

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

COREY PALMS,

Plaintiff,

v.

ORDER

07-C-44-C

SANDRA SITZMAN, Health
Service Manager or Active Supervisor;
and JOHN DOES, Nurses-prison
official, individually and in their
official capacities,

Respondents.

In this case, plaintiff is proceeding pro se and in forma pauperis on a claim that defendants were deliberately indifferent to pain he suffered on March 17, 2006, after having a tooth pulled in the morning and then being forced to wait until nearly 6:00 p.m. before receiving his prescribed pain medication. Unfortunately, the case has gotten off to a rough start.

Initially, plaintiff sued the dentist (Dr. Quisling), the dental assistant (Vicki Kamrath), the health services manager (defendant Sandra Sitzman) and an unspecified number of Doe defendants described in the caption of plaintiff's complaint as "nurses-prison

official.” In an order dated February 12, 2007, Judge Crabb dismissed the dentist and the dental assistant, because plaintiff’s own allegations revealed that they were not responsible for the delay he experienced in receiving his medication. Judge Crabb allowed him to proceed against defendant Sitzman on the basis of his allegations that she had been notified at least twice during the day about plaintiff’s need for medication and that she nevertheless failed to arrange for its prompt delivery. Judge Crabb allowed plaintiff to proceed against unnamed Doe defendants, who she understood to be officers in plaintiff’s unit that plaintiff asked to help him get his medication but who failed to accomplish the task. In the February 12 order, Judge Crabb told plaintiff that it might well turn out that the correctional officers did everything in their power to obtain his medication, in which case they could not be found to have violated his constitutional rights, but that at the first stages of a lawsuit, he had said the minimum necessary to allow him to proceed on the claim.

When a party is allowed to proceed against a Doe defendant, the case cannot move forward at the pace ordinarily preferred in this court. This is because the plaintiff must first identify the Doe and then amend his complaint to substitute the newly identified defendant in place of the Doe. The new defendant then must be served with the amended complaint and allowed at least 20 days following service of the complaint within which to file an answer. If the complaint is served upon the new defendant under the informal service agreement between the Wisconsin Department of Justice and this court, the time within

which an answer is required is later still. This is why, in some cases, the court has attempted to speed up the process by calling on the good graces of various assistants Attorney General at the time of the preliminary pretrial conference to help plaintiff identify the Doe defendants informally, that is, without discovery. In no instance, however, has the informal identification procedure been required under the Federal Rules of Civil Procedure.

In this case, the parties were unable to work informally together to identify plaintiff's Doe defendants. Perhaps this is because plaintiff's claim against the Doe defendants appears to be weak. The allegations of the complaint reveal that the length of the delay between the time plaintiff's tooth was pulled at around 9:00 a.m. on the morning of March 17, 2006 and the time his medication was delivered at 5:45 p.m. was approximately nine hours. During that time, plaintiff told more than one officer in his unit that he was in pain and asked them to check on the whereabouts of his medication. However, plaintiff alleges also that in several instances, the officers stopped by his cell to tell him that they had called about the medication and had been told that it would be delivered. As plaintiff was told when the court allowed him to proceed against the "Doe" officers, if it turns out that they did what they could to obtain his pain medication, he cannot prevail on an Eighth Amendment claim against them. To succeed on his claim, he will have to prove that each officer from which he sought assistance wanted him to suffer; that is, knew that plaintiff was in horrible pain and deliberately refused to take steps to obtain his pain medication for him. In any event,

plaintiff owns in full the responsibility to learn the name or names of the individual officers he believes ignored his pleas for help.

A review of the record reveals that plaintiff already knows who the Doe defendants are. On February 16, 2007, just after he was allowed to proceed with his claims and before defendant Sitzman had been served with his complaint, plaintiff wrote a letter to the court in which he said that “some of the John Does” are first shift sergeant Morrin, correctional officers Tomac and Gray, second shift sergeant Madsy, and correctional officers Herbrand and Morgan. Because this letter had not been served on the existing defendant, Judge Crabb entered a memorandum dated February 23, 2007, telling plaintiff that his letter could not be considered until he submitted confirmation that he had served defendant Sitzman with a copy. In addition, Judge Crabb told plaintiff that it was not proper procedure for him to name additional defendants in a letter to the court but, rather, that he would have to amend his complaint to replace the Doe defendants in the caption and in the body of the complaint. She suggested that plaintiff wait to file such an amendment until he learned the names of all the Doe defendants. Subsequently, plaintiff sought production of documents from defendant Sitzman, but nothing in his request appears to seek information that would lead him to identifying additional Does. He asks for his dental records, reports of prison officials that may have been generated about the incident in response to his inmate complaint and copies of policies or procedures the unit officers should follow in situations such as the one

occurring on March 17, 2006.

Meanwhile, defendant Sitzman is making a mad dash to the finish line. On April 16, 2007, a full four months before the August 31, 2007 deadline for filing dispositive motions, she has moved for summary judgment. On April 17, 2007, the clerk of court issued a briefing schedule on the motion, giving plaintiff until May 16 to file a response. No doubt startled by the prospect that his case against Sitzman might be decided before he can get the remainder of his ducks in a row, plaintiff has now moved for appointment of counsel. It is time to take a step backward.

In reviewing plaintiff's letter of February 16, 2007, it is hard to imagine that plaintiff will need to conduct additional discovery to identify the Doe defendants. It appears that he has identified every officer who worked in his unit on March 17, 2006 on the first and second shift. Thus, there is no reason for plaintiff to delay preparation and submission of an amended complaint except, perhaps, because he believes defendant Sitzman's motion for summary judgment demands his full attention.

Fed. R. Civ. P. 56(f) allows a court to stay briefing on a motion for summary judgment when the opposing party has not had an opportunity to conduct discovery or obtain evidence necessary to justify the party's position. In this case, it seems reasonable to vacate the briefing schedule on defendant Sitzman's motion and stay the motion for a period of at least 90 days to allow plaintiff to gather his evidence and make an appropriate

response. Such a stay will allow plaintiff time to immediately prepare his amended complaint, submit it to the court for screening, and have it served on the newly identified defendants and then turn his attention to gathering evidence in opposition to defendant Sitzman's motion.

To assist plaintiff in filing an amended complaint, I have made a copy of his original complaint and am sending it to him with a copy of this order. Plaintiff may hand-write in his changes. The caption of the document shall be changed to identify it as the *amended* complaint. Plaintiff shall replace all references to John Doe defendants with the names of the officers he identified in his February 16 letter. Plaintiff should not make any other changes to his complaint. If plaintiff does not file an amended complaint naming the "John Doe" defendants by May 9, 2007, then Judge Crabb will dismiss plaintiff's claims against the "John Doe" defendants. Assuming plaintiff does file an amended complaint substituting the names of Sergeants Morrin and Madey and Correctional Officers Tomac, Gray, Herbrand and Morgan for the Doe defendants, the court will expedite service of the amended complaint on the new defendants by arranging with the United States Marshal for service of process. The new defendants will have 20 days from the date of service of the amended complaint upon them within which to file their answers.

Turning to plaintiff's motion for appointment of counsel, the motion will be denied. In light of the straightforward nature of plaintiff's claim, the discreet one-time incident at

issue and the well-developed case law governing claims of deliberate indifference to serious medical needs, I conclude that this case is not at all complex. Plaintiff is literate and expresses himself well. Although he says that he has been diagnosed with an antisocial personality, hyperactivity, attention deficit and manic depressive disorder, these conditions have not prevented plaintiff from prosecuting his case thus far and I see no reason why they would interfere with his ability to vigorously prosecute his case to completion. In sum, given the simple nature of plaintiff's claim and his shown abilities, I conclude that appointment of counsel is not warranted.

ORDER

IT IS ORDERED that

1. The schedule for briefing defendant Sitzman's motion for summary judgment is RESCINDED. A briefing schedule will be reissued in approximately 90 days, after plaintiff has had an opportunity to amend his complaint and conduct the discovery he deems necessary to prove his claim of constitutional wrongdoing against Sitzman.
2. Plaintiff's motion for appointment of counsel is DENIED.
3. Plaintiff may have until May 9, 2007, in which to submit an amended complaint identifying the Doe defendants. The caption of the amended complaint is to be changed to name the new defendants and to identify the pleading as the *amended* complaint. Plaintiff

shall replace all references in the body of the complaint to John Doe defendants with the names of the officers he identified in his February 16 letter. Plaintiff should not make any other changes to his complaint. If, by May 9, 2007, plaintiff does not file an amended complaint naming the “John Doe” defendants, Judge Crabb will dismiss plaintiff’s claims against the “John Doe” defendants.

Entered this 25th day of April, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge