

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

WILLIAM BAXTER :  
 :  
 v. : PRISONER  
 : Case No. 3:03cv2187 (JBA)  
 :  
 EDWARD PESANTI, et al.<sup>1</sup> :

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff William Baxter ("Baxter"), currently incarcerated at the Osborn Correctional Institution in Somers, Connecticut, brings this civil rights action pro se<sup>2</sup> pursuant to 28 U.S.C. § 1915. Baxter challenges his medical care for HIV and Hepatitis C. Defendants have filed a motion for summary judgment. For the reasons that follow, defendants' motion will be granted.

I. Standard of Review

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) when the moving party establishes that there is no genuine issue of material fact to be resolved at trial and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Materiality is determined by the substantive law that governs the case.

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<sup>1</sup>The named defendants are Dr. Edward Pesanti, Dr. Mark Buchanan, Lisa Jaser and Dr. James O'Halloran.

<sup>2</sup>Although plaintiff appears pro se, the complaint and all documents filed in opposition to the motion for summary judgment were drafted by an attorney from Inmates' Legal Assistance Program.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this inquiry, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden of establishing that there is no genuine issue of material fact in dispute will be satisfied if he or she can point to an absence of evidence to support an essential element of the non-moving party's claim. Celotex, 477 U.S. at 322-23. "A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must 'designate specific facts showing that there is a genuine issue for trial.'" Parker v. Sony Pictures Entm't, Inc., 260 F.3d 100, 111 (2d Cir. 2001), quoting Celotex, 477 U.S. at 324; see also Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-1224 (2d Cir. 1994) ("the moving party may obtain summary judgment by showing that little or no evidence may be

found in support of the nonmoving party's case."). The non-moving party, in order to defeat summary judgment, must then come forward with evidence that would be sufficient to support a jury verdict in his or her favor. Anderson, 477 U.S. at 249 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). In making this determination, the Court draws all reasonable inferences in the light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587. However, a party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e), and "some metaphysical doubt as to the material facts" is insufficient. Id. at 586 (citations omitted).

## II. Facts<sup>3</sup>

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<sup>3</sup>The facts are taken from defendants' Local Rule 56(a)1 Statement [doc. #16-2]; the affidavits of James O'Halloran, O.D. [doc. #16-3], John Gittzus, M.D. [doc. #16-4], Michelle Cabana, L.P.N. [doc. #16-5], Lisa J. Jaser R.Ph. [doc. #16-6], Edward Pesanti, M.D. [doc. #16-7] and Mark Buchanan, M.D. [doc. #16-8], all with supporting exhibits, that were filed in support of defendants' motion for summary judgment; Baxter's Local Rule 56(a)2 Statement [doc. #22-1]; the affidavit of Mark Onorato [doc. #22-2] and the affidavit of William Baxter [doc. #22-3] with attached exhibits filed in support of Baxter's opposition to the motion for summary judgment; the supplemental affidavits of Michelle Cabana, L.P.N. [doc. #29], John Gittzus, M.D. [doc. #30] and James O'Halloran, O.D. [doc. #31], all with attached exhibits, filed by defendants after Baxter filed his amended complaint; and the supplemental affidavit of William Baxter [doc. #34-1] with attached exhibits.

Defendant Dr. Edward Pesanti served as the Medical Director of the Correctional Managed Health Care Program ("CMHC"), a division of the University of Connecticut Health Center that provides medical care for Connecticut Inmates, from 1997 through May 2002. He was replaced as Medical Director by the current director, defendant Dr. Mark Buchanan, in May 2002. Defendant Lisa Jaser has been the Director of Pharmacy Services for CMHC since March 2002. Defendant Dr. James O'Halloran is board certified in internal medicine and infectious diseases. In addition to his private practice, defendant O'Halloran conducts Infectious Disease Clinics at Garner Correctional Institution in Newtown, Connecticut.

Baxter is co-infected with the Human Immunodeficiency Virus ("HIV") and the Hepatitis C virus ("HCV"). On September 6, 2000, Baxter was transferred to Garner Correctional Institution. Because of his infections, Baxter was followed in defendant O'Halloran's Infectious Disease Clinic.

On September 7, 2000, defendant O'Halloran reviewed Baxter's medical file. In August 2000, the Infectious Disease Specialist at Cheshire Correctional Institution had requested that Baxter undergo a gastroenterology consultation to evaluate the appropriateness of a liver biopsy and HCV treatment. The Utilization Review Committee ("URC") approved the request.

Baxter was seen at the UConn Gastroenterology Clinic on October 5, 2000, and underwent a liver biopsy. The biopsy revealed mildly active chronic liver disease that was consistent with viral hepatitis. In January 2001, defendant O'Halloran requested approval from the URC for a forty-eight week course of treatment with Interferon Alfa 2b and Ribavirin. The URC approved the request.

Defendant O'Halloran told Baxter that he would prescribe daily doses of Interferon Alpha 2b and advised him of the possible side effects of the drug. This treatment plan was described in medical literature for treating patients co-infected with HIV and HCV and was the same treatment plan defendant O'Halloran used in his private practice for patients co-infected with HIV and HCV. Defendant O'Halloran did not tell Baxter that this dosage frequency differed from the manufacturer's recommendation of three doses per week. Use of a drug in an amount or frequency different from the manufacturer's recommendation has been recognized by the American Medical Association where the use is based on sound scientific evidence and sound medical opinion. Defendant O'Halloran also told Baxter that he intended to switch Baxter to a new form of interferon, Pegylated Interferon, once it became available.

Baxter began receiving daily doses of Interferon Alpha 2b

and Ribavirin on January 24, 2001. On March 12, 2001, defendant O'Halloran received a letter from defendant Pesanti, opting for more conservative treatment and instructing defendant O'Halloran to administer the Interferon Alpha 2b three times per week instead of daily. Dr. Pesanti's letter stated:

I was alerted to the usage of high doses of Interferon- $\alpha$  in Mr. Baxter... . I asked the staff at Garner to review the dosage being prescribed. In response, I was basically informed that the patient was doing well. I do not think that a patient doing well on an incorrect dosage of a potentially toxic medication is a reason to continue the overdosage.

For most agents, I do not have, and do not wish to have, any control of the dosage being used. For this one, however, I must approve the therapy and a part of that, in my view, is determining that a correct dose be used. I reviewed the information on Schering-Plough's [the manufacturer's] web site and they make no mention of increasing the dosage of interferon - only of decreasing it.

I remain strongly against treatment of HIV infected patients with interferon, but will approve it if the HIV-RNA has been stably non-detectable and the CD4 count is in a relatively safe range... But, in that situation, my approval is reluctant and is contingent on the physician using the drug according to the dosage recommended by the manufacturer and approved by the FDA. ...

If the dosage is not reduced to comply with the manufacturer's dosing recommendations, I must prohibit the use of the drug, viewing its use at high doses as being "experimental" and, as such, not allowed in our facilities. ...

Pl. Ex. C.

Defendant O'Halloran complied with Pesanti's directive. Baxter continued taking his HIV medications, the three doses of

Interferon Alpha 2b per week and the daily doses of Ribavirin through August 14, 2001. While he remained on Interferon Alpha 2b, Baxter's T-cell counts and liver functions were monitored regularly. The T-cell counts remained stable and the viral loads remained undetectable. After beginning the HVC treatment, Baxter experienced a significant reduction in his liver function levels and his Hepatitis C viral loads were undetectable.

In August 2001, Baxter informed the medical staff that he was stopping all medications, including those for HIV and HCV, because he had a feeling of malaise and general body pain. Once he stopped taking Interferon Alpha 2b, his liver function levels became elevated and his Hepatitis C viral load rose dramatically.

At the Infectious Disease Clinic on August 29, 2001, Baxter complained to defendant O'Halloran of fatigue and aches. He acknowledged that he experienced no improvement since discontinuing the medications. Defendant O'Halloran discussed the risk of not taking the medications and Baxter agreed to consider restarting his HIV medications. A few days later, Baxter transferred to Osborn Correctional Institution. Defendant O'Halloran did not treat Baxter after his transfer.

At Osborn Correctional Institution, Dr. John Gittzus recommended that Baxter undergo HVC treatment with Pegylated Interferon, a new type of interferon that had just become

available. Baxter's HIV treatment was discontinued while he received HCV treatment.

Dr. Gittzus submitted the order for Pegylated Interferon on January 22, 2002. The drug manufacturer placed Baxter on a waiting list. Pharmacy records indicate that the first order for Pegylated Interferon was received by the pharmacy on February 25, 2002. Baxter's medical records indicate, however, that Baxter's drug access number was faxed and provided verbally to the pharmacy on February 5, 2002.<sup>4</sup>

Baxter received his first dose of Pegylated Interferon and Ribavirin on March 8, 2002. The Pegylated Interferon was administered by weekly injections. The Ribavirin was administered twice per day in pill form.

From March 29, 2002, through April 1, 2002, Baxter missed eight doses of Ribavirin. This problem was documented by medical

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<sup>4</sup>The person at the pharmacy indicated that he did not know when the Pegylated Interferon would "come in." Thus, although Baxter has provided evidence suggesting that the order for Pegylated Interferon was submitted to the pharmacy before February 25, 2002, he has not provided evidence to show that the drug was in the pharmacy but not delivered to the facility for twenty days. (See Pl.'s Local Rule 56(a)2 Statement, Ex. L.) Further, Dr. Gittzus states in his supplemental affidavit [Doc. #30], that the drug manufacturer would not fill the pharmacy's order based on the initial prescription because the Pegylated Interferon dosage depended on the weight of the patient and Dr. Gittzus had not considered this information in the initial prescription. On February 26, 2002, Dr. Gittzus wrote a second, weight-specific prescription for Pegylated Interferon. (See Doc. #30, Ex. C.)



staff on a Medication Administration Variance Report. When Baxter reported another instance of missing Ribavirin in April 2002, the medical staff investigated the problem and discovered that Ribavirin was delivered in a bulk bottle and not in blister packs. As a bulk medication, it had to be reordered weekly. Because the medical staff at the facility was not aware of this requirement, no one had reordered the Ribavirin. Once the medical staff was made aware of this requirement, a procedure was implemented to ensure that the Ribavirin was reordered in a timely manner. The pharmacy responded promptly every time medical staff called to report that Baxter's medications had not arrived. Baxter's medical records contain no other Medication Administration Variance Reports.

The Pegylated Interferon was administered in two twenty-four week periods. The first period ended on August 19, 2002. Before the second period could commence, the drug manufacturer required that the patient undergo testing to determine whether the treatment was effective. Dr. Gittzus received Baxter's test results on August 26, 2002. The results showed that the viral load was undetectable. Because the treatment was working, Dr. Gittzus ordered a second twenty-four week period of treatment. The Pegylated Interferon and Ribavirin was ordered on August 28, 2002. Treatment commenced on September 6, 2002.

Baxter did not miss any doses of Pegylated Interferon during the two treatment periods. Dr. Gittzus' treatment notes indicate that at no time during the treatment periods did Baxter complain about missed medications. Medical literature indicates that many patients receiving HCV therapy miss 10-15% of their Ribavirin with no notable adverse effect on the effectiveness of the HCV therapy. A recent study concluded that a patient receiving 80% of the medications would receive maximum benefit from the HCV treatment. Baxter received approximately 98% of his Ribavirin and all of the Pegylated Interferon.

Baxter's liver function levels were significantly reduced in April 2002 and his viral load was undetectable in June 2002. The tests performed between the treatment periods showed stable liver function levels. A December 2002 HCV viral load test showed that Baxter's viral load continued to be undetectable. Throughout the treatment periods, Baxter's HIV viral load remained undetectable. Once HCV treatment concluded, Dr. Gittzus renewed Baxter's HIV treatment.

The favorable HCV test results did not continue after Baxter's HCV treatment was concluded. Continued favorable results occur only in 50-55% of patients. For patients co-infected with HIV, sustained favorable results occur only in 45% of patients. Recent tests have determined that Baxter's liver

disease has progressed and a third course of HCV treatment was not approved.

Defendants Pesanti, Buchanan and Jaser have no recollection of personally receiving any communication from Baxter or regarding Baxter's HCV treatment or medications.

Since defendant Buchanan became Clinical Director at CMHC, improvements have been made to the HCV management and treatment program. In addition, when Ribavirin is prescribed for a definite period, the prescription now is renewed automatically.

### III. Discussion

Baxter raises two claims. First, he contends that defendant O'Halloran violated his Fourteenth Amendment right to bodily integrity by failing to tell Baxter that he was prescribing medication for Hepatitis C in manner that varied from the manufacturer's recommendation thereby preventing Baxter from making an informed decision regarding treatment. Second, he argues that defendants Pesanti, Buchanan and Jaser were deliberately indifferent to his serious medical need because he missed several doses of Ribavirin during the second course of treatment for Hepatitis C.

Defendants move for summary judgment on four grounds: (1) the Eleventh Amendment bars any claims for damages against defendants in their official capacities; (2) Baxter did not

suffer a physical injury as required under 42 U.S.C. § 1997e(e); (3) defendants did not violate any of Baxter's constitutional rights; and (4) defendants are entitled to qualified immunity.

In his memorandum in opposition to defendants' motion for summary judgment, filed February 10, 2005, Baxter requested additional discovery to enable him to obtain evidence to show that defendants Pesanti, Buchanan and Jaser were aware the problems with delivery of medication. The court granted Baxter additional time for discovery and Baxter filed a supplemental memorandum on May 23, 2005.

A. Eleventh Amendment

Defendants first argue that any claims for damages against them in their official capacities are barred by the Eleventh Amendment. In opposition, Baxter states that he seeks damages against defendants only in their individual capacities.

Generally, a suit for recovery of money may not be maintained against the state itself, or against any agency or department of the state, unless the state has waived its sovereign immunity under the Eleventh Amendment. See Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 684 (1982). Section 1983 does not override a state's Eleventh Amendment immunity. See Quern v. Jordan, 440 U.S. 332, 342 (1979). The Eleventh Amendment immunity which protects the state from suits

for monetary relief also protects state officials sued for damages in their official capacity. See Kentucky v. Graham, 473 U.S. 159 (1985). A suit against a defendant in his official capacity is ultimately a suit against the state if any recovery would be expended from the public treasury. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1984).

Baxter names all defendants in their official and individual capacities. Although he states, in opposition to the motion for summary judgment, that he seeks damages from defendants in their individual capacities only, he does not restrict his request for damages in the amended complaint. Thus, to the extent that the amended complaint may be construed to seek damages from defendants in their official capacities, this relief is barred by the Eleventh Amendment. Defendants' motion for summary judgment is granted as to all claims for damages against defendants in their official capacities.

B. Defendant O'Halloran

Baxter contends that defendant O'Halloran violated his Fourteenth Amendment right to bodily integrity by failing to provide sufficient information to enable him to make an informed decision regarding HCV treatment.

Baxter is a convicted prisoner. Thus, the Eighth Amendment "serves as the primary source of substantive protection."

Whitley v. Albers, 475 U.S. 312, 327 (1986). See County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (“[I]f a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”) (internal quotation marks omitted); Graham v. Connor, 490 U.S. 386, 395 (1989) (same).

Despite these holdings, the Third Circuit has considered a prisoner’s claim regarding his right to be informed of proposed treatment under the Substantive Due Process Clause of the Fourteenth Amendment. See White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990). The Fifth Circuit, on the other hand, has indicated that the bodily integrity of prisoners is protected under both the Eighth and Fourteenth Amendments and the “legal standards are virtually identical.” Austin v. Johnson, 328 F.3d 204, 210 n.10 (5<sup>th</sup> Cir. 2003) (citation omitted). The Second Circuit has not yet addressed this question. As shown below, however, the applicable standard under each amendment is the same.

Deliberate indifference by prison officials to a prisoner’s serious medical need constitutes cruel and unusual punishment in violation of the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976). To prevail on such a claim, Baxter must

allege "acts or omissions sufficiently harmful to evidence deliberate indifference" to his serious medical need. Id. at 106. He must show intent to either deny or unreasonably delay access to needed medical care or the wanton infliction of unnecessary pain by prison personnel. See id. at 104-05

Mere negligence will not support a section 1983 claim; "the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor a substitute for state tort law." Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003). Thus, "not every lapse in prison medical care will rise to the level of a constitutional violation," id.; rather, the conduct complained of must "shock the conscience" or constitute a "barbarous act." McCloud v. Delaney, 677 F. Supp. 230, 232 (S.D.N.Y. 1988) (citing United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970)); see also Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Tomarkin v. Ward, 534 F. Supp. 1224, 1230 (S.D.N.Y. 1982) (holding that treating physician is liable under the Eighth Amendment only if his conduct is "repugnant to the conscience of mankind.").

Inmates do not have a constitutional right to the treatment of their choice. See Dean v. Coughlin, 804 F.2d 207, 215 (2d Cir. 1986). Thus, mere disagreement with prison officials about

what constitutes appropriate care does not state a claim cognizable under the Eighth Amendment. See Ross v. Kelly, 784 F. Supp. 35, 44 (W.D.N.Y.), aff'd, 970 F.2d 896 (2d Cir.), cert. denied, 506 U.S. 1040 (1992).

The Due Process Clause essentially protects citizens against arbitrary government action. See County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) ("touchstone of due process is protection of the individual against . . . the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). As a part of the right to bodily integrity under the Substantive Due Process Clause, convicted prisoners "retain a limited right to refuse treatment and a related right to be informed of the proposed treatment and viable alternatives." White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990). Such information is necessary for the prisoner to make an informed decision whether to accept or reject prescribed treatment. Where a substantive due process claim is based on a specific act of a state official, the official's act must shock the conscience, that is, the act must constitute deliberate indifference to prisoner's constitutional rights. See County of Sacramento, 523 U.S. at 846-50.

Thus, defendant O'Halloran's actions must be judged under the deliberate indifference standard whether Baxter's claim is



premised on the violation of Eighth or Fourteenth Amendment rights. Although he asserts a Fourteenth Amendment claim against defendant O'Halloran, Baxter has not identified and research has not revealed any case in which lack of informed consent by a prisoner to medical treatment has risen to the level of a constitutional violation. See White, 897 F.3d at 114 n.4 (declining to resolve whether a tort of failure to obtain informed consent rises to the level of a constitutional violation); Wright v. Fred Hutchinson Cancer Research Center, 269 F. Supp. 2d 1286, 1295 (W.D. Wash. 2002) (noting, in case alleging absence of adequate information regarding risks, benefits and alternatives to participation in experimental treatment program, the absence of any cases equating lack of informed consent in medical context with constitutional violation). Thus, the court will consider this claim under the Eighth Amendment.

There are both subjective and objective components to the deliberate indifference standard. See Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994), cert. denied sub nom. Foote v. Hathaway, 513 U.S. 1154 (1995). The alleged deprivation must be "sufficiently serious" in objective terms. Wilson v. Seiter, 501 U.S. 294, 298 (1991). See also Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (Pratt, J., dissenting) ("`serious medical need'

requirement contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain"). The Second Circuit has identified several factors that are highly relevant to the inquiry into the seriousness of a medical condition: "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.'" Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (citation omitted). In addition, where the denial of treatment causes plaintiff to suffer a permanent loss or life-long handicap, the medical need is considered serious. See Harrison v. Barkley, 219 F.3d 132, 136 (2d Cir. 2000).

In addition to demonstrating a serious medical need to satisfy the objective component of the deliberate indifference standard, Baxter also must present evidence that, subjectively, the charged prison official acted with "a sufficiently culpable state of mind." Hathaway, 37 F.3d at 66. "[A] prison official does not act in a deliberately indifferent manner unless that official 'knows and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Id. (quoting

Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

The judgment of doctors treating inmates is presumed valid unless the prisoner provides evidence that the decision was “such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.” White at 113. In White, the prison doctor deliberately refused to tell White, who was severely allergic to penicillin, whether the medication he had prescribed contained penicillin. The court found that there was no ready justification for this decision and concluded that the doctor’s refusal was “so far outside the realm of professional judgment as to demonstrate the [doctor] was not exercising professional judgment at all.” Id. at 114.

Baxter suffers from HCV. Chronic Hepatitis C is a serious medical condition. See, e.g., Christy v. Robinson, 216 F. Supp. 2d 398, 413 (D.N.J. 2002). The issue of a serious medical need, however, is fact-specific; it “must be tailored to the specific circumstances of each case.” Smith, 316 F.3d at 185. See Bender v. Regier, 385 F.3d 1133, 1137 (8<sup>th</sup> Cir. 2004) (agreeing with district court’s determination that although Hepatitis C infection was a serious medical need, the issue was whether inmate had serious medical need for immediate interferon treatment). The medical need at issue in this case, therefore,

is not that Baxter suffers from HCV, but that he was not informed that the drug manufacturer recommended that Interferon Alpha 2b be given three times per week instead of daily as defendant O'Halloran had prescribed.

Baxter admits that defendant O'Halloran described the prescribed treatment and advised him of the side effects of the medications. Baxter does not contend that defendant O'Halloran refused to answer any questions. He contends only that defendant O'Halloran failed to tell him that the recommended frequency of administering the doses of Interferon Alpha 2b was three times per week rather than daily. Baxter characterizes the increased dosage frequency as "experimental" and "not medically appropriate." He contends that the increased dosage frequency caused him to experience increased incidence of side effects both in frequency and severity.

Although Baxter's medical records show that he suffered side effects, plaintiff fails to identify any medical evidence or offer any expert opinion stating that the side effects were more severe or occurred more often during the time he received daily doses of Interferon Alpha 2b. Baxter directs the court to literature from the drug manufacturer regarding the effects of overdoses of Interferon Alpha 2b. (See Pl.'s Aff. Ex. A at 20.) The drug manufacturer's literature describes possible effects of

a single dose in excess of the recommended level of 3 million IU. There is no reference in the literature to any adverse effects of doses at the recommended level administered more frequently than three times per week.

Baxter alleges that the side effects he experienced forced him to stop his HCV treatment. However, Baxter did not stop his treatment until August 14, 2001, five months after the dosage frequency was changed. Defendants have presented evidence that Interferon Alpha 2b cannot be detected in a patient's system twenty-four hours after injection. (See Suppl. Aff. of James O'Halloran, D.O., Doc. #31 at ¶5.) Baxter has provided no contrary medical evidence regarding the time Interferon Alpha 2b remains in a patient's system or a medical opinion linking the severity of the side effects Baxter experienced in August 2001 with the daily doses of Interferon Alpha 2b that were stopped as of mid-March 2001.

In addition, defendants have presented evidence that patients receiving daily doses showed no toxicity differences from patients receiving doses three times per week. (See *id.* at ¶6.) Defendant O'Halloran states that he successfully has prescribed daily doses to his private patients and has provided reports of medical studies recommending daily doses for co-infected patients.

The only evidence Baxter has presented suggesting that the prescription of daily doses was improper is the March 12, 2001 letter from defendant Pesanti. (See Pl. Aff. Ex. C and Aff. of James O'Halloran Ex. H.) The letter clearly indicates that defendant Pesanti did not approve of the prescribed treatment.

In light of the medical evidence presented by defendants, the lack of medical evidence provided by Baxter and the absence of any cases in which the failure to provide complete information regarding the treatment provided was of constitutional dimension, the court cannot conclude that defendant O'Halloran's failure to inform Baxter that the recommended dosage frequency was three times per week was such a substantial departure from accepted medical judgment or practice as not to be based on accepted medical judgment at all. Thus, Baxter has not met his burden of providing evidence to demonstrate a genuine issue of material fact regarding the seriousness of the medical issue, the first component of the deliberate indifference standard.

Further, even if the court were to determine that the existence of the letter from defendant Pesanti were sufficient to show the existence of a seriously disputed medical issue, Baxter fails to present evidence demonstrating that defendant O'Halloran appreciated and disregarded a significant risk to Baxter's health by failing to tell him the drug manufacturer's recommended dosage

frequency. Defendant O'Halloran has stated that he prescribed the same treatment with which he achieved success in his private practice and which was shown to be more successful with co-infected patients in various medical studies. He states that he was not aware of any increased toxicity with the daily dosages and Baxter has provided no contrary evidence.<sup>5</sup> Thus, Baxter has failed to present evidence showing that defendant O'Halloran was aware of and disregarded a serious risk to Baxter's health from failing to inform Baxter of the manufacturer's recommended dosage frequency. Baxter's claim alleges, at most, medical malpractice which is not cognizable under section 1983. Defendants' motion for summary judgment is granted as to the claims against defendant O'Halloran.

C. Defendants Pesanti, Buchanan and Jaser

Baxter contends that defendants Pesanti, Buchanan and Jaser were aware that inmates were experiencing problems getting their medication and failed to remedy the situation. Defendants Pesanti and Buchanan were the Directors of CMHC during the

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<sup>5</sup>Baxter argues that there was a possibility that the side effects he suffered could have been more severe or more frequent with the increased dosage frequency. He has not, however, provided any medical evidence to support his assertions. Such assumptions are not facts and Baxter's unsupported allegations cannot create a material issue of fact sufficient to overcome defendants' motion for summary judgment. See Poe v. Leonard, 282 F. 3d 123, 128 n.5 (2d Cir. 2002).

relevant time period and defendant Jaser was the director of the UConn Health Center Pharmacy. All three were supervisory officials. None was directly involved with dispensing Baxter's medications.

"A supervisor may not be held liable under section 1983 merely because his subordinate committed a constitutional tort." Leonard v. Poe, 282 F.3d 123, 140 (2d Cir. 2002). Section 1983 imposes liability only on the official causing the violation. Thus, the doctrine of respondeat superior is inapplicable in section 1983 cases. See Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999); Prince v. Edwards, No. 99 Civ. 8650 (DC), 2000 WL 633382, at \*6 (S.D.N.Y. May 17, 2000) ("Liability may not be premised on the respondeat superior or vicarious liability doctrines, . . . nor may a defendant be liable merely by his connection to the events through links in the chain of command.") (internal quotations and citation omitted).

[A] supervisor may be found liable for his deliberate indifference to the rights of others by his failure to act on information indicating unconstitutional acts were occurring or for his gross negligence in failing to supervise his subordinates who commit such wrongful acts, provided that the plaintiff can show an affirmative causal link between the supervisor's inaction and [his] injury.

Leonard, 282 F.3d at 140. Thus, Baxter must demonstrate that his constitutional rights were violated by the alleged conduct before



the supervisors can be found liable. See Blyden v. Mancusi, 186 F.3d 252, 265 (2d Cir. 1999) ("for a supervisor to be liable under Section 1983, there must have been an underlying constitutional deprivation").

Baxter contends that systemic problems existed regarding the delivery of medications by the UConn Pharmacy to inmates during this time. He alleges that defendants Pesanti, Buchanan and Jaser were aware of the problems and refers the court to notes of meeting of a task force established to correct these problems. Before the court considers whether awareness of or participation in the task force is sufficient to establish supervisory liability, however, it must determine whether Baxter suffered a constitutional deprivation regarding the medication deliveries.

Baxter alleges that although he was approved for use of Pegylated Interferon by the manufacturer on February 4, 2002, he did not start his treatment program until March 8, 2002, because the pharmacy did not deliver the medication to his correctional facility. Baxter's medical records indicate, however, that the delay in starting treatment was attributed to Dr. Gittzus' submission of an improper prescription. The pharmacy could not order the medication from the drug manufacturer until after February 26, 2002, the date Dr. Gittzus wrote the weight-specific prescription for Pegylated Interferon. (See Doc. #30, Gittzus

Affidavit and Ex. C.) The court concludes that Baxter has failed to present any evidence in opposition to defendants' motion for summary judgment suggesting that the delay in the start of his second course of HCV treatment was caused by the pharmacy.

Baxter also contends that he missed eight doses of Ribavirin from March 29, 2002, through April 1, 2002, and, possibly, a few other doses later on. Defendants have provided the affidavit of Nurse Cabana who is responsible for following up on physician orders for infectious disease patients at Osborn Correctional Institution. Nurse Cabana states that Baxter experienced problems receiving Ribavirin because the correctional facility was not submitting orders to the pharmacy. The matter was investigated and the ordering procedure corrected to ensure no further disruptions. (See Doc. #16-5 at ¶¶ 9-10.) The pharmacy cannot be faulted for failing to deliver prescriptions that were not submitted. Thus, Baxter fails to show that his constitutional rights were violated as a result of problems in the delivery of prescriptions by the pharmacy.

Further, even if the court were to conclude that defendants Pesanti, Buchanan and Jaser were responsible for ensuring that medical staff was aware of the proper ordering procedures, the failure to receive approximately ten doses of Ribavirin has not been shown to be of such substantial proportions as to rise to

constitutional dimension.

“[N]ot every lapse in prison medical care will rise to the level of a constitutional violation.” Smith, 316 F.3d at 184 (citing Estelle v. Gamble, 429 U.S. 97, 105-06 (1976)). “When the basis for a prisoner’s Eighth Amendment claim is a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged *delay or interruption* in treatment rather than the prisoner’s *underlying medical condition* alone” to determine whether the alleged deprivation was sufficiently serious. Id. at 185. Thus, the court must focus on “the particular risk of harm faced by [Baxter] due to the challenged deprivation of care, rather than the severity of [his] underlying medical condition, considered in the abstract.” Id. at 186. Under this approach, the failure to provide treatment for an insignificant wound with the result that the wound becomes infected and causes a substantial risk of injury to an inmate would be actionable under the Eighth Amendment while a minor and inconsequential lapse in treatment of a serious medical condition would not. See id.; see also Graham v. Wright, No. 01 Civ. 9613(NRB), 2004 WL 1794503, at \*5 n.7 (S.D.N.Y. Aug. 10, 2004) (holding, in case where prisoner complained of delay in providing treatment for Hepatitis C, that objective element of deliberate indifference standard must be

satisfied by "harm that resulted from the delay"); Evans v. Bonner, 196 F. Supp. 2d 252, 256 (E.D.N.Y. 2002) (holding that alleged injury from untimely receipt of medication, aches, pains and joint problems, was, as a matter of law, not sufficiently serious to rise to constitutional level; even if related to untimely receipt of medication, allegations did not demonstrate condition of urgency or condition that would produce death, degeneration or extreme pain); Leon v. Johnson, 96 F. Supp. 2d 244, 249-50 (W.D.N.Y. 2000) (granting summary judgment on claim of several weeks delay in providing AIDS medication; "Plaintiff has taken one small aspect of that course of treatment, a delay of several weeks in getting him his medications, which is attributable at most to negligence on the part of some Orleans staff members, if not to plaintiff's own inaction, and attempted to fashion from it an Eighth Amendment claim.").

Defendants have provided medical evidence that the missed doses of Ribavirin had no effect on Baxter's condition. In addition, they have provided copies of medical reports indicating that a patient who received 80% of the medications will obtain the maximum benefit from the HCV treatment. Baxter received 100% of the Pegylated Interferon and approximately 98% of the Ribavirin. In opposition, Baxter has provided no medical evidence showing any ill effects from the missed doses of

Ribavirin and no expert opinion<sup>6</sup> indicating the likelihood of such ill effects. Although Baxter states that the treatment was ineffective, defendants have provided medical evidence that HCV treatment is successful in only 45% of co-infected patients. Thus, the mere fact that the virus was not permanently eradicated is insufficient to demonstrate an ill effect from the missing doses of Ribavirin.

The court concludes that Baxter has failed to meet his burden of presenting evidence of an underlying constitutional violation. Thus, his claim for supervisory liability fails as well. Defendants' motion for summary judgment is granted as to the claims against defendants Pesanti, Buchanan and Jaser.

#### IV. Conclusion

Defendants' Motion for Summary Judgment [**doc. #16**] is **GRANTED**. The Clerk is directed to enter judgment in favor of defendants and close this case.

\_\_\_\_\_/s/\_\_\_\_\_  
JANET BOND ARTERTON  
United States District Judge

**Dated this 29th day of July, 2005, at New Haven, Connecticut.**

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<sup>6</sup>Baxter is proceeding pro se and, ordinarily, would not have access to medical opinion evidence. As indicated above, however, an attorney from Inmates' Legal Assistance Program has drafted Baxter's opposition to defendants' motion. The court takes judicial notice of Document 97 in Coderre v. Pesanti, 3:02cv1096(RNC), where this same attorney obtained a medical expert opinion on behalf of a pro se inmate.