IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DION MATHEWS and MUSTAFA-EL K.A. AJALA
formerly known as Dennis E. Jones-El,

OPINION AND ORDER

Plaintiffs,

10-cv-742-bbc

v.

RICK RAEMISCH, GARY BOUGHTON,
JANET GREER, DAVID BURNETT,
CYNTHIA THORPE, LT. HANFELD,
MARY MILLER, KAMMY JONES,
WISCONSIN DEPARTMENT OF CORRECTIONS
and WISCONSIN SECURE PROGRAM FACILITY,

Defendants.

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Plaintiffs Dion Mathews and Mustafa-El K.A. Ajala are housed in segregated confinement at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. They contend that defendants have violated their federal rights by (1) refusing to allow them to wear medically needed shoes; (2) putting video cameras in their cells; and (3) exposing them to 24-hour lighting. In addition, plaintiff Ajala contends that defendants are violating his rights under the Eighth Amendment by adopting a dental policy of always performing tooth extractions rather than root canals. Plaintiffs bring their claims under 42 U.S.C. § 1983 and

the Americans with Disabilities Act, 42 U.S.C. § 12132.

Both plaintiffs have submitted a full filling fee in accordance with Boriboune v. Berge, 391 F.3d 852, 856 (7th Cir. 2004). Because plaintiffs are prisoners, I must screen their complaint to determine whether it states a claim upon which relief may be granted. 28 U.S.C. § 1915A.

Having reviewed the complaint, I conclude that plaintiffs may proceed on their claims regarding shoes, 24-hour lighting and dental care, with the exception of the aspects of those claims in which they contend that defendants are violating their right to equal protection by giving shoes to other prisoners and letting other prisoners turn their lights out at night. Plaintiffs' claims regarding video monitoring must be dismissed for plaintiffs' failure to state a claim upon which relief may be granted because the Court of Appeals for the Seventh Circuit has held that prisoners do not have a constitutional right to be free from monitoring. In addition, defendant Wisconsin Secure Program Facility must be dismissed because it is a building and cannot be sued. Each defendant must be an individual or legal entity that may accept service of a complaint. Fed. R. Civ. P. 4. To the extent plaintiffs intended to sue the Wisconsin Department of Corrections for any claim other than the one under the ADA, those claims are barred by Will v. Michigan Dept. of State Police, 491 U.S. 58, 65-66, (1989), in which the Supreme Court held that state agencies may not be sued for constitutional violations under 42 U.S.C. § 1983.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). In their complaint, plaintiffs fairly allege the following facts.

ALLEGATIONS OF FACT

Plaintiffs Dion Mathews and Mustafa-El K.A. Ajala are incarcerated at the Wisconsin Secure Program Facility. Mathews has been confined in segregation since April 2009, Ajala since February 2007.

A. Requests for Shoes

Both plaintiffs have suffered injuries to their "lower extremities." Mathews has a "sports injury to his left ankle and a gun-shot wound to his right foot." Ajala has a patellar tendon tear above and below his left knee and an Achilles tendon tear. These injuries have caused plaintiffs "chronic pain" and "instability." Ajala is prohibited from playing sports at the prison because of his injuries.

Prisoners in segregation receive canvas shoes for daily wear. These shoes have thin insoles and provide little support. Because of their injuries, plaintiffs have "Medical Restrictions/Special Needs" orders for "velcro" shoes. These shoes have thicker insoles, more cushioning and greater ankle support.

Since February 2009 for Ajala and April 2009 for Mathews, plaintiffs have not been allowed to have the velcro shoes, even though they have the same medical restrictions as before. This is a result of a decision by defendants James Greer (the director of the bureau of health services), David Burnett (the medical director of the bureau of health services) and Cynthia Thorpe (the regional nursing coordinator) to discontinue the velcro shoes as part of budget "cut-backs."

Defendant Mary Miller (the health services manager at the Wisconsin Secure Program Facility) said that she would not provide any shoes to Matthews. Two members of the special needs committee, defendant Miller and defendant Gary Boughton, told Mathews that he could not have velcro shoes because of his security level.

Plaintiff Ajala asked defendants Miller, Boughton, Kammy Jones (a special needs committee member) and Lieutenant Hanfeld (a security supervisor) for the velcro shoes, but each of them denied his request. Hanfeld and Jones told Ajala that he did not have a medical need for the shoes, even though he sent them his"Medical Restrictions/Special Needs" order for velcro shoes. Both plaintiffs complained through the inmate complaint review system to defendants Thorpe, Peter Huibregtse (the warden) and Rick Raemisch (Secretary of the Wisconsin Department of Corrections), but each of them upheld the decisions denying relief.

Mathews was permitted to order his own ankle support straps, but they "could not

be worn with the segregation shoes."

B. Cameras in the Cells

In most Wisconsin maximum security prisons, video cameras are not placed in cells, with the exception of "a few observation cells" for prisoners who are in imminent danger of harming themselves or others. However, at the Boscobel prison, cameras are placed in the segregation unit cells "at random," without regard to the security concerns posed by the prisoner in the cell. Both plaintiffs have been housed in cells with video cameras.

The cameras monitor the cells 24 hours a day. They capture all activity in the cell, including undressing, showering and using the toilet. The images are viewed by male and female officers. Visitors at the prison may be able to view the screens "when they pass by the sgt. station." If a prisoner attempts to cover the camera, he may be disciplined.

Defendants Hanfeld, Huibregtse, Boughton and Raemisch "are aware of the use of the cameras" and have "helped implement and perpetuate their use."

C. Constant Illumination

Prisoners in general population are permitted to turn their lights out at night. They are counted by prison staff during that time with small flashlights. Prisoners in segregation must keep their lights on at all times. Plaintiffs have suffered from sleep deprivation as a

result of the constant illumination.

Defendants Hanfeld, Boughton and Huibregtse are responsible for the policy of 24-hour lighting in segregation. Plaintiffs have complained to defendants Huibregtse and Raemisch about the policy, but they have refused to change it.

D. Dental Care

Defendants Huibregtse, Miller, Greer and Burnett are responsible for a policy "of permitting . . . prisoners' teeth . . . to be extracted only, even when they can be saved by a root canal." Defendant Raemisch "is aware of" the policy "and has upheld it." Defendants have adopted this policy as a "cost-cutting measure" without considering the medical needs of the prisoners. As a result of this policy, plaintiff Ajala is being denied a root canal on two teeth that "could be saved."

OPINION

A. Shoes

1. Eighth Amendment

I understand plaintiffs to contend that defendants James Greer, David Burnett, Cynthia Thorpe, Mary Miller , Gary Boughton, Kammy Jones, Lieutenant Hanfeld, Peter Huibregtse and Rick Raemisch are violating their Eighth Amendment rights to adequate

medical care by refusing to provide them shoes with better support or allow them to purchase the shoes themselves. A prison official may violate this right if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir.1997).

Thus, under this standard, plaintiff's claim has three elements:

(1) Do plaintiffs need medical treatment?

(2) Do defendants know that plaintiffs need treatment?

(3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

Both plaintiffs allege that they have a medical need for special shoes and that

defendants are refusing to provide them. That is sufficient to state a claim upon which relief may be granted.

At summary judgment or trial, plaintiffs will have to show that their conditions cause more than just mild discomfort and inconvenience, but meet the requirements for a serious medical need. Compare Pippin v. Frank, 2005 WL 1378725, *9-10 (W.D. Wis. 2005) (prisoner stated claim under Eighth Amendment by alleging that "he was forced to use a wheelchair for almost six months in 2003 because he did not receive corrective shoes"), with Franklin v. McCaughtry, 2004 WL 221982, *15 (W.D. Wis. 2004) (athletic shoes not necessarily required by Eighth Amendment simply because one doctor recommended them). In addition, plaintiffs will have to show that each of the defendants is aware of their need and is refusing to provide the shoes *or* another reasonable alternative, despite an ability to do so.

It is enough at the pleading stage that plaintiffs allege that each defendant was responsible for the policy that prohibits the shoes or denied a request, but more will be required at summary judgment and trial. For example, with respect to those defendants plaintiffs allege are responsible for the policy, plaintiffs will have to come forward with evidence showing that the policy exists and that the particular defendant had a role in enacting or implementing the policy. With respect to those defendants who refused direct requests for shoes, plaintiffs will have to show that the particular defendant had authority

to grant the request. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job.")

2. Americans with Disabilitites Act

Title II of the ADA states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. State prisons are considered public entities under the ADA. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)). Generally, state agencies such as the Wisconsin Department of Corrections have sovereign immunity against claims for money damages under the ADA, Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001), but an exception exists when the alleged conduct violates a provision of the Constitution that applies to the states through the Fourteenth Amendment, such as the Eighth Amendment. United States v. Georgia, 546 U.S. 151, 158-59 (2006). Even when the alleged conduct does not meet that standard, a plaintiff may sue state officials in their official capacity for injunctive relief under Title II. Bruggeman ex rel. Bruggeman v. Blagojevich, 324 F.3d 906, 912-13 (7th Cir. 2003).

A person is disabled under the ADA if he has a "physical or mental impairment that

substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). In general, being "substantially limited" means that "a person must be 'either unable to perform a major life function, or [be] significantly restricted in the duration, manner, or condition under which the [person] can perform a particular major life activity, as compared to the average person in the general population.'" Peters v. City of Mauston, 311 F.3d 835, 843 (7th Cir. 2002) (alterations in original) (quoting Contreras v. Suncast Corp., 237 F.3d 756, 762 (7th Cir. 2001)). A person is "qualified" if he is able to participate in the program, activity or service with a reasonable accommodation. 42 U.S.C. § 12131(2). A reasonable accommodation must be effective in allowing the plaintiff to participate, but prison officials are not obligated to provide whatever accommodation a prisoner requests. Mobley v. Allstate Insurance, 531 F.3d 539, 546-47 (7th Cir. 2008).

"Walking" is a major life activity under the statute. Turner v. The Saloon, Ltd., 595 F.3d 679, 689 (7th Cir. 2010); Brunker v. Schwan's Home Service, Inc., 583 F.3d 1004, 1008 (7th Cir. 2009). It is difficult to tell from plaintiffs' complaint whether they are "substantially limited" in their ability to walk, but they have alleged enough to state a plausible claim.

Plaintiffs do not identify a "program, service or activity" in which they wish to participate. They say that the shoes fulfill this requirement, but they misunderstand the statute. The shoes are the requested accommodation; the purpose of requesting the shoes

under the statute would be to allow plaintiffs to participate in a "program, service or activity." Although plaintiffs do not identify any particular programs or services to which they do not have equal access, it may be inferred at this stage of the proceedings that a substantial impairment in walking could limit access in a variety of ways.

Accordingly, I will allow plaintiff to proceed on a claim under the ADA against defendants Wisconsin Department of Corrections, Greer, Burnett, Thorpe, Miller, Boughton, Jones, Hanfeld, Huibregtse and Raemisch. At summary judgment or trial, plaintiffs will have to come forward with admissible evidence that each of them is substantially impaired in walking, that they are being deprived of equal access to a program, service or activity at the prison and that velcro shoes are a reasonable accommodation. Plaintiffs are reminded that they are limited to injunctive relief on this claim unless they can show that any violation of the Americans with Disabilities Act also violates the Eighth Amendment.

3. Fourteenth Amendment

Plaintiffs include an allegation in their complaint that "prisoners . . . in the same segregation statuses as Mathews and Ajala . . . were not denied [velcro shoes] due to their segregation statuses." Cpt. ¶ 54, dkt. #1. In addition, they allege that prisoners in general population are allowed to have velcro shoes. Plaintiffs' view is that this differential treatment violates their right to equal protection.

The first allegation is problematic because it seems to contradict plaintiffs' other allegation that there is a policy of denying velcro shoes to prisoners in segregation. It is difficult to reconcile plaintiffs' views: they say that they are being singled out for unfair treatment but then they say that various higher ranking officials have adopted a wide-ranging policy. Plaintiffs have filed a number of affidavits of other prisoners in support of the allegation of unequal treatment, but these affidavits seem to undermine the allegations, not support them. Dkt. ## 2-5. In particular, most of the prisoners say that their situation is the same as plaintiffs', that is, they were allowed velcro shoes at one time, but prison officials will no longer provide the shoes. E.g., Jones Aff. ¶ 5, dkt. #2 ("I couldn't get another pair of shoes. I was . . . told that security disapproved of . . .prisoners having any shoes but seg shoes in seg."). When documents attached to the complaint contradict the allegations, the cited documents control. Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750, 754 (7th Cir. 2002)

In any event, even if I ignore all the inconsistencies, plaintiffs have failed to state a claim under the equal protection clause. Plaintiffs do not allege that defendants treated them differently because of their race or another characteristic that requires heightened scrutiny. In fact, plaintiffs do not suggest that defendants singled them out for being members of a particular group or sharing a particular characteristic. This means that defendants' conduct does not violate the equal protection clause so long as there is a rational

basis for the conduct. Johnson v. Daley, 339 F.3d 582, 585-86 (7th Cir. 2003).

With respect to the general population prisoners, courts have recognized often that it is rational to give prisoners in different security classifications different privileges. E.g., Hammer v. Ashcroft, 570 F.3d 798, 800-01 (7th Cir. 2009). The reasons for treating prisoners within the segregation unit differently may be less obvious, but that is not enough for plaintiffs to prevail. Rather, it is plaintiffs' burden to "allege facts sufficient to overcome the presumption of rationality that applies to government classifications." St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 639 (7th Cir. 2007) (quoting Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992)). Particularly in light of plaintiffs' inconsistent allegations, I cannot conclude that plaintiffs have met this standard.

B. Video Monitoring

I understand plaintiffs to contend that defendants are violating their rights under the Fourth Amendment and Eighth Amendment by monitoring them with video cameras in their cells. Although it is understandable that plaintiff would object to being viewed while undressing or engaging in other acts most would assume are private, they do not have a claim under § 1983. Both the Supreme Court and the Court of Appeals for the Seventh Circuit have concluded that the privacy rights of prisoners are severely curtailed. Hudson v. Palmer,

468 U.S. 517, 527 (1984); Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994). Those courts have concluded that, because security is of paramount concern in a prison, officials must have great discretion in determining when and what kind of search is appropriate.

1. Fourth Amendment

Plaintiff's claim under the Fourth Amendment is foreclosed by Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), in which the Court of Appeals for the Seventh Circuit considered whether a male pretrial detainee was "entitled to prevent female guards from watching [him] while [he] undressed." The court of appeals rejected the plaintiff's Fourth Amendment privacy claim because prisoners" do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life." Id. at 146. The court reasoned that "constant vigilance without regard to the state of the prisoners' dress is essential. Vigilance over showers, vigilance over cells—vigilance everywhere, which means the guards gaze upon naked inmates." Plaintiffs' claim is not distinguishable from Johnson. Irby v. Thompson, 2003 WL 23218538, *7 (W.D. Wis. 2003) (applying Johnson to claim brought by prisoner objecting to video monitoring at Wisconsin Secure Program Facility).

2. Eighth Amendment

Plaintiffs' claim under the Eighth Amendment does not fare any better. Plaintiffs

seem to be relying on case law in which the Court of Appeals for the Seventh Circuit has concluded that a strip search may violate the Eighth Amendment if it is "conducted in a harassing manner intended to humiliate and inflict psychological pain." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). The court has not extended the rationale in Calhoun to video monitoring. The obvious difference between video monitoring and strip searches is that monitoring does not involve any physical contact, which is often viewed as more intrusive.

Even if I assume that video monitoring could violate the Eighth Amendment when conducted for the sole purpose of harassment and humiliation, plaintiffs have pleaded themselves out of court by alleging that defendants are not targeting particular inmates. Rather, plaintiffs allege that defendants have placed cameras in cells "at random" without regard to the characteristics of the prisoner in the cell. Under Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998), prison officials do not violate the Eighth Amendment if they conduct random strip searches of prisoners or searches that are not justified by reasonable suspicion. Although plaintiffs include a conclusory allegation that the monitoring is part of a "campaign of humiliation, oppression and harassment," Cpt. ¶ 84, dkt. #1, I cannot accept this conclusion as true because plaintiffs include no facts to support it. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009) ("It is the conclusory nature of respondent's allegations . . . that disentitles them to the presumption of truth.")

C. Constant Illumination

1. Eighth Amendment

Plaintiffs allege that they are subject to 24-hour lighting and have suffered from sleep deprivation as a result. I have concluded in past cases that similar allegations are sufficient to state a claim upon which relief may be granted under the Eighth Amendment. Maddox v. Berge, 473 F. Supp. 2d 888, 898 (W.D. Wis. 2007); King v. Frank, 371 F. Supp. 2d 977, 984 (W.D. Wis. 2005). Accordingly, I will allow plaintiffs to proceed on this claim against defendants Hanfeld, Boughton, Huibregtse and Raemisch.

Plaintiffs should know that they have an uphill battle ahead of them. In King v. Frank, 371 F. Supp. 2d 977 (W.D. Wis.2005), I concluded that a 9-watt fluorescent light, burning 24 hours a day at the Waupun Correctional Institution did not subject the plaintiff in that case to cruel and unusual punishment. However, because plaintiffs were not parties to that case and the circumstances may be different in this case, they must be given an opportunity to prove their own claims. Cf. Blonder-Tongue Lab., Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) (explaining that due process prohibits barring a litigant who was not a party to a prior action from litigating same issue despite existing decisions on the issue that are contrary to the litigant's position). Plaintiffs will have to prove that defendants are aware that the lights were so bright as to subject plaintiffs to a substantial risk of serious harm as a result of sleep deprivation. In addition, it determining

whether defendants have disregarded a risk to plaintiffs' health, it will be relevant whether defendants have other reasonable alternatives to further their legitimate security objectives without harming plaintiffs. Cf. Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir.1988) ("If order could be maintained in [the prison] without resort to the harsh methods attacked in this lawsuit, the plaintiffs would have a stronger argument that the methods were indeed cruel and unusual punishments.").

2. Fourteenth Amendment

I understand plaintiffs to contend that defendants are violating their right to equal protection of the laws because prisoners in general population at the Boscobel prison are not subjected to constant illumination. This claim fails for the same reason as plaintiffs' other equal protection claim: it is not irrational to conclude that higher security prisoners require additional security precautions.

D. Dental Care

This claim relates to plaintiff Ajala only. He challenges what he says is a dental policy of defendants Huibregtse, Miller, Greer and Burnett to extract teeth in every case that a root canal is required. The same standard applies to claims about dental care as to any other Eighth Amendment medical care claim: whether the defendants were deliberately indifferent

to a serious medical need. Board v. Farnham, 394 F.3d 469, 479-80 (7th Cir.2005).

Most claims involving a prisoner's allegations of inadequate dental care involve serious pain, risks to future health or complications caused by a botched procedure. Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001) (inability to chew food, bleeding, headaches, cracked teeth and extreme pain are examples of harms that present serious dental needs). Ajala's allegations are a bit different because he does not allege any of these harms. For example, he does not allege that he will have difficulty eating if the two teeth are extracted or that, if he does, defendants would refuse to provide him with replacements. However, at this early stage, I will assume that a lost tooth may qualify as serious deprivation under the Eighth Amendment even without collateral consequences.

At summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with the policy, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that the policy will lead to the extraction of some teeth when it is not absolutely necessary. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to prove that the policy as applied to *his* teeth "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). In addition, defendants remain free to argue that in and of itself, a lost tooth is not a sufficiently serious deprivation to support a claim under the Eighth

Amendment.

ORDER

IT IS ORDERED that

1. Plaintiffs Dion Mathews and Mustafa-El K.A. Ajala are GRANTED leave to proceed on the following claims:

(a) defendants James Greer, David Burnett, Cynthia Thorpe, Mary Miller, Gary Boughton, Kammy Jones, Lieutenant Hanfeld, Peter Huibregtse and Rick Raemisch are refusing to provide shoes with adequate support, in violation of the Eighth Amendment right;

(b) defendants Wisconsin Department of Corrections, Greer, Burnett, Thorpe, Miller, Boughton, Jones, Hanfeld, Huibregtse and Raemisch are refusing to provide shoes with adequate support, in violation of the Americans with Disabilities Act.

(c) defendants Hanfeld, Boughton, Huibregtse and Raemisch are subjecting plaintiffs to 24-hour lighting, in violation of the Eighth Amendment.

2. Plaintiff Ajala is GRANTED leave to proceed on his claims that defendants Huibregtse, Miller, Greer and Burnett have refused to authorize a root canal on two of Ajala's teeth, in violation of the Eighth Amendment.

3. Plaintiffs' complaint is DISMISSED as to their claims that defendants are violating

their rights to equal protection of the laws and their claims that defendants have subjected them to video monitoring for their failure to state a claim on which relief may be granted. In addition, the complaint is DISMISSED as to the Wisconsin Secure Program Facility because it is not a suable entity.

4. For the remainder of this lawsuit, plaintiffs must send defendants a copy of every paper or document that they file with the court. Once plaintiffs learn the name of the lawyer who will be representing defendants, they should serve the lawyer directly rather than defendants. The court will disregard documents plaintiffs submit that do not show on the court's copy that they has sent a copy to defendants or to defendants' attorney.

5. Plaintiffs should keep a copy of all documents for their own files. If they are unable to use a photocopy machine, they may send out identical handwritten or typed copies of documents.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiffs' complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiffs' complaint if it accepts service for defendants.

7. Because the entire action was not dismissed for failure to state a claim upon which relief may be granted, no strike will be assessed. Turley v. Gaetz, — F.3d —, 2010 WL

4286368 (Nov. 2, 2010).

Entered this 17th day of December, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge