

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

DAVID LEE GREEN,

Plaintiff,

v.

WARDEN, MCC CHICAGO,
CASE MANAGER MS. CHRISTMAS,
SUPERVISOR MR. HARRIS, and
THE UNITED STATES OF AMERICA,

Defendants.

ORDER

07-C-37-C

This is a civil action in which plaintiff is proceeding on claims under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for damages he suffered when defendants allegedly failed to protect him from an assault by another prisoner and then retaliated against him when he complained about it. On March 16, 2007, plaintiff's complaint was forwarded to the United States Marshal for service on the defendants., who have 60 days from the date of service of plaintiff's complaint on the United States in which to answer. Now before the court is plaintiff's motion for appointment of counsel, which includes a

motion for an order enjoining defendants from transferring him to another institution during the pendency of this action. Both motions will be denied without prejudice.

In support of his motion for an order enjoining defendants from transferring him, plaintiff asserts that he believes someone (he does not say who) has arranged to have his custody level lowered so that he can be transferred out of the Federal Correctional Institution and placed on a bus that will travel across the country over weeks and months to plaintiff's new destination. Plaintiff believes that the federal bureau of prisons is plotting this action to prevent him from prosecuting this case.

Unfortunately, plaintiff's new claim of retaliation cannot be brought in the context of this lawsuit. In situations in which a plaintiff alleges that prison officials have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action.

The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit. In this case, plaintiff believes his potential transfer will take weeks and even months to complete and that his constant movement will impede his ability to receive mail related to the case. However, at this point, his fears are speculative at best. As noted above, it will be

at least 60 days before defendants are even required to answer his complaint. After defendants file a responsive pleading, Magistrate Judge Stephen Crocker will hold a telephonic preliminary pretrial conference to set a trial date and establish deadlines for moving this case to resolution. Defendants will be responsible for arranging the call and insuring plaintiff's participation in the conference, no matter where he might be housed. At that time, plaintiff may raise the issue of his transfer if, in fact, it is not complete, and work with defendants' counsel to insure that he will be able to receive mail pertaining to this case. With respect to plaintiff's ability to gather evidence to prove his claims, it should not matter whether plaintiff is housed at Oxford or another prison. He has personal knowledge of the events giving rise to his claims and he can conduct written discovery to obtain additional facts if they exist. In other words, nothing about his transfer should physically impair his ability to prosecute this lawsuit.

Plaintiff's motion for appointment of counsel appears to be grounded on the same concerns as those prompting plaintiff's motion for an order enjoining his transfer. He does not suggest that he cannot prosecute his case for reasons such as its complexity or because he has physical or mental impairments that will interfere with his ability to perform the tasks necessary to prosecute a lawsuit. He simply fears a transfer will interfere with his ability to receive his mail. Because this concern is speculative at best, I am not persuaded that appointment of counsel is warranted.

ORDER

IT IS ORDERED that plaintiff's motion for an order enjoining his transfer is DENIED.

Further, IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 13th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge