

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

BERNARD TAINTER,

Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT
OF HEALTH AND FAMILY SERVICES; STEVE
WATTERS, SRSTC Director; and
MICHAEL DITTMAN, SRSTC Security Director,

Defendants.

ORDER

02-C-540-C

For reasons I cannot fully explain, this case has been plagued by a series of mistakes.

First, in an order dated November 4, 2002, I ruled that plaintiff Bernard Tainter, a patient at the Sand Ridge Secure Treatment Center, was financially eligible to proceed in forma pauperis in this action alleging that defendants are enforcing a policy at the center that violates plaintiff's First Amendment right to practice his religion. At that time, I reviewed plaintiff's complaint to insure that he was alleging a claim properly raised in a lawsuit filed in federal court as required by 28 U.S.C. § 1915(e)(2). Through an oversight, however, I overlooked the fact that plaintiff was suing a defendant who should have been

dismissed immediately under 28 U.S.C. § 1915(e)(2)(B)(iii), on the ground that the defendant was immune from suit.

Next, plaintiff prepared a Marshals Service and summons form for defendant Steve Watters, but did not complete forms for Michael Dittman or the State of Wisconsin Department of Health and Family Services. Instead, plaintiff submitted Marshals Service and summons forms for two people who are not defendants in this lawsuit, a Reverend Mark Teslik and a Reverend Neil Jensen. This mistake was compounded when the three sets of forms plaintiff had completed were forwarded to the marshal's office with plaintiff's complaint for service, without anyone questioning why the names of the persons named in the forms did not match the names of the defendants in the caption of the complaint. No one in the Marshal's office noticed the discrepancy. On November 22, 2002, Rachel Behnke, an "authorized representative," accepted service of plaintiff's complaint on behalf of Watters, Teslik and Jensen.

On December 13, 2002, the State of Wisconsin Department of Health and Family Services and defendant Watters answered the complaint. On that same date, defendant State of Wisconsin Department of Health and Family Services and non-defendants Mark Teslik and Neil Jensen moved to dismiss the complaint. Defendants requested dismissal of the defendant department on the grounds that it was not properly served with plaintiff's complaint and in any event, is immune from suit under the Eleventh Amendment. They

asked for dismissal of Teslik and Jensen because plaintiff has not alleged any wrongdoing against them in the body of his complaint or named them as defendants in the caption of his complaint. A briefing schedule was established on the motion, under which plaintiff had until January 2, 2003, in which to oppose it.

Plaintiff added to the confused state of this case when, on December 18, 2002, he filed an untitled document requesting postponement of a trial which has not yet been scheduled. Plaintiff did not serve a copy of his communication on Jody Schmelzer, counsel for the defendants, as he was required to do under the rules governing the conduct of federal lawsuits. See Fed. R. Civ. P. 5.

Here is where things stand. Plaintiff should not have been granted leave to proceed in forma pauperis against the defendant Department of Health and Family Services, because the department is immune from suit under the Eleventh Amendment. The Eleventh Amendment bars federal suits against the State of Wisconsin and its agencies. See Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 62-63 (1945); Gleason v. Board of Education of City of Chicago, 792 F.2d 76, 79 (7th Cir. 1986) (stating that “the eleventh amendment ‘prohibits federal courts from entertaining suits by private parties against States and their agencies’”) (quoting Alabama v. Pugh, 438 U.S. 781, 782 (1978)). Therefore, pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii), I will grant defendant Department of Health and Family Services’ motion to dismiss plaintiff’s claim against it.

There is no need for the parties to brief or the court to consider a motion to dismiss Reverend Mark Teslik and Reverend Neil Jenson from the case, as these individuals are not parties to this lawsuit. The briefing schedule established on December 17, 2002 will be rescinded and defendants' motion to dismiss Teslik and Jenson from the case will be denied as unnecessary.

Defendant SRSTC Security Director Michael Dittman still needs to be served with plaintiff's complaint. Plaintiff will have until January 6, 2003, in which to complete a Marshals Service and summons form for this defendant and return it to the court. Blank Marshals Service and summons forms are being sent to plaintiff with this order.

Finally, I am sending defense counsel a copy of plaintiff's motion to postpone the trial in this case on this one occasion, but will deny the motion as premature because no trial has been scheduled. Plaintiff is cautioned that in the future, he is to serve a copy of every communication or document he files with the court on the lawyer for the defendants and show on the court's copy that he has done so. If he does not do this, the court will not give any consideration to the communication.

As soon as plaintiff's complaint has been served on defendant Dittman and Dittman has filed a response to the complaint, the case will be scheduled for a preliminary pretrial conference by telephone before United States Magistrate Judge Stephen Crocker.

ORDER

IT IS ORDERED that

1. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii), defendant State of Wisconsin Department of Health and Family Services' motion to dismiss plaintiff's claim against it is GRANTED.

2. The motion to dismiss filed by Reverend Mark Teslik and Reverend Neil Jenson is DENIED as unnecessary and the briefing schedule is RESCINDED.

3. Plaintiff may have until January 6, 2003, in which to complete and return to the court a Marshals Service and summons form for defendant SRSTC Security Director Michael Dittman. Blank Marshals Service and summons forms are enclosed to plaintiff with this order.

4. Plaintiff's motion to postpone the trial in this case is DENIED as premature.

Entered this 19th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge