IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICIA WILLIAMS,

OPINION and ORDER

Plaintiff,

16-cv-475-bbc

v.

STATE OF WISCONSIN,
DEPARTMENT OF WORKFORCE DEVELOPMENT,
DIVISION OF VOCATIONAL REHABILITATION
and NICHOLAS LAMPONE, DVR Director,

Defendants.

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Pro se plaintiff Patricia Williams has filed a complaint regarding her treatment by the Wisconsin Department of Workforce Development. Her complaint includes few details and is difficult to follow, but the various attachments to the complaint help provide context. The complaint is before the court for screening under 28 U.S.C. § 1915(e)(2).

My understanding is that plaintiff is unemployed and receiving services from the department's Division of Vocational Rehabilitation to help her find a job because she is disabled. 29 U.S.C. § 722(a)(1) (setting out requirements for assistance). See also Yochim v. Gargano, 882 F. Supp. 2d 1068, 1076 (S.D. Ind. 2012) (summarizing relationship between federal law and state agencies in providing vocational services to individuals with disabilities). The department's services include an "individualized plan for employment." Among other things, the plan lists items that the department will provide at no cost to the

individual with a disability. 29 U.S.C. § 722(b)(4).

In this case, I understand plaintiff to be contending that defendants violated her rights by (1) removing "work clothes" and "car repairs" from the items that the department would purchase for her; and (2) failing to consult her before removing these items. Plaintiff's claim arises under the Rehabilitation Act, which governs individualized plans for employment and allows those aggrieved by an administrative decision related to such a plan to seek relief in federal or state court. 29 U.S.C. § 722(c)(5)(J). (Plaintiff mentions the Americans with Disabilities Act as well, but she does not cite any provisions that would apply to this case and I am not aware of any.) From the attachments to the complaint, it appears that plaintiff presented her claims to the state agency and received an adverse decision before filing this lawsuit.

There is little case law in this circuit regarding the required content of an individualized plan for employment and the procedures to which an individual with a disability is entitled before a plan is altered to the individual's detriment. The provisions in § 722 that relate directly to the issue of individualized plans for employment identify the *type* of information that must be included in a plan, but they do not expressly state which services must be provided by the state free of charge. 29 U.S.C. § 722(b)(4). However, a number of courts have concluded that the state must pay for services that are "necessary" to achieve the individual's employment goals. Millay v. Maine, 986 F. Supp. 2d 57, 72 (D. Me. 2013); Yochim v. Gargano, 882 F. Supp. 2d 1068, 1080 (S.D. Ind. 2012); Carrigan v. New York State Education Dept., 485 F. Supp. 2d 131, 138 (N.D.N.Y. 2007). This

conclusion comes from provisions such as § 722(b)(4)(B)(i)(I), which states that a plan must include those services "needed to achieve the employment outcome," and 29 U.S.C. § 723(a), which defines vocational rehabilitation services under the Rehabilitation Act as "any services described in an individualized plan for employment *necessary* to assist an individual with a disability in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individual." 29 U.S.C. § 723(a) (emphasis added).

For the purpose of screening the complaint, I will assume that the Rehabilitation Act requires a state to pay for necessary services. It seems unlikely that plaintiff will be able to show that free clothes and car repairs are necessary to achieve her employment goals, but it would be premature to decide this issue now, without reviewing all the evidence.

In addition to any other issues that may be relevant, the parties should be prepared to address the following issues at summary judgment or trial: (1) whether "necessity" is the proper standard and, if not, what the standard should be; and (2) the extent to which any administrative decisions are entitled to deference, Wasser v. New York State Office of Vocational & Educational Services for Individuals with Disabilities, 602 F.3d 476, 479 (2d Cir. 2010) (adopting "modified de novo review," adapted from cases under Individuals with Disabilities in Education Act); Diamond v. Michigan, 431 F.3d 262, 266 (6th Cir. 2005) (same).

I have uncovered no case law addressing the question whether an individual with a disability is entitled to be consulted before services are removed from an individualized plan

for employment. Plaintiff's repeated use of the phrase "informed choice" throughout her complaint suggests that she is invoking 29 U.S.C. § 722(b)(2)(B), which requires a plan to

> be developed and implemented in a manner that affords eligible individuals the opportunity to exercise informed choice in selecting an employment outcome, the specific vocational rehabilitation services to be provided under the plan, the entity that will provide the vocational rehabilitation services, and the methods used to procure the services, consistent with subsection (d) of this section.

This provision does not state expressly that the individual has a right to be heard before the state agency makes changes to a plan, but one could argue plausibly that making a decision unilaterally is inconsistent with allowing the individual to make her own choices about the services she needs.

Section 722(b)(3)(E) is more explicit. It states that "[t]he individualized plan for employment shall be . . . amended, as necessary, by the individual . . . , in collaboration with a representative of the designated State agency or a qualified vocational rehabilitation counselor (to the extent determined to be appropriate by the individual), if there are substantive changes in the employment outcome, the vocational rehabilitation services to be provided, or the service providers of the services." Because § 722(b)(3)(E) states that changes to services provided under a plan are to be made "in collaboration" with the individual and the state, the provision provides support for a view that the state must give an individual notice of potential changes and give her an opportunity to be heard if she opposes the changes. Accordingly, I will allow plaintiff to proceed on this claim as well.

I note that plaintiff's attachments to her complaint suggest that she received a full hearing before Wisconsin Division of Hearings and Appeals, dkt. #1-1, during which she

had an opportunity to object to the removal of services. At summary judgment or trial, plaintiff should be prepared to identify why that hearing failed to cure any procedural defects by the agency and what additional remedy is needed.

Also before the court is plaintiff's "motion to add documents," dkt. #4, but I am denying this request because the attached documents are not related to the issues raised in the complaint. Even if they were related, plaintiff does not need to send every document to the court that she believes is relevant to her case. Rather, the court requires evidence from the parties only when there is a motion before the court that requires evidentiary support.

## ORDER

IT IS ORDERED that

1. Plaintiff Patricia Williams is GRANTED leave to proceed on the following claims: (1) defendant State of Wisconsin, Department of Workforce Development and Nicholas Lampone removed plaintiff's services for "car repairs" and "work clothes," in violation of the Rehabilitation Act; and (2) defendants failed to consult with plaintiff before removing these services, in violation of the Rehabilitation Act.

2. Plaintiff's "motion to add documents," dkt. #4, is DENIED.

3. The clerk of court is directed to forward copies of plaintiff's complaint, completed summons forms and this order to the U.S. Marshal for service. Plaintiff should not attempt to serve defendants on her own.

4. For the time being, plaintiff must send defendants a copy of every paper or

document she files with the court. Once plaintiff has learned what lawyer will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendants or their attorney.

5. Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

Entered this 2d day of September, 2016.

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