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

ANTHONY MICHAEL PEAKER,

Plaintiff,

v.

DENNIS STUART, DANIEL BERENTON, ANA SEVERSON, TIM NICKELL, and MAKENZIE HANSON,

Defendants.

OPINION AND ORDER

20-cv-764-wmc

In this proposed civil complaint brought under 42 U.S.C. § 1983, Anthony Michael Peaker alleges that the Washburn County Sheriff and employees at the Washburn County Jail put him in danger of contracting Covid-19 by ignoring Wisconsin Governor Tony Evers' August 1, 2020 executive order and failing to wear face masks while Peaker was confined at the jail. Plaintiff sues the defendants in both their individual and official capacities. He seeks an injunction requiring the jailers to wear masks when interacting with inmates and monetary damages for what he alleges were violations of his rights under the United States Constitution.

Since plaintiff seeks to proceed in this lawsuit *in forma pauperis*, this court is required to screen his complaint, and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief can be granted or ask for money damages from a defendant who by law cannot be sued for money damages. *See* 28 U.S.C. § 1915(e)(2); *see also Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1022 (7th Cir. 2013). Even construing Peaker's allegations generously and in his favor, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this lawsuit must be dismissed for failure to state a claim upon which relief can be granted.

First, Peaker's request for injunctive relief is moot because he left the jail in September 2020 and there is no indication that he is likely to return. *See Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996) (If prisoner is transferred to another prison, his request for injunctive relief against officials of the first prison is moot unless he can make non-speculative showing that he is likely to return). Second, insofar as Peaker seeks relief for defendants' failure to follow Governor Evers' mask mandate, a violation of state law does not give rise to a federal constitutional claim, *Wozniak v. Adesida*, 932 F.3d 1008, 1011 (7th Cir. 2019) ("[A] constitutional suit is not a way to enforce state law through the back door"), and in any case the Wisconsin Supreme Court has struck down the mandate. *Fabick v. Evers*, 2021 WI 28, 956 N.W.2d 856.

Third, although the court empathizes with Peaker's Covid-related anxiety during his approximately two-month jail stay, the mere fact that jail staff failed to wear masks does not rise to the level of a constitutional violation. Claims regarding conditions of confinement brought by pretrial detainees are governed the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's prohibition on cruel and unusual punishment.[1] *See Hardeman v. Curran*, 933 F.3d 816, 822-823 (7th Cir. 2019); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 350-51 (7th Cir. 2018). Nevertheless, a detainee plaintiff must show that "the severity and the duration of the conditions experienced were so significant . . . that they violated the Constitution." *Hardeman*, 933 F.3d at 824. Under that test, a plaintiff must demonstrate that "(1) the conditions in question are or were

[1]Although it is unclear if Peaker was a pre-trial detainee or was instead serving a sentence following conviction, the court presumes for purposes of this order that he was a pre-trial detainee.

objectively serious . . .; (2) the defendant acted purposefully, knowingly, or recklessly with respect to the consequences of his actions; and (3) the defendant's actions were objectively unreasonable-that is, not rationally related to a legitimate governmental objective or . . . excessive in relation to that purpose." *Id*. at 827 (Sykes, J., concurring). To establish a due process violation resulting from inadequate medical care, the detainee must demonstrate that (1) he suffered from an objectively serious medical condition and (2) the staff's response to it was objectively unreasonable. *Williams v. Ortiz*, 937 F.3d 936, 942-43 (7th Cir. 2018). Although a plaintiff need not prove the defendant's subjective state of mind, he has to show more than negligence. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018); *Miranda*, 900 F.3d at 353.

Plaintiff alleges that he has asthma, but the extent to which individuals with asthma are at greater risk of severe illness from Covid-19 is not a settled question. *See United States v. Cole*, No. 1:09CR118, 2021 WL 1207556, at *3 (N.D. Ind. Mar. 31, 2021) (summarizing medical literature). Even assuming plaintiff was at *some* greater risk, and that defendants were aware of this risk, his general concerns that the jail staff were not doing enough to protect him from Covid-19 are not sufficient to show that his conditions of confinement were objectively serious. In particular, he does not allege that any of the jail staff who did not wear masks did so knowing they had tested positive for the virus or had been exposed to it, nor does he allege that they failed to isolate those inmates who did. Nor does he allege that he contracted Covid-19 at the jail or even that an outbreak occurred while he was there. The general allegations in the complaint simply fail to show that

plaintiff was subject to conditions that were severe enough or lasted long enough to amount to a constitutional violation.

For all these reasons, Peaker's complaint must be dismissed.

ORDER

IT IS ORDERED that:

1) Plaintiff Anthony Peaker's complaint under 42 U.S.C. § 1983 is DISMISSED with prejudice for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

2) The clerk of court is directed to enter judgment and close this case.

Entered this 3rd day of November, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge