither Bretzel nor Hintz “recklessly or intentionally disregarded a substantial risk of serious harm” to Delgadillo-Perez. *Estelle*, 429 U.S. at 104; *Brady*, 493 F. App'x at 791-92. Accordingly, the Court should find that neither Bretzel nor Hintz acted with deliberate indifference.

II. Defendants are entitled to qualified immunity.

Even if the Court declines to grant summary judgment on the basis of the undisputed facts presented above, the Defendants are entitled to qualified immunity on Delgadillo-Perez's claims of deliberate indifference. Qualified immunity protects government officials from damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

⁶⁵ DPFOF ¶¶ 14, 40-45.

would have known.” *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019) (citation omitted). Qualified immunity standard protects “all but the plainly incompetent or those who knowingly violate the law.” *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted).

Although qualified immunity is “an affirmative defense,” once it’s raised, “the burden shifts to the plaintiff to defeat it.” *Leiser v. Kloth*, 933 F.3d 696, 701 (7th Cir. 2019). To do so, Delgadillo-Perez must show two elements: (1) that the facts show “a violation of a constitutional right,” and (2) that the “constitutional right was clearly established at the time of the alleged violation.” *Id.* A court has “discretion to choose which of the elements to address first.” *Id.*

The “clearly established” requirement (the second element) is based on the “principle of fair notice.” *Campbell*, 936 F.3d at 545. Clearly established thus “means that, at the time of the [official’s] conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful.” *Wesby*, 138 S. Ct. at 589 (citation and internal quotations omitted). “In other words, existing law must have placed the constitutionality of the [official’s] conduct beyond debate.” *Id.* (citation and internal quotation omitted).

A legal principle is beyond debate only when it has a “sufficiently clear foundation in then-existing precedent.” *Wesby*, 138 S. Ct. at 589 (citation omitted). That means the “rule must be settled law,” *i.e.*, “dictated by controlling authority or a robust consensus of cases of persuasive authority.” *Id.* at 589–90 (citation and internal quotations omitted).

Given the “emphasis on notice, clearly established law cannot be framed at a ‘high level of generality.’” *Campbell*, 936 F.3d at 545. To avoid generality, a court “must determine whether a right is clearly established in light of the specific context of the case, not as a broad general proposition.” *Leiser*, 933 F.3d at 702 (internal quotations omitted). That requires a court to consider whether the law clearly prohibited “the [official’s] conduct in the particular circumstances before him.” *Wesby*, 138 S. Ct. at 590. Although a plaintiff need not point to a case “on all fours” with the facts presented, he must “show some settled authority that would have shown a reasonable” official in the same position that his or her “actions violated the Constitution.” *Leiser*, 933 F.3d at 702.

It is not clearly established that Defendants’ actions, based on the facts of this case, were unconstitutional. There is no genuine dispute that Bretzel made a mistake when he administered Delgadillo-Perez a single Mirtazapine 15-mg pill. However, each of the Defendants took prompt action to remedy the situation and ensure Delgadillo-Perez’s safety and well-being and he suffered no ill effects to his health except dizziness and tiredness lasting approximately 24 hours. Clearly established case law states that, to be deliberately indifferent, the Defendants had to “recklessly or intentionally disregarded a substantial risk of serious harm” to Delgadillo-Perez. *Estelle* 429 U.S. at 104. They clearly did not do so. Therefore, Defendants are entitled to qualified immunity, and the Court should dismiss Delgadillo-Perez’s Eighth Amendment deliberate indifference claim.

Conclusion

For the reasons stated above, the Defendants are entitled to summary judgment and Delgadillo-Perez's lawsuit against them must be dismissed, in its entirety.

Dated: March 23, 2021

Respectfully submitted,

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