

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

JOSHUA CHEEK,

Plaintiff,

v.

JEN BEEMAN,

Defendant.

ORDER

13-cv-527-bbc

Plaintiff Joshua Cheek is proceeding pro se on claims that his constitutional rights were violated when defendant Jen Beeman bit him during an altercation at Mendota Mental Health Institute. Plaintiff has filed a proposed amended complaint, dkt. #27, in which he asks the court to reconsider whether he should proceed on his due process claim and associated claims, in which he alleges that he has been denied access to the courts. In this proposed amended complaint, he seeks to add defendants associated with that claim and a battery claim against defendant Beeman. In addition, plaintiff has renewed his motion for assistance in recruiting counsel. Dkt. #25. Both motions will be denied.

REQUEST FOR LEAVE TO AMEND COMPLAINT

Plaintiff requests leave to amend his complaint in part to add claims against additional defendants for their alleged interference with plaintiff's filing and litigating of this

lawsuit. When plaintiff filed his original complaint, he alleged that these defendants had prevented him from gaining access to the Mendota Mental Health Institute's grievance process for his claim about defendant's bite. I denied plaintiff leave to proceed on a due process claim on those facts because plaintiff does not have a right to internal grievance procedures. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011). Now, he says that staff members at Mendota Mental Health Institute have been pushing [him] back from reporting [the bite incident] to courts, law enforcement, public officials and advocacy agencies for 6 months." Plt.'s Proposed Amended Cpt., dkt. #27, at 4.

Although it is true that plaintiff has a right to gain access to the courts, he cannot state a claim of denial of access unless he has received an "actual injury." Lewis v. Casey, 518 U.S. 343, 351 (1996). This means that the staff members' activities must have "hindered [the prisoner's] efforts to pursue a legal claim," resulting in some harm to plaintiff, such as inability to file a complaint or dismissal of his complaint for its untimeliness or inadequacy. Id. It does not appear that plaintiff has been unable to file and litigate his claim, as is evident from the fact that the case is proceeding in this court. There does not appear to be a statute of limitations problem created by plaintiff's alleged six-month delay in filing this case. Without an allegation that plaintiff has experienced a plausible actual injury, he has failed to state a claim and amendment of his complaint would be futile and will be denied. Brunt v. Service Employees International Union, 284 F.3d 715, 720 (7th Cir. 2002) (requests to amend pleadings under Fed. R. Civ. P. 15(a) are "appropriately denied when, among other reasons, the amendment would be futile.").

Plaintiff also asks to add a retaliation claim under the same facts, but he has failed to allege any facts about what staff members actually did to retaliate against him or about why he believes their actions were retaliatory. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009) (To state claim for retaliation under First Amendment, plaintiff must identify (1) constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by defendant that would deter person of “ordinary firmness” from engaging in protected activity; and (3) sufficient facts to make it plausible to infer that plaintiff’s protected activity was a reason defendant took action against him.). He says that defendants have been “pushing” him not to file this case, but he does not explain what he means by this.

Plaintiff also seeks to add a state law conspiracy claim on the same facts but has failed to state such a claim by failing to allege any facts about whether the staff members formed an agreement or acted upon that agreement when allegedly “pushing” him not to file his case. City of Milwaukee v. NL Industries, Inc., 2005 WI App 7, 278 Wis. 2d 313, 328-29, 691 N.W.2d 888, 896 (“To state a cause of action for civil conspiracy, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts.”) (quoting Onderdonk v. Lamb, 79 Wis.2d 241, 246, 255 N.W.2d 507 (1977)). Thus, plaintiff cannot proceed on these claims.

Next, plaintiff lists three claims against Beeman in his amended complaint: (1) an Eighth Amendment claim; (2) a Fourteenth Amendment claim; and (3) a state law battery

claim. (He also lists a claim for “breach of care contract,” but he does not explain what this claim is or how it would be applicable to his case, so I will not consider it further.) Plaintiff says that he wants to add the first two as new claims and suggests that the battery claim is already present in his suit. However, he has his facts reversed; he has not yet alleged a tort claim for battery, but his claim for excessive force under the Eighth Amendment or Fourteenth Amendment is proceeding. (His status as a detainee or prisoner at the time of the incident is unclear, so I cannot determine which amendment applies to him.) Nevertheless, plaintiff will not be granted leave to add a claim for battery because he has not alleged the facts necessary to show that he could file such a claim at this time.

For state law claims like battery that are brought against a state employee, Wisconsin law requires that plaintiff serve a written notice of the circumstances of the claim on the employee within 120 days of the occurrence giving rise to the claim. Wis. Stat. § 893.80(1d)(a). Filing a proper notice of claim is an act that must occur before the plaintiff may file a suit. Snopek v. Lakeland Medical Center, 223 Wis. 2d 288, 295, 588 N.W.2d 19, 23 (1999). Because plaintiff has not alleged that he filed a notice of claim letter, he cannot proceed on his claim for battery.

RENEWED MOTION FOR ASSISTANCE IN RECRUITING COUNSEL

In an order dated January 10, 2014, this court denied plaintiff’s initial motion for assistance in recruiting counsel on the ground that he had not shown sufficient need for counsel in this relatively straightforward case on a single incident of alleged excessive force.

Plaintiff has renewed his motion, stating that he thinks he is incapable of proceeding in this case without representation. He also lists three attorneys' offices he has written to request counsel but has been turned down. Although I appreciate plaintiff's efforts in seeking counsel on his own, he has not explained why he is incapable of representing himself. He has added no facts about his abilities or the challenges of this case, so I see no reason to deviate from the conclusion in the January 10 order. Therefore, I am denying his motion.

ORDER

IT IS ORDERED that plaintiff Joshua Cheek's motion to amend his complaint, dkt. #27, and his motion for assistance in recruiting counsel, dkt. #24, are DENIED.

Entered this 6th day of March, 2014

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge