

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

JOEL FLAKES,

Plaintiff,

v.

MATTHEW J. FRANK
AND JANE SONDALLE,

Defendants.

ORDER

04-C-0189-C

On September 29, 2005, I issued an order denying defendant Jane Sondalle's motion for summary judgment on plaintiff Joel Flakes's claim that she retaliated against him for exercising his First Amendment right to file a grievance by refusing him the assistance of an aide to help him move about the prison in his wheelchair. In the same order I granted defendant Matthew Frank's motion for summary judgment on plaintiff's claim that he violated plaintiff's rights under the American with Disabilities Act of 1990 by failing to arrange for him to receive the services of an aide.

On October 13, 2005, defendant Sondalle filed a motion for reconsideration,

supported by proposed findings of fact and seeking reversal of the order denying her motion for summary judgment. Also on October 13, 2005, plaintiff filed an objection to summary judgment, which I understand to be a motion for reconsideration of my decision to grant defendant Frank's motion for summary judgment. Both motions will be denied; defendant Sondalle's because there is still a factual dispute concerning her motivation for denying plaintiff an aide and plaintiff's because he failed to allege facts showing that he met the eligibility requirements for receiving the services of an aide.

DISCUSSION

A. Defendant Jane Sondalle

When I denied defendant Sondalle's motion for summary judgment on September 29, 2005, I noted that plaintiff had succeeded in putting into dispute her proposed facts concerning her motivation for denying him an aide. Plaintiff filed a grievance against defendant Sondalle's colleague Carol Wetzel on March 15, 2005. Plaintiff wrote a letter to warden Judy Smith on March 19, 2005, alleging that "Ms. Sondalle has wrote special condition for me on this unit the aids can't push me in my wheelchair."

In the motion for reconsideration, defendant Sondalle argues that because she did not know until March 21, 2005, that plaintiff had filed a grievance against Wetzel, she would have had no reason to retaliate against him on March 19. Defendant Sondalle did not

obtain permission from the court to file what is in fact a new motion for summary judgment. Therefore, plaintiff has not had an opportunity to respond to defendant Sondalle's proposed findings of fact of October 13, and the record still reflects a factual dispute between plaintiff's letter of March 19 alleging that defendant Sondalle had already decided to deny him an aide and defendant Sondalle's allegations that she did not know about plaintiff's grievance against Wetzel prior to March 21. I stand by my decision that plaintiff's letter puts into dispute defendant Sondalle's allegations that she was not retaliating against him when she denied him the assistance of an aide. I will deny defendant Sondalle's motion for reconsideration.

B. Defendant Matthew Frank

In granting defendant Frank's motion for summary judgment on September 29, 2005, I wrote that I could not conclude that plaintiff was a qualified individual with a disability as defined in the ADA, because plaintiff had not proffered any facts to show that he met the ADA's requirements for the receipt of an aide.

In the motion for reconsideration, plaintiff focuses on persuading the court that he was disabled, as defined by the ADA. In the September 29 order I conceded that plaintiff may well have fit within the ADA's definition of "disabled." I did not grant defendant Frank's motion for summary judgment on the ground that plaintiff was not disabled, but

because plaintiff had failed to allege facts showing that he met the eligibility requirements for receiving the services of an aide. In particular, I noted that occupational therapist Nick Heinritz reported that plaintiff was able to propel himself and plaintiff had failed to allege facts showing otherwise. In his motion for reconsideration, plaintiff fails to allege facts showing he could not propel himself or that he met the requirements for receiving the services of an aide. I will deny plaintiff's motion for reconsideration.

C. Trial Schedule

Trial on this matter is currently scheduled for November 14, 2005. Judge Crabb's trial schedule is currently congested and she will not be able to hold the trial on that date. The parties have two options. They may consent to have Magistrate Judge Crocker try this matter on November 14, or they can postpone the trial before Judge Crabb to November 21. If the parties cannot reach an agreement, trial will be postponed to November 21. The parties should notify the court of their decision on or before November 1, 2005.

ORDER

IT IS ORDERED that

1. The motion for reconsideration filed by defendant Jane Sondalle is DENIED;
2. The motion for reconsideration filed by plaintiff Joel Flakes is DENIED.
3. The parties are to advise the court of their preference for trial no later than November 1, 2005.

Entered this 25th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge