IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TODD ROSE,

Plaintiff,

v.

GRANT COUNTY,
SHERIFF KEITH GOVIER,
SERGEANT ROBERT NELSON,
and ABC INSURANCE COMPANY,
(a fictitious name),

Defendants.

OPINION AND ORDER

00-C-0088-C

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In this civil case for money damages, plaintiff Todd Rose is suing for violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, and under 42 U.S.C. § 1983 for violations of his rights under the Eighth and Fourteenth Amendments to the United States Constitution in connection with his incarceration in the Grant County, Wisconsin jail. Plaintiff alleges that while he was in the jail, defendants subjected him to unconstitutional conditions and failed to provide him necessary accommodations for his disability.

The case is before the court on plaintiff's motion for partial summary judgment and

defendants' cross-motion for summary judgment. I conclude that disputed facts make it impossible to grant summary judgment to either side, except with respect to certain claims against certain defendants. Judgment will be granted to defendant Nelson on plaintiff's ADA claims because this defendant is not suable under Title II of the ADA. Judgment will be granted to defendants Govier and Grant County on plaintiff's § 1983 claims because plaintiff has not alleged or proposed any facts from which a jury could find that either of these defendants is liable on these claims.

From the findings of fact proposed by the parties, I find that there is no genuine issue with respect to any of the following material facts. (In the future, counsel should confine themselves to facts in their proposed findings. It is not a "fact," for example, that this court has subject matter jurisdiction. Jurisdiction is a legal determination.)

UNDISPUTED FACTS

Plaintiff Todd Rose is a Wisconsin citizen; defendant Grant County is a political subdivision of the state of Wisconsin. At all relevant times, defendant Sheriff Keith Govier was serving as Grant County Sheriff and defendant Sergeant Robert Nelson was serving as a sergeant at the Grant County jail.

Plaintiff is a paraplegic and has been since 1985, when he was injured in a single car

accident. He is paralyzed from the upper ribs down and uses a wheelchair. He can transfer from his chair to his bed alone and needs no assistance or bars for bathing or using the toilet when he is in his own home. At his home, plaintiff uses a drop arm commode that allows him to transfer his body from his bed to the toilet. For showering, he transfers from his wheelchair to a shower bench that is half in and half out of the tub.

On April 26, 1999, plaintiff was sentenced to 15 days in the Grant County jail after having been found guilty of a second offense of driving while intoxicated. His reporting date was May 20, 1999. Before he reported, defendant Nelson called him to see what he needed while he was incarcerated. Plaintiff had been incarcerated on an earlier occasion in 1992 and housed in the Huber facility, which has dormitory style housing. Defendant Nelson was aware of no problems during that incarceration, which was brief enough that plaintiff did not have to take a shower. During his telephone conversation with plaintiff, defendant Nelson learned that plaintiff needed a commode and a shower chair. Plaintiff's doctor, Kurt Wilhelm, provided a written prescription confirming that plaintiff needed both a commode and a shower bench. Such a prescription is a prerequisite for any prisoner seeking permission to bring in special items, including medication.

Plaintiff reported to the jail on Thursday evening, May 20, 1999. At that time, Ann Jenkins, a public health nurse, met with him to discuss his needs. Jenkins was familiar with

plaintiff because she had done a community options program assessment to see about his getting public funding for different things, including items that would improve accessibility. Jenkins brought a larger size commode and two different shower chairs from the health department. Plaintiff informed her that the items were not suitable. Jenkins went into cellblock K with plaintiff to look at the facilities. Plaintiff refused to try either the commode or the shower chairs, even with Jenkins's assistance. He could tell from looking at the commode that it would not allow him to transfer from his chair and he was unwilling to accept being lifted or carried to the toilet or shower from his bed, undressed. Lifting plaintiff, who is 6'5" and weighs 230 pounds, would have been potentially dangerous to plaintiff and the person who tried to lift him.

Defendant Grant County has a portable drop arm commode of the type plaintiff used at home but it was already in use. The jail shower was not wide enough to allow plaintiff to get into the shower in his own wheelchair and transfer to a bench.

While he was at the jail, plaintiff was housed in cellblock K, which has four two-person cells and a large day room with a toilet and shower. Plaintiff was unable to use the day room toilet because it had bars on either side that prevented him from pulling his wheelchair up to the side of the toilet where he could manage a transfer. He could not transfer while facing the toilet. In addition, the day room toilet would not have allowed plaintiff to undertake the digital

stimulation required to enable him to have a bowel movement. Plaintiff could not use the day room shower because of its small size.

The toilet in plaintiff's cell had a bar that prevented plaintiff from transferring to the toilet from his chair. Also, because the toilet was solid, plaintiff could not use digital stimulation. Plaintiff was able to get to either the toilet in his cell or in the day room to empty his urine collection bag.

While in the jail, plaintiff had his bowel movements while lying in bed. (Plaintiff can plan his bowel movements.) He arranged newspapers on his bed before the bowel movements. The next day he flushed the solid waste down the toilet and threw away the newspapers.

Plaintiff uses an external catheter that allows urine to be collected in a bag that is fastened to his leg. The bed in his cell was not wide enough for him to sleep with both legs on the bed. As a result, on one occasion, his external catheter came off, wetting plaintiff's pants and the bedding. Plaintiff told a jailer about the incident the next morning and asked for clean bedding and clothing. He was told that bedding and clothing were given out only on designated days. Plaintiff had to wait until the next day to get clean clothes. Plaintiff was unable to use the shower to rid himself of the smell of urine.

On May 21, 1999, plaintiff talked to defendant Nelson about the difficulty he was having sleeping and the problems he was having because of the narrowness of the bed. Plaintiff

told defendant that he could not use the shower bench the jail provided. Defendant told plaintiff he would have health care staff take care of plaintiff's hygiene needs or assist him with them. Plaintiff told defendant that he did not want assistance because he was capable of taking care of himself if he had the equipment he needed and that he wanted to get out of jail. On May 25, 1999, a Grant County Health Department staff nurse helped plaintiff take a sponge bath in an area of the jail where no other inmates were present and the surveillance camera could be turned off. Plaintiff did not ask for any assistance in bathing or showering during his stay at the jail.

On either Friday, May 21, 1999 or Monday, May 24, 1999, defendant Nelson talked to someone at the Public Defender's office to see whether plaintiff could have an early release. The Public Defender and the District Attorney worked out a stipulation requesting the court to order plaintiff's release from jail. The two offices agreed that defendant Nelson had informed them that the jail was unable to meet plaintiff's needs and that although "the jail is ADA approved for normal disabilities, [it] does not have ability to meet the needs required by defendant's disabilities." The court reduced plaintiff's sentence to 5 days and he was released on May 26, 1999.

OPINION

The Americans with Disabilities Act prohibits discrimination against qualified persons with disabilities. Title II of the act is concerned with public entities. It prohibits such entities from excluding qualified persons with disabilities from participation in or receiving the benefits of the services, programs or activities offered by the entity and from discriminating against qualified disabled persons. See 42 U.S.C. § 12132. The act applies to correctional institutions. See Pennsylvania Dept. of Corrections v. Yeskey, 118 S. Ct. 1952, 1954-55 (1998); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 483 (7th Cir. 1997). The parties agree that plaintiff is a qualified individual with a disability, that Grant County is a public entity and that access to a toilet and to a shower are services that Grant County provides its jail inmates. Their disagreement focuses on what actually transpired during plaintiff's stay at the jail.

Defendants allege that defendant Nelson told plaintiff he could bring his own drop arm commode and shower bench with him to the jail; plaintiff denies that Nelson ever made such an offer. Defendants allege that plaintiff refused to cooperate with jail and nursing authorities and would not try out any of the substitute equipment the jail provided; plaintiff denies the "refusal to cooperate" characterization of his behavior, saying he could tell from looking at the proposed equipment that it would not accommodate him and that some of the proposals defendants made were potentially dangerous or personally humiliating to him. Defendants allege that plaintiff never asked for assistance in bathing or using the toilet; plaintiff says that

he never saw a nurse after the first night and thus had no opportunity to ask for help. Plaintiff says that the jail officials offered to carry him but that carrying is not an acceptable method for making services or facilities accessible. Defendants say they are aware that under the regulations implementing the ADA, carrying is an exception to the rules and is permissible only in rare and unusual instances; see 28 C.F.R. pt. 35, App. A, § 35.150, but they say they did not offer to "carry" plaintiff, only to assist him in moving from his chair to the toilet or from his chair to the shower bench. Defendants allege that plaintiff refused the offer of a wheelchair kept at the jail that would have allowed him to use the shower; plaintiff denies that the offer was ever made. (Plaintiff argues that the court should ignore defendant Nelson's averment that plaintiff refused the offer of the smaller chair because it is inconsistent with defendant's deposition testimony, in which he made no reference to a smaller wheelchair and denied even knowing that plaintiff had not been able to have a shower. In fact, the statements in the affidavit are not inconsistent. Defendant Nelson averred that plaintiff was offered a smaller wheelchair to use for showering when he first came to the jail. That statement is consistent with the undisputed fact that Jenkins brought plaintiff two wheelchairs and a commode, all of which he refused, and it is not inconsistent with defendant's deposition testimony that he did not know that plaintiff never took a shower during his stay in the jail.)

There are enough disputed facts to require a trial on both of plaintiff's claims. A jury

will have to decide the facts and from them determine whether the jail offered plaintiff reasonable accommodations for his disability. It will have to decide as well whether defendant Nelson held plaintiff in a cell that did not meet plaintiff's basic human needs and if so, whether he intended to violate plaintiff's rights under the Eighth Amendment by doing so.

Neither side discussed whether a county employee such as defendant Nelson could be sued under Title II of the ADA. Although some courts have assumed that the answer is yes, see, e.g., Hall v. Thomas, 190 F.3d 693, 696-97 (5th Cir. 1999); Key v. Grayson, 179 F.3d 996, 999-1000 (6th Cir. 1999), the Court of Appeals for the Seventh Circuit has held that natural persons are not proper defendants in a suit under either Title I or Title II. See Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000) ("the ADA addresses its rules to employers, places of public accommodation, and other organizations, not to the employees or managers of these organizations") (citing Silk v. Chicago, 194 F.3d 788, 797 n. 5 (7th Cir. 1999); Alsbrook v. Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc)). Thus, plaintiff's allegations are sufficient to state a claim under the ADA against defendant Grant County and defendant Govier in his official capacity as the entities responsible for the operation of the Grant County jail but they do not state a claim agaisnt defendant Nelson, the jail sergeant.

Plaintiff has asserted claims under § 1983 against all defendants, but he has not adduced any facts that would enable a jury to find liability on the part of defendants Govier

or Grant County. Plaintiff suggests that he need not adduce such facts; rather, defendants have the burden of showing the absence of any basis for liability. Fed. R. Civ. P. 56(e) suggests otherwise. The rule provides that when a motion for summary judgment is filed and supported as required under Rule 56, an adverse party may not rest upon his mere allegations or denials in his pleading but must set forth specific facts showing that there is a genuine issue for trial. See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial"), and Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Plaintiff has proposed no facts from which a jury could find that defendant Govier had personal knowledge of plaintiff's situation or that he had any involvement in plaintiff's treatment while incarcerated. Defendant's direct participation in the deprivation is not required, but there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 76l F.2d 360, 369 (7th Cir. 1985); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. l983). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § l983. See Board of Commissioners of Bryan County v. Brown, 520

U.S. 397, 403 (1997); Polk County v. Dodson, 454 U.S. 312, 325 (1981).

As for the county's liability under § 1983, it exists only if official policy is the "moving force of the constitutional violation." Board of Commissioners of Bryan County, 520 U.S. at 404. A county may be liable if it has a municipal policy or custom that caused the plaintiff's injury, id. at 403, or if an official acting as the municipality's policy maker causes a constitutional violation. See id. at 406 (citing Pembaur v. Cincinnati, 475 U.S. 469, 481 (1986) (county prosecutor's action in directing county deputies to enter a place of business by force in order to serve summonses gave rise to liability on part of county)). However, plaintiff has not proposed any facts that would support a finding that defendant Grant County had a policy or custom of subjecting jail inmates to conditions that denied them their basic human needs or that defendant Govier played any part in the alleged violations or even knew of them. As a consequence, there is no ground on which a jury could find the county liable.

The individual defendants contend that they are entitled to qualified immunity. It is not necessary to reach this question as to defendant Govier, because the suit is brought against him only in his official capacity. "Qualified immunity is a personal defense, which does not apply to institutional defendants in suits under federal statutes." Walker, 213 F.3d at 346 (citing Owen v. Independence, 445 U.S. 622 (1980)). As to defendant Nelson, the question of qualified immunity blends with his liability under § 1983 for intentional violation of

plaintiff's constitutional rights. If defendant Nelson did act intentionally to subject plaintiff to inhumane and unconstitutional conditions in his jail cell, he cannot argue that he would not have known at the time that it was illegal to do so. Defendants appear to acknowledge this. They argue that the issue is not that the law was unsettled but "that the steps they took in working with [plaintiff] were reasonable." Dfts.' Reply Br., dkt. #40, at 7. The steps that Nelson took and the reasonableness of those steps are questions for the jury. "Nothing but factfinding will resolve this point . . . ." Ruffino v. Sheahan, 218 F.3d 697, 701 (7th Cir. 2000).

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Grant County, Sheriff Keith Govier, Sergeant Robert Nelson and ABC Insurance Company is GRANTED with respect to plaintiff Todd Rose's ADA claim against defendant Nelson and with respect to plaintiff's § 1983 claim against defendants Grant County and Govier. In all other respects, it is DENIED. FURTHER, IT IS ORDERED that plaintiff's motion for partial summary judgment is DENIED.

Entered this 28th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge