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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Alexander Rios,	:	
	:	Case No. 16-cv-3352 AHL
Plaintiff,	:	
	:	
v.	:	
	:	
Jane Komsky, R.N., in her official and individual capacity,	:	
	:	
Defendant.	:	

**BRIEF IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION

Defendant Jane Komsky, the Section Chief Health Officer in charge of providing medical care to Plaintiff Alexander Rios and making medical-related decisions during his stay at the Turner Guilford Knight Correctional Center (“TGKCC”), carelessly disregarded her responsibility to him on multiple occasions, giving rise to the Rehabilitation Act and Eighth Amendment claims that are the foundation of this suit.

Komsky was aware of Rios’s unique medical situation early on as she diagnosed him with the Zika virus shortly after his arrival to TGKCC. After Rios’s symptoms abated and he was moved to the general population, he applied to TGKCC’s Boot Camp Program. Although Rios met the Program’s eligibility requirements, Komsky denied his application without offering an explanation beyond her concern about his past Zika diagnosis, and inflexibly refused to consider accommodations that could be made to ensure the safety of his participation.

Two months later, Rios sought help from Komsky for a painful tingling sensation in his limbs. Komsky refused to conduct a physical examination for nearly two weeks, merely providing Tylenol to alleviate his symptoms. Komsky’s treatment plan was ineffective and the pain worsened, but still she did not examine him until Rios sent an explicit letter exclaiming his pain. During the exam, Komsky reportedly found nothing unusual, so Rios was again sent away with only over-the-counter medicine. Six days later, when Rios was found in his cell unable to move, he was transported to the hospital where he was diagnosed with Guillain-Barre Syndrome. To this day, Rios has not regained full mobility and suffers from anxiety and depression.

The interests of justice will be served by denying Komsky’s motion for summary judgment on both claims and allowing a jury to resolve the factual issues presented in this case. Komsky’s motion on the Rehabilitation Act claim must fail because a reasonable jury could conclude that Rios is otherwise qualified. Komsky’s motion on the Eighth Amendment issue

should not be granted because there is a genuine dispute of material fact as to whether she acted with deliberate indifference to Rios's serious medical need. Therefore, Komsky's motions fail as a matter of law, and summary judgment must be denied.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Alexander Rios is an inmate living in Section 4 at the Turner Guildford Knight Correctional Center (TGKCC). (Rios Dep. 3; 6, Dec. 12, 2016). Defendant Jane Komsky, an experienced nurse practitioner, is a Section Chief Health Officer of TGKCC, responsible for the medical needs of all inmates assigned to Section 4. (Komsky Dep. at 4; 21-23, Dec. 13, 2016). This dispute arises from Komsky's denial of Rios's application to the Boot Camp Program, and her subsequent delay in providing medical treatment for him. (Compl. at 7; 1-7, Nov. 12, 2016).

In early May 2016, Rios agreed to a plea deal for a non-violent offense and was sentenced to a seventeen-month period of incarceration. (Rios Dep. at 4; 9). Upon arrival at the state correctional center, Rios was processed and underwent a medical exam conducted by Komsky. (Rios Dep. at 4; 17-19). During the exam, Rios presented with a 101-degree fever, skin rash, and joint pain. (Rios Dep. at 5; 4-9). Rios also reported that he had travelled to Puerto Rico one month before sentencing. (Rios Dep. at 5; 11-12). In response to Rios's history and symptoms, Komsky took a blood test and placed Rios in sequestration pending the results. (Rios Dep. at 6; 1-4). Approximately one week after the test was conducted, the results of Rios's test revealed that he had the Zika virus. (Rios Dep. at 6; 6).

Zika is a mosquito-borne virus that most commonly results in flu-like symptoms, such as fever, skin rash, conjunctivitis, muscle and joint pain, and headache. (WHO "Zika Virus" at 1). However, Zika can have serious complications if the infected person has a baby. (WHO "Zika Virus" at 1). Additionally, there is scientific consensus that there is a link between Zika and Guillian-Barre Syndrome (GBS). (WHO "Zika Virus" at 1). As a result of his Zika diagnosis,

Rios was kept in medical segregation for an additional week until his symptoms abated. (Rios Dep. at 6; 14-17). Upon cessation of his symptoms, Rios was released from medical segregation and transferred to the general population in Section 4A. (Rios Dep. at 6; 17).

Rios requested admission to TGKCC's Boot Camp Program nearly a week after he had been cleared of any medical risk that he represented to the general population. (Rios Dep. at 7; 17-18). The sixteen-week Boot Camp Program, which is for non-violent offenders, provides educational and vocational training to teenagers and young adults. (Miami Dade DOC "Boot Camp Program" at 1). Rios was interested in the program because he believed the training would enable him to develop skills that could help him get a job. (Rios Dep. at 7; 7-8). Komsky denied Rios's admission due to his prior Zika diagnosis. (Komsky Dep. at 13; 9-11). Komsky suggested that the greater amount of contact, possibility of minor lacerations, and heightened risk of violent behavior in the Boot Camp Program presented too great of a risk to other inmates. (Komsky Dep. 13; 20-23). However, Komsky had cleared him of illness and approved him to live in the general population. (Komsky Dep. at 13; 20-21). Additionally, the program is specifically geared toward non-violent offenders. (Miami Dade DOC "Boot Camp Program" at 1). Rios requested that Komsky approve his participation for the non-dangerous parts of the program. (Rios Dep. at 7; 8-10). However, Komsky refused due to her belief that any changes made to accommodate personal needs of participants would upset the regimentation of the program. (Komsky Dep. 15; 1-3). Rios appealed to the warden, who affirmed Komsky's decision. (Rios Dep. at 8; 13).

Two months later, on July 8, 2016, Rios experienced a painful tingling sensation in his arms and legs. (Rios Dep. at 8; 23). Although he reported his symptoms to Komsky, he was only given over-the-counter pain medication; there was no physical examination. (Rios Dep. at 9; 1-3). Two days later, Rios's symptoms had not abated, and he reported the continuing painful

sensations he was experiencing directly to Komsky while she was on her normal rounds. (Rios Dep. at 9; 6-8). Specifically, Rios reported that despite the over-the-counter medication she had prescribed, he was still experiencing tingling pain, that his hands felt weak, and that he had difficulty eating and sleeping. (Rios Dep. at 9; 9-13). In response to Rios's complaints, Komsky continued to order only over-the-counter medication. (Rios Dep. at 9; 13-14). One week later, on July 18, 2016, Rios wrote a letter to Komsky stating "my arms are on fire. HELP me!" (Rios Dep. at 9; 17-18). As a result, Komsky performed a physical examination that revealed nothing remarkable; Rios had normal vital signs, no fever, and acceptable blood pressure. (Komsky Dep. at 16; 12-14). However, Rios reported to Komsky that he felt like he was dying, and pled to be sent to the hospital. (Rios Dep. at 9; 17-22). Komsky did not recommend treatment, and continued to prescribe over-the-counter pain medication. (Komsky Dep. at 16; 16-17).

On July 24, 2016, two and a half weeks after Rios initially reported his symptoms to Komsky, he was found unable to move his arms in his cell. (Komsky Dep. at 16; 20-22). Rios was transported to Jackson Memorial Hospital, where he reported a pain level of nine out of possible ten. (Jackson Emergency Record at 1). Rios presented with a hypertensive blood pressure and elevated pulse rate. (Jackson Emergency Record at 1). Two hours after his arrival, Rios was diagnosed with GBS. (Jackson Emergency Physician Record at 1). As a result of the incident, Rios continues to suffer from anxiety, depression, and residual pain in his arms and hands. (Compl. at 7; 1-2). Rios has not yet gained full range of movement in his arms, prohibiting him from performing normal functions such as brushing his hair, lifting, or reaching anything over his shoulders. (Rios Dep. at 11; 9-12). Rios initiated this action, seeking monetary damages under the Rehabilitation Act and Eighth Amendment. (Compl. at 1; 11-13).

ARGUMENT

I. LEGAL STANDARDS

A. Standard for Motion for Summary Judgment

A motion for summary judgment may be granted only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). If a reasonable jury could return a verdict for the non-movant, summary judgment must be denied. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party is responsible for identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The function of the court is not to weigh evidence, but to determine whether there is a genuine issue of material fact for trial. Anderson, 477 U.S. at 242. At the summary judgment stage, inferences must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 at 587 (1986).

B. Standard for Rehabilitation Act and Eighth Amendment Claims

To prevail on a Rehabilitation Act claim, a complainant must show that (1) he is “handicapped” within the meaning of the Act; (2) he is “otherwise qualified” or would be with reasonable accommodations; (3) he is excluded from programs or activities solely because of the handicap; and (4) the programs or activities from which he is excluded are operated by an agency that receives federal financial assistance. Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991). The only element in dispute is whether Rios is otherwise qualified for participation in the Boot Camp Program. A reasonable jury could conclude that Rios is otherwise qualified, because objective medical evidence and Komsky’s own professional opinion indicate that his

participation does not present a significant risk. Even if Rios is not otherwise qualified, reasonable accommodations can be made to enable him to safely participate. To succeed on an Eighth Amendment claim, a complainant must show that the defendant acted with an attitude of deliberate indifference to serious medical need. Estelle v. Gamble, 429 U.S. 97 at 104 (1976). Here, a genuine dispute of material fact exists as to whether the symptoms that Rios reported to Komsky constituted a serious medical need, and whether Komsky acted with an attitude of deliberate indifference in prescribing only over-the-counter medication, refusing to perform a physical examination for nearly two weeks, and denying his request to be sent to the hospital.

II. KOMSKY IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE A GENUINE DISPUTE OF MATERIAL FACT EXISTS AS TO WHETHER RIOS IS “OTHERWISE QUALIFIED.”

Rios’s Rehabilitation Act should survive summary judgment because a reasonable jury could conclude that Rios is otherwise qualified to participate in the Boot Camp Program. Section 504 of the Rehabilitation Act prohibits discrimination against “otherwise qualified individuals with a disability.” 29 U.S.C. §794(a). An individual with a disability does not include “an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals.” 29 U.S.C. §705(20)(D). The Rehabilitation Act is interpreted in the same way as the Americans with Disabilities Act (“ADA”); claims under both statutes are governed by the same standards. Henderson v. Thomas, 913 F. Supp. 2d 1267, 1287 (M.D. Ala. 2012). In the employment context, reasonable accommodations include job restructuring, adapted work schedules, reassignment to a vacancy, and equipment modification. 42 U.S.C. §12111(9)(B).

To obtain relief under the Rehabilitation Act, a complainant must show that (1) he is “handicapped” within the meaning of the Act; (2) he is “otherwise qualified”; (3) he is excluded

from programs solely because of the handicap; and (4) the programs from which he is excluded are operated by an agency that receives federal financial assistance. Harris, 941 F.2d at 1522.

Elements (1), (3), and (4) are not in dispute. The parties have stipulated that Rios is handicapped because he has a physical impairment that substantially limits his major life activities, and that TGKCC receives federal assistance. (Order). Additionally, Komsky conceded that Rios's exclusion was solely due to his Zika diagnosis. (Komsky Dep. 13:10-11). Therefore, to prevail on his Rehabilitation Act claim, Rios need only show he is otherwise qualified.

The otherwise qualified analysis consists of two steps. First, it must be shown that the handicapped individual is otherwise qualified. Id. at 1525. Second, even if the individual is not otherwise qualified, the Rehabilitation Act requires reasonable accommodations. Id. at 1525. Rios is otherwise qualified because objective medical evidence and Komsky's professional opinion indicate he does not represent a significant risk. Even if Rios is not otherwise qualified, reasonable accommodations can make him otherwise qualified.

Moreover, the purpose of the Rehabilitation Act is vindicated by allowing Rios to participate in the Boot Camp Program. The Supreme Court has recognized that one of the goals of the Act is to combat discrimination and misapprehension that results from the irrational fear that a person who was previously afflicted with a disease may be contagious. School Board of Nassau City, Florida v. Arline, 480 U.S. 273, 285 (1987). By refusing to allow Rios to participate in the Boot Camp Program without medical evidence to substantiate her concern of his contagiousness, Komsky is enabling these unfounded concerns. Komsky's inflexible position is not justifiable discrimination based on concrete, medical evidence; rather, it is unnecessarily singling him out based on irrational public fear in contravention of Congress's stated purpose.

A. Objective medical evidence, as well as Komsky’s professional opinion, indicate that despite his previous Zika diagnosis, Rios is an “otherwise qualified” individual.

Despite his past Zika diagnosis, Rios is otherwise qualified to participate in the Boot Camp program because he does not present a significant risk to other participants. When a handicap relates to a contagious disease, there are four factors relevant to determining if the individual is entitled to the protections of the Rehabilitation Act: (a) the nature of the risk; (b) the duration of the risk; (c) the severity of the risk; and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. Onishea v. Hopper, 171 F.3d 1289, 1297 (11th Cir. 1999). Due to the inevitable overlap of the factors, the Eleventh Circuit emphasizes the significance of the risk, which is the product of factor (d), probability that transmission will occur, and factor (c), severity of consequences that will result. Id. at 1297. In making these findings, the court should defer to the reasonable medical judgments of public health officials. Id. at 1297. The determinations of public health officials, including Komsky, indicate that factor (b), duration of risk, weighs in favor of characterizing Rios as otherwise qualified, as Zika symptoms typically last only two to seven days. (WHO “Zika Virus” at 1). The remaining three factors support this conclusion, because the probability that transmission will occur is negligible since Zika is primarily transmitted via mosquito bite, and the severity of the risk that Rios presents is exceedingly low, because the symptoms of Zika are mild and short-lived. Therefore, in totality, the four factors indicate Rios should be considered otherwise qualified.

Where the risk of transmission is only theoretical, the individual is otherwise qualified. Martinez v. Sch. Bd. of Hillsborough Cty., Florida, 861 F.2d 1502, 1506 (11th Cir. 1988). In Martinez, the speculative possibility that a HIV-positive student could transmit the disease through tears, saliva, or urine was insufficient to conclude that the overall risk of transmission

was significant. Id. at 1506. Particularized findings evidencing the purported possibility of transmission were required before the risk could be classified as significant. Id. at 1506.

Probability of transmission invariably includes consideration of the nature of the risk, which is defined as how transmission occurs. Onishea, 171 F.3d at 1297. Implicit in Martinez was the conclusion that probability of transmission was too remote because the nature of the risk, transmission through bodily fluids, was highly unlikely. Martinez, 861 F.2d at 1506.

Here, the risk that, through his participation in the Boot Camp Program, Rios will transmit the Zika virus to other participants has not been established as significant. As in Martinez, here Komsky's fear that Rios will transmit the Zika virus to others is conjectural at best. First, Komsky has not produced evidence supporting the belief that a past diagnosis of Zika means that the individual remains contagious, even after their symptoms have abated. Nothing in the Zika literature supports this proposition. In fact, Komsky approved his transfer back to the general population due to an assumption that the contagious period of the carrier, like with most infectious diseases, ends when symptoms have subsided. (Komsky Dep. 12; 10-12). Second, Komsky's objection to Rios's participation in the Boot Camp Program is largely based on her fear that there is higher probability for fights amongst participants in the program. (Komsky Dep. 14; 9-12). However, there is nothing in the record to substantiate this concern as it applies to Rios and the Boot Camp Program, as the participants are non-violent offenders. (Miami Dade DOC "Boot Camp Program" at 1). Moreover, the 90% success rate of the program indicates that participants refrain from violent behavior. (Miami Dade DOC "Boot Camp Program" at 2). Additionally, there is greater supervision of inmates in the Boot Camp Program, so the likelihood of Rios engaging in unsafe behavior is decreased. (Komsky Dep. 15; 7-9). Finally, Komsky suggested that Rios could transmit the virus through blood transmission via minor lacerations

incurred while operating machinery as part of the Program's vocational training. (Komsky Dep. 14; 16-18). However, vocational training occurs during Phase 2, which is four months into the Program. (Miami Dade DOC "Boot Camp Program" at 1). There is no medical evidence or testimony from Komsky suggesting that a person previously diagnosed with the Zika virus continues to be contagious for over four months after symptoms have abated. Additionally, blood transmission of Zika has only been confirmed once. (WHO "Zika Virus" at 1). Moreover, in addition to a low probability of transmission, here nature is equally inconsequential as transmission primarily occurs through the bite of an infected mosquito not presently found in the United States. (WHO "Zika Virus" at 1). Therefore, nature of risk and probability of transmission weigh in favor of classifying Rios as otherwise qualified.

When assessing severity of risk, a high quality of life, despite the potential for permanent harm, can weigh in favor of otherwise qualified classification. Henderson, 913 F. Supp. 2d at 1289. In Henderson, prison officials segregated HIV-positive inmates from the general population due to concern that other inmates would become infected. Id. at 1290. In analyzing severity of risk, the fact that HIV-positivity is permanent was balanced with acknowledgement that the vast majority of people with HIV enjoy near-normal lifespans; the condition is treatable; and those with HIV can have lives nearly identical to those without. Id. at 1294.

Here, the severity of risk and potential for permanent harm to third parties is negligible. Deferring to Komsky's own medical judgment, the symptoms of Zika are very mild, as the virus most commonly manifests in the form of rashes, fever, and joint pain. (Komsky Dep. 7; 6-8). The Zika virus can cause GBS, a disorder of the body's immune system. (WHO "Zika Virus" at 1). However, the condition is treatable. (U.S. HHS "Guillain-Barre Syndrome" at 5). As in Henderson, where the fact that the condition was permanent did not automatically lead to the

conclusion that the severity of the risk was so great as to bar the individual from being otherwise qualified because the quality of life of someone with the condition was nearly identical to that of someone without it, here, GBS is treatable with therapies that enable the afflicted individual to lead a normal life. (U.S. HHS “Guillain-Barre Syndrome” at 5).

B. The accommodations to the Boot Camp Program suggested by Rios are reasonable, do not unduly burden Komsky or TGKCC, and do not affect a fundamental alteration in the nature of the program.

In requesting that he be allowed to participate in the portions of the Boot Camp Program that are not dangerous, Rios requested a reasonable accommodation that Komsky has not shown to be unduly burdensome. If reasonable accommodations do not create a significant risk of transmission, the individual will be considered otherwise qualified within the meaning of the Rehabilitation Act. Arline, 480 U.S. at 287. If plaintiff makes a prima-facie showing that he is otherwise qualified or would be with reasonable accommodations, the burden shifts to defendant to show that the proposed accommodations are not reasonable, either because implementation would impose an undue financial or administrative burden, or result in a fundamental alternation in the character of the program. Harris, 941 F.2d at 1527; see also Henderson, 913 F. Supp. 2d at 1289 (citing Henrietta D. v. Bloomberg, 331 F.3d 261, 280 (2d Cir. 2003) (holding that prima-facie showing of reasonable accommodation has been made once plaintiff suggests the existence of a plausible accommodation, the costs of which facially do not clearly exceed its benefits)).

If an accommodation can be made without requiring the prison to change procedures, the accommodation is reasonable because it doesn't impose an undue financial or administrative burden, and it does not result in fundamental alteration of the program. Henderson, 913 F. Supp. 2d at 1289. In Henderson, where all HIV-prisoners were precluded from being integrated into the general population, the prisoners requested accommodation in the form of individualized

determinations of their medical classifications. Id. at 1296. This accommodation, which did not require excessive cost expenditures, was deemed reasonable because the prison had the ability to measure the prisoners' viral loads without substantially altering their procedures. Id. at 1296.

Here, Komsky has not shown that Rios's proposed accommodation, being allowed to participate in the non-dangerous parts of the Boot Camp Program, is unreasonable. As in Henderson, where it was possible to modify the classification system to reflect the prisoners' relative risk, here it is possible to modify Rios's participation in the Boot Camp Program so that he does not join in the activities that are dangerous. In fact, Komsky herself identified the dangerous parts of the program as the vocational trainings, which involve heavy machinery where inmates could get minor lacerations. (Komsky Dep. 14; 16-18). To address this, Rios could either be placed in educational, as opposed to vocational, training, or be required to sit out. (Miami Dade DOC "Boot Camp Program" at 1). As in Henderson, where defendant failed to show the proposed accommodations were unreasonable, here Komsky has not shown that accommodating Rios would impose an undue financial or administrative burden. Additionally, while Komsky testified that in her opinion no changes to the Boot Camp Program could be made to accommodate the personal needs of participants since the "whole point" of the program is its regimentation, she has not shown that modification would fundamentally alter the nature of the program. (Komsky Dep. 15; 1-3). Komsky's individual beliefs cannot establish that modification would affect a fundamental alteration of the nature of the program, because she has not presented any objective evidence beyond her personal opinion or made an effort to analyze how the modification would alter the program. See Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (holding that defendant showed proposed accommodation would fundamentally alter the nature of the program because their analysis showed that it would require a reallocation of labor).

Therefore, Komsky has not shown that Rios's proposed accommodation is unreasonable, either due to an undue financial or administrative burden, or due to a resulting alteration in the fundamental nature of the program.

Moreover, even if allowing Rios to sit out of the dangerous parts of the Boot Camp Program is unreasonable, Komsky has not attempted to engage with Rios to determine an accommodation that would be reasonable. See Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1364 (11th Cir. 1999) (holding that once an accommodation has been requested, a reasonable effort must be undertaken to identify an appropriate accommodation); see also Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997) (holding that an employer who offered five accommodations satisfied their obligation under the ADA); Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 385 (2d Cir. 1996) (holding that providing ergonomic furniture and allowing employee to periodically stretch was "plainly reasonable"). Therefore, Komsky's claim that Rios's proposed accommodation would be unduly burdensome must fail, because not only has she failed to give consideration to the accommodation he proposed; she has not made an effort to work with Rios to identify a reasonable accommodation.

III. A REASONABLE JURY COULD CONCLUDE THAT KOMSKY'S BEHAVIOR VIOLATED THE EIGHTH AMENDMENT BECAUSE SHE ACTED WITH DELIBERATE INDIFFERENCE TO RIOS'S SERIOUS MEDICAL NEED.

Rios's Eighth Amendment claim should survive summary judgment because a genuine dispute of material fact exists as to whether Komsky acted deliberately indifferent to Rios's serious medical need. The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. Punishments which involve the "unnecessary and wanton infliction of pain" contravene the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153 at 156 (1976). Acting with deliberate indifference to serious

medical needs of prisoners constitutes “unnecessary and wanton infliction of pain” in violation of the Eighth Amendment. Estelle, 429 U.S. 97 at 104.

To show that a prison official acted with deliberate indifference to serious medical need, plaintiff must satisfy both an objective and a subjective inquiry. Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003). First, he must set forth evidence of an objectively serious medical need. Id. at 1243. Second, he must prove that the prison official acted with an attitude of deliberate indifference to that serious medical need. Id. at 1243.

Construing all of the evidence in the light most favorable to Rios, a reasonable jury could conclude in his favor on both elements of the Eighth Amendment claim. First, Rios consistently notified Komsky of his painful tingling sensations and the increase in discomfort he was experiencing, despite the over-the-counter medication that she had prescribed. Although Rios’s underlying GBS had not been diagnosed, a reasonable jury could conclude that the symptoms he was experiencing constituted a serious medical need that necessitated attention. Second, a jury could find that Komsky’s conduct, in prescribing only over-the-counter medication, declining to perform a physical examination for nearly two weeks, and refusing to send him to the hospital for evaluation by a physician, constituted deliberate indifference.

A. Rios’s complaints of acute pain and persistent requests for medical attention, due to his underlying Guillain-Barre Syndrome, constitute an objectively serious medical need.

Rios’s complaints of severe pain, tingling, and restricted mobility, for which he consistently requested medical attention, constitute an objectively serious medical need. In the Eleventh Circuit, a serious medical need is one that either (a) has been diagnosed by a physician as mandating treatment or (b) is so obvious that even a layperson could easily recognize the necessity for a doctor’s attention. Id. at 1243.

Where a doctor is aware of constant complaints of pain by an inmate, serious medical need has been established. McElligott v. Foley, 182 F.3d 1248, 1256 (11th Cir. 1999). In McElligott, even though the prisoner's condition was undiagnosed, the doctor was aware of the tremendous pain and illness the prisoner was suffering due to the prisoner's constant complaints. Id. at 1256. This sufficiently established serious medical need. Id. at 1256.

Here, it is clear that Komsky was aware of the significant pain and discomfort Rios was experiencing due to his constant complaints; therefore, serious medical need has been satisfied. As in McElligott, where the doctor's failure to diagnose the patient's underlying cancer did not constitute deliberate indifference, here Komsky's failure to diagnose Rios's Guillain-Barre Syndrome is not the source of her deliberate indifference. Id. at 1256. While this failure may have been extremely negligent, the source of Komsky's Eighth Amendment liability comes from her deliberate indifference to Rios's medical need for further diagnosis of and treatment for the severe pain he was experiencing. Komsky's knowledge of Rios's repeated complaints of considerable pain establishes a serious medical need that is so obvious that even a layperson could easily recognize the necessity for a doctor's attention. Therefore, there is sufficient evidence to permit a jury to infer that Rios had a serious medical need.

B. In prescribing only over-the-counter pain medication, failing to perform a physical examination for two weeks, and refusing to oblige Rios's request to be sent to the hospital, Komsky acted with deliberate indifference to Rios's serious medical need.

Komsky's conduct, which included refusing to alter her treatment program of over-the-counter medication, failing to provide a clinical examination to address Rios's symptoms for two weeks, and ignoring his requests to be seen by a hospital physician, constitutes deliberate indifference. In the Eleventh Circuit, deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more

than mere negligence. Id. at 1255. The subjective knowledge element requires that the official both be aware of the facts from which the inference that a substantial risk of serious harm exists, and that she actually draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

Komsky's subjective knowledge is established by her awareness of Rios's constant complaints that he was in severe pain and her general medical training. Komsky's deliberate indifference is established by her failure to perform a physical examination on Rios for nearly two weeks; her refusal to alter the treatment plan that she prescribed for Rios despite knowing that it was ineffective; and her denial of his pleas to be sent to the hospital for evaluation by a doctor.

Where a doctor is aware of a patient's tremendous pain from constant complaints and examination, her subjective knowledge of a substantial risk of harm is established. McElligott, 182 F.3d at 1256; see also Farrow, 320 F.3d at 1246 (holding that doctor who had been repeatedly told of inmate's pain, weight loss, bleeding gums, and soft diet established subjective knowledge of risk of serious harm). In McElligott, the patient made constant complaints to the prison doctors about the considerable pain and illness he was suffering. McElligott, 182 F.3d. at 1256. This knowledge, along with the examinations the doctor had conducted, established the doctor's subjective knowledge of a substantial risk of harm to the patient. Id. at 1256.

Subjective knowledge of a substantial risk can also be established from the very fact that the risk was obvious. Steele v. Shah, 87 F.3d 1266, 1270 (11th Cir. 1996). In Steele, a doctor who knew that a prisoner had attempted to commit suicide on two prior occasions and had been warned from the prisoner's prior institution that he was a suicide risk proceeded to give no medication. Id. at 1270. The doctor's subjective knowledge was established because the risk of harm was blatantly apparent. Id. at 1270.

However, if appreciation for a substantial risk requires certain knowledge, subjective knowledge cannot be established without it. Cottrell v. Caldwell, 85 F.3d 1480, 1491 (11th Cir. 1996). In Cottrell, an arrestee who suffered from positional asphyxiation while being transported by police brought suit against the officers who transported him. Id. at 1488. The defendants did not have subjective knowledge because they had not received the training that would have enabled them to recognize the signs of suffocation. Id. at 1491.

Here, Komsky's subjective knowledge of substantial risk to Rios's health is established by her awareness of his constant complaints and general medical training. As in McElligott, where the doctor had performed an examination and received regular complaints of substantial pain from the prisoner, here, Rios reported his painful tingling sensations and discomfort to Komsky on a regular basis. She also performed an examination of him, which indicates that she knew there was a possible risk. Moreover, as in Steele, where the risk of harm was obvious due to the patient's history, here, the risk that Rios was severely ill was obvious to Komsky.

Unlike in Cottrell, where the officers did not have the requisite level of knowledge to enable them to perceive and appreciate a risk, here, Komsky had ample medical training that made her aware of a substantial risk to Rios's health. As a medical professional with over fifteen years of experience in emergency rooms and prisons, Komsky knew that an individual who is unable to eat, sleep, or make normal use of his extremities, and who has painful tingling sensations in his limbs which last for over two weeks, is at risk of experiencing serious health complications. While Komsky did not perceive the particular risk of GBS, she knew of a risk that Rios's health was in jeopardy due to the constant complaints he made to her and her general knowledge as an experienced health practitioner. Therefore, since subjective knowledge of risk is

established, to maintain his Eighth Amendment claim Rios need only show that Komsky's conduct disregarded a risk of harm in a way that is more than mere negligence.

In distinguishing deliberate indifference from mere negligence, the Eleventh Circuit has explicated various categories that may constitute deliberate indifference, including (1) failure or refusal to obtain medical treatment; (2) delaying treatment of serious medical needs; and (3) medical care that is so cursory as to amount to no treatment at all. Melton v. Abston, 841 F.3d 1207, 1223 (11th Cir. 2016). For each of the aforementioned categories, there is ample evidence from which a reasonable jury could conclude that Komsky's behavior constituted deliberate indifference. In declining to perform a physical examination on Rios for nearly two weeks, despite being aware of the increasing intensity of his painful symptoms; continuing to provide over-the-counter pain medication, despite knowing that this was not alleviating his discomfort; and refusing to send Rios to the hospital for further medical evaluation, Komsky's actions satisfy the Eleventh Circuit's threshold for deliberate indifference to a serious medical need.

First, deliberate indifference is established where there is a refusal or failure to obtain medical treatment. Mandel v. Doe, 888 F.2d 783, 790 (11th Cir. 1989). In Mandel, the doctor cavalierly ignored repeated indications that the patient's condition was worse than his diagnosis. Id. at 789. The doctor took 20 days and three requests to conduct an examination, during which the patient screamed in pain, and still the doctor refused to send him to the hospital. Id. at 789. Here, Komsky's callous behavior amounts to a failure to obtain treatment for Rios, establishing deliberate indifference. Despite Rios's complaints that the Tylenol she had prescribed was not working, Komsky did not alter her treatment plan or make an effort to provide a more accurate diagnosis. (Rios Dep. 9; 12-14). Like the Mandel complainant, here Rios begged and pleaded with Komsky to be sent to the hospital, to which she refused. (Rios Dep. 9; 21). Just as the

patient in Mandel displayed symptoms of extreme distress, here Rios told Komsky that he felt like he was dying, and still Komsky refused to send him to the emergency room. (Rios Dep. 9; 21). Komsky's testimony that she did not take additional action because Rios had normal vital signs amplifies her deliberate indifference, because the symptoms he was complaining of would not occur in a healthy young man with normal vitals. Komsky has the ability to send inmates to the hospital, and it is difficult to imagine a situation necessitating the attention of a doctor more than this one, in which Rios manifested symptoms of serious illness but did not have unusual vitals. Refusing to oblige Rios's request to be sent to the hospital amounts to a failure to obtain treatment, establishing Komsky's deliberate indifference.

Second, deliberate indifference is satisfied when treatment for a serious medical need is delayed. Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989). In Waldrop, a prison official who declined to take action or inform others of a prisoner's need for psychiatric care was deliberately indifferent because the prisoner was delayed in getting the treatment he needed. Id. at 1036. Here, Komsky's failure to perform a physical examination on Rios for nearly two weeks, despite his repeated complaints of pain and requests to be medically evaluated, constitutes a delay in treatment establishing deliberate indifference. As in Waldrop, Komsky's delay in taking action to address the symptoms Rios reported prevented him from getting timely treatment for his condition. Komsky testified that her delay in treatment was reasonable because Rios's complaints were unspecific. (Komsky Dep. 16; 2-3). However, lack of specificity is not a valid medical reason for refusing to perform an exam and delaying treatment. Instead of ignoring his requests for evaluation, Komsky should have given Rios a physical exam to ascertain the source of his pain. Her unexplained ten-day delay in providing a physical examination to investigate the sources of his symptoms constitutes deliberate indifference.

Third, deliberate indifference is satisfied where the medical care provided is so cursory as to amount to no treatment at all. McElligott, 182 F.3d at 1256. In McElligott, despite the patient's repeated complaints about pain, the doctor did essentially nothing to alleviate the pain, prescribing only over-the-counter medication. Id. at 1256. Moreover, the doctor was aware that medication was not treating the pain and that the patient's condition was continuing to deteriorate. Id. at 1256. Therefore, the medical care was so cursory as to amount to no care at all. Id. at 1259. Here, the medical care provided by Komsky in prescribing Tylenol to address Rios's complaints of painful tingling sensations, restricted mobility, and inability to eat, sleep or walk was so cursory as to amount to no treatment at all. As in McElligott, Komsky did essentially nothing to alleviate Rios's pain. Komsky knew that the treatment plan she had prescribed was not working, since Rios repeatedly told her that the Tylenol was not alleviating his pain. Komsky was aware that Rios's condition worsened over a ten-day period despite his Tylenol regimen, and still she refused to adjust the care she was providing. Therefore, in providing medical care that was so cursory as to amount to no care at all, Komsky acted with deliberate indifference.

CONCLUSION

Viewing the evidence in the light most favorable to Rios, there is more than sufficient grounds on which to conclude that a genuine dispute of material fact exists as to Rios's Rehabilitation Act and Eighth Amendment claims. A reasonable jury could conclude both that Rios is otherwise qualified for participation in the Boot Camp Program because his participation is not a significant risk, or in the alternative, can be reasonably accommodated to allow him to safely participate; and that Komsky acted with deliberate indifference to his serious medical need in prescribing only Tylenol, failing to perform a physical examination for two weeks, and refusing to allow Rios to go to the hospital. Accordingly, Komsky has not shown she is entitled to judgment as a matter of law, and her motions for summary judgment must be denied.

SIGNATURE PAGE

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Defendant's Motion for Summary Judgment was served this day via email, to counsel for Defendant at the following address:

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