IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW S. SATO
A.K.A. TIMOTHY TIKKURI,

Plaintiff, ORDER

v. 03-C-0185-C

SHERIFF DAVID CLARKE and
DAVID "DOE" (LAST NAME UNKNOWN R.N.)
at the Milwaukee County Jail,

Defendants.

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In an order dated May 15, 2003, I granted plaintiff leave to proceed in forma pauperis on his claim that defendant David "Doe" was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment when he failed to provide plaintiff medical attention for a fractured wrist for twelve days. I allowed plaintiff to proceed against defendant Sheriff David Clarke for the sole purpose of discovering the last name of defendant David "Doe."

Now defendants have filed a document titled "Motion for Judgment on the Pleadings," which is accompanied by a brief "in support of Motion to Dismiss." In the

motion, defendants argue among other things that venue is improper in the Western District of Wisconsin under Wis. Stat. § 801.50 and that plaintiff has failed to allege exhaustion of his administrative remedies.

The applicable venue provision governing claims such as this one brought pursuant to 42 U.S.C. § 1983 is set out at 28 U.S.C. §1391(b). It provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Although it is clear from the allegations of plaintiff's complaint that the claim arose in Milwaukee, Wisconsin while plaintiff was a prisoner at the Milwaukee County jail, defendant Clarke has not supported his venue motion with an affidavit averring that he does not have a residence in the Western District of Wisconsin. Thus, while it is certainly possible that defendant Clarke resides in the Eastern District of Wisconsin and does not have a residence in the Western District of Wisconsin, I am not willing to infer this dispositive fact in deciding defendant's venue motion. Therefore, I will stay a decision on the motion to dismiss for improper venue to allow defendant Clarke to supplement his motion with an affidavit averring that he does not have a residence in the Western District of Wisconsin.

When exhaustion of administrative remedies has been raised as an affirmative

defense, the district court lacks discretion to resolve the claim on the merits. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Therefore, I will not consider defendants' motion to dismiss to the extent they are arguing that the action is a negligence action rather than an action cognizable under § 1983. Resolution of this issue must be stayed until I resolve the question whether venue for the action lies in this district and, if it does, whether plaintiff has exhausted his administrative remedies.

Nevertheless, defendants should be aware that 42 U.S.C. § 1997e, not Wis. Stat. § 801.50, is the applicable exhaustion statute. According to the federal statute, a prisoner must exhaust "such administrative remedies as are available" before bringing suit in federal court. Defendants assert that plaintiff "failed to allege in his complaint" that he exhausted his administrative remedies and that he failed to "appeal the dismissal of the circuit court action or properly recommence the action in the circuit court."

A plaintiff in federal court is not required to plead exhaustion of administrative remedies. The Court of Appeals for the Seventh Circuit has held that a prisoner's failure to exhaust administrative remedies is an affirmative defense that defendant has the burden of pleading and proving. See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). Defendants have not submitted evidence of plaintiff's failure to exhaust his administrative remedies in support of their motion. Therefore, if the case proceeds to a decision on the motion to dismiss for plaintiff's failure to exhaust, defendants will have to supplement their motion to

dismiss with proof of plaintiff's failure to utilize the administrative remedies available to him at the jail for grieving defendant Doe's alleged failure to promptly treat his broken wrist.

In addition, defendants should be aware that ordinarily, administrative exhaustion does not require a prisoner plaintiff to exhaust "state court remedies" in order to satisfy the exhaustion requirements of 42 U.S.C. § 1997e. Although § 1997e(a) does not delineate the procedures prisoners must follow, the Court of Appeals for the Seventh Circuit has held that the rules come from the prison grievance systems themselves. "[P]risoner[s] must file complaints and appeals in the place, and at the time, the prison's administrative rules require," Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002), containing "the sort of information that the administrative system requires," Strong v. David, 297 F.3d 646 (7th Cir. 2002). Defendants do not refer to the administrative rules governing grievance procedures at the Milwaukee County jail to show that those rules require inmates to appeal adverse decisions of jail or county officials to state courts. Without such a showing, it is irrelevant that plaintiff failed to "appeal the dismissal of the circuit court action or properly recommence the action in the circuit court."

Defendant makes several other threshold arguments why plaintiff's complaint fails to state a claim upon which relief may be granted, all of which will be denied. First, defendant asserts that dismissal is proper because "[plaintiff] has failed to keep the court informed of his whereabouts." This court's record shows that on July 30, 2003, the

magistrate judge attempted to hold a preliminary pretrial conference in this case but was unable to conduct the conference because plaintiff had been transferred from the Milwaukee County jail, which was his last known address at the time. During the conference, defense counsel believed that plaintiff had been transferred to federal custody and was en route to FCI-Beckley in Beaver, West Virginia. On defense counsel's representation, the magistrate judge mailed his order to plaintiff at FCI-Beckley and asked him to confirm his whereabouts no later than August 29, 2003, so that another preliminary pretrial conference could be scheduled. In a letter dated August 7, plaintiff confirmed that he had been transferred to FCI-Beckley.

Although there is no indication in plaintiff's August 7 letter that he sent a copy to opposing counsel as he is required to do pursuant to Fed. R. Civ. P. 5 (a copy of the letter is enclosed to counsel with this order), the court has taken notice of plaintiff's new address and the preliminary pretrial conference has been rescheduled to take place on September 17, 2003, if the pending motions to dismiss have not been resolved in defendants' favor. Therefore, defendants are not entitled to dismissal for plaintiff's failure to notify the court of his change of address. Plaintiff is cautioned, however, that he is to serve opposing counsel with every letter or other paper he files in connection with this case and to show on the court's copy that he has done so. The court need not take notice of any submission that does not show on its face that a copy has been served on opposing counsel in compliance

with the service requirements of Fed. R. Civ. P. 5.

Next, defendants argue that dismissal of the action is appropriate because the sheriff and his deputies are protected by the doctrine of absolute immunity from suits for money damages when they are sued in their official capacities. As noted above, plaintiff is proceeding in this action against the sheriff for the sole purpose of learning the name of defendant Doe. Plaintiff is not proceeding against the sheriff or any of his deputies on his constitutional claim. Therefore, it would be inappropriate to dismiss this action on the ground that these individuals are immune from suits for money damages under the doctrine of absolute immunity.

Defendants argue next that dismissal of the complaint is proper because there is no "supervisor liability or respondent superior liability for civil rights claims" [sic]. However, plaintiff is not proceeding against defendant Doe on a theory of supervisory responsibility or respondeat superior. He is proceeding against defendant Doe for Doe's alleged personal involvement in constitutional wrongdoing and he is proceeding against defendant Clarke for the sole purpose of discovering defendant Doe's name.

Finally, defendants argue that the suit should be dismissed because defendant Doe has qualified immunity from suit for acts taken in his official capacity. However, plaintiff has not specified anywhere in his complaint whether he is suing defendant Doe in his official or his individual capacity. Defendants appear to believe that because plaintiff failed to

specify in his complaint whether he is suing defendant Doe in his personal or official capacity, or both, the court must assume that defendant Doe is being sued in his official capacity only.

The Court of Appeals for the Seventh Circuit has provided guidance to district courts addressing questions about the capacity in which a public official or municipal employee is sued. In Hill v. Shelander, 924 F.2d 1370, 1373 (7th Cir. 1991), the court of appeals refused to read its precedents as establishing a rule that "a § 1983 action that fails to designate the defendant in his official or individual capacity shall be presumed to be against him in his official capacity." Instead, the court of appeals held that "in a suit where the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant's capacity in the complaint." Id. at 1374. More recently, the court of appeals reaffirmed this approach in Miller v. Smith, 220 F.3d 491, 494 (7th Cir. 2000), noting that where "the plaintiff seeks injunctive relief from official policies or customs, the defendant has been sued in her official capacity; where the plaintiff alleges tortious conduct of an individual acting under color of state law, the defendant has been sued in her individual capacity." This is an action against defendant Doe, a state actor, alleging tortious conduct. Therefore, defendant Doe is not entitled to dismissal of this action against him on the ground that he is qualifiedly immune from suit in his official capacity.

ORDER

IT IS ORDERED that

1. A decision on defendants' motion to dismiss for improper venue is STAYED. Defendants may have until September 8, 2003, in which to support their motion with the affidavit of defendant Clarke attesting to his residency or lack of it in the Western District of Wisconsin. Plaintiff may have until September 16, 2003, in which to oppose the motion. There will be no reply.

2. A decision on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies is STAYED until a decision has been reached on the motion to dismiss for improper venue.

3. A decision on defendants' motion to dismiss on the merits is STAYED pending a decision on the motion to dismiss for failure to exhaust administrative remedies.

4. Defendants' motion to dismiss is DENIED on the threshold questions whether dismissal is appropriate because plaintiff has failed to keep the court informed of his current address; the sheriff and his deputies are protected by the doctrine of absolute immunity from suits for money damages; there is no supervisory liability or respondeat superior liability for

civil rights claims; and defendant Doe has qualified immunity from suit for acts taken in his official capacity.

Entered this 28th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge