IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GEORGIA ERICKSON,

Plaintiff,

OPINION and ORDER

04-C-265-C

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendant.

- -

This is a civil suit for monetary and injunctive relief in which plaintiff alleges violations of Title VII of the Civil Rights Act of 1964. Plaintiff's claims stem from an incident in which plaintiff was sexually assaulted by a prisoner employed as a janitor at the Oregon Correctional Center System, a facility operated by defendant. Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court are plaintiff's Motion for Leave to Amend the Complaint and Add Parties Absent Stipulation and defendant's Motion to Strike or Declare Invalid the Amended Complaint. For the reasons that follow, I will grant plaintiff's motion and allow her amended complaint. Defendant's motion will be denied.

Although a district court shall freely grant leave to amend "when justice so requires," the rule does not command that leave be granted every time. Fed. R. Civ. P. 15(a); Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d 750, 759 (7th Cir. 2002). A court may deny leave to amend when (1) there is undue delay; (2) there is a dilatory motive on the movant's part; (3) the movant has failed repeatedly to cure previous deficiencies; or (4) amendment would be futile. See Cognitest Corp. v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995); Moore v. State of Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993) (well settled that leave to amend complaint should not be granted in situations in which amendment would be futile). The decision to grant or deny leave to amend rests within the sound discretion of the district court. J.D. Marshall Int'l Inc. v. Redstart, Inc., 935 F.2d 815, 819 (7th Cir. 1991).

As a threshold matter, the parties dispute the meaning of a section of the pretrial conference order entered by the magistrate judge. At issue is the section governing amendments to the pleadings, which states that "[a]mendments to the pleadings pursuant to Rules 13, 14 and 15 must be filed and served not later than [June 25, 2004]." Plaintiff argues that she thought this language applied to amending the pleadings to add parties. Defendant argues that Fed. R. Civ. P. 21 governs the addition of parties and that since the pretrial conference order does not refer to Rule 21, the order does not constitute leave to add parties. This court has long understood this section of the pretrial conference report to cover

amendments adding either claims or parties or both. The fact that the pretrial conference order refers only to amending the pleadings pursuant to Rules 13, 14 and 15 does not change this understanding. Defendant also argues, correctly, that once a responsive pleading has been filed, a plaintiff needs permission from the court to amend his or her complaint. See Fed. R. Civ. P. 15(a). This objection is moot because plaintiff has filed a motion to amend her complaint.

In addition, defendant hints that allowing plaintiff to amend her complaint will violate the due process rights of the proposed individual defendants, apparently because they will not have timely notice of the claim against them. In support of this argument, defendant cites Nelson v. Adams USA, Inc., 529 U.S. 460 (2000), and Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001). Neither case is analogous. In Nelson, 529 U.S. at 463, a court granted leave to amend and immediately made the added party subject to a previously entered judgment without allowing the added party a opportunity to respond. The Supreme Court held that this violated due process. Id. Nelson does not apply to this case, however, because plaintiff seeks only to amend her complaint to bring the individual defendants into the case. No pre-existing judgment awaits the individual defendants. They will be given a full and fair opportunity to respond to plaintiff's allegations. In Chavez, 251 F.3d at 631, a group of plaintiffs sought to add an individual as a named representative of their class. The plaintiffs sought leave to amend three years after learning of the individual's

claims, after fact discovery had been completed and two months before trial. Id. at 633. The district court denied leave to amend and this decision was upheld on appeal. Id. In the present case, plaintiff seeks to amend her complaint only four months after it was removed to this court and approximately two months after defendant filed its answer. Also, the deadline for discovery has not passed; indeed, the pretrial conference order sets the discovery deadline for February 18, 2005. In sum, allowing plaintiff to amend her complaint will not cause undue prejudice or violate the fundamental due process rights of the individual defendants.

Finally, defendant argues that plaintiff should be denied leave to amend because the amendment would be futile. A proposed amendment is futile if it would not survive a motion to dismiss for failure to state a claim. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir. 1997) (internal citations omitted). Thus, I must determine whether the allegations in plaintiff's amended complaint state a claim against the individual defendants. A district court may dismiss a claim under Rule 12(b)(6) only when "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In addition, the district court must accept all of plaintiff's well-pleaded facts as true, draw all inferences in favor of plaintiff and resolve all ambiguities in favor of plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). After examining the relevant

case law and the arguments submitted by the parties, I conclude that, although the question is close, plaintiff has alleged facts that state a claim on which relief may be granted.

With respect to the individual defendants, plaintiff's amended complaint alleges the following.

ALLEGATIONS OF FACT

In December 2001, plaintiff worked as a payroll and benefit specialist for the Wisconsin Department of Corrections. On December 20, 2001, plaintiff was working by herself at the Oregon Correctional Center System in Oregon, Wisconsin, as her job duties required her to do on a regular basis. At 4:30 in the afternoon, plaintiff found herself alone in the office with John Spicer, an inmate at the Oregon Correctional Center who worked for the Department of Corrections as a janitor. Plaintiff's understanding was that she would not have unsupervised contact with any violent inmates. Upon realizing she was alone with Spicer, plaintiff left the office and went to a local establishment where Department of Corrections supervisors, proposed defendants Thompson, Johnson, Mixdorf and Bambrough, were attending a holiday celebration.

The individual defendants approved plaintiff's work schedule and knew that plaintiff often worked late. These individuals also were responsible for allowing Spicer to enter her area of the office. In addition, they knew or reasonably should have known that Spicer, an

inmate with a violent criminal history, presented a significant and unreasonable risk of immediate and serious harm to plaintiff if left alone with her. Defendants knew or should have known also that three women, including another Department of Corrections employee, had lodged complaints against Spicer for leering at them, and in the case of the Department of Corrections employee, for "explicit sexual conduct." Defendants knew or should have known that Spicer had been convicted of numerous violent crimes and had exhibited a general disregard for the law and prison regulations. In fact, at the time of Spicer's assault on plaintiff, the Department of Corrections classified Spicer as a "high risk" inmate.

At the party, plaintiff informed Thompson, Johnson, Mixdorf and Bambrough about Spicer's presence in her area and complained about the lack of security. Plaintiff was told by a supervisor (she does not provide a specific name) that the situation with Spicer would not be allowed to occur again. Nevertheless, the individual defendants knowingly and intentionally allowed plaintiff to be left alone with Spicer. On December 28, 2001, at approximately 5:00 pm, plaintiff was alone again with Spicer in her office. Spicer put a knife to plaintiff's throat, forced her into a restroom and repeatedly sexually assaulted her and threatened her life. Spicer then stole personal property from plaintiff, including her car, some clothing and a purse. On January 3, 2002, Spicer was convicted of kidnapping, armed robbery and sexual assault among other charges in connection with this incident.

DISCUSSION

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a party acting under color of state law deprived the plaintiff of a federal right. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Lehn v. Holmes, 364 F.3d 862, 872 (7th Cir. 2004). Plaintiff alleges that the individual defendants acted at all relevant times under color of Wisconsin law and violated her substantive due process rights under the Fourteenth Amendment.

The substantive component of the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986). However, the Supreme Court has expressed reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). The Court has stated further that the due process clause does not guarantee state employees a workplace free of unreasonable risks of harm. Collins, 503 U.S. at 129. Although a state's failure to protect citizens from private violence does not violate due process, DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197 (1989), the Court of Appeals for the Seventh Circuit recognizes two situations in which a state's failure to protect may give rise to liability under § 1983. The first situation arises where the state has a "special relationship" with an individual such that the individual's ability to protect himself is limited. Wallace v. Adkins, 115 F.3d 427,

429 (7th Cir. 1997). The second, or state-created danger situation, arises where state action "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993). Plaintiff argues that her claim falls within the state-created danger exception.

To state a claim under the state-created danger exception, the Court of Appeals for the Seventh Circuit requires a plaintiff to "plead facts showing some *affirmative act* on the part of the state that either created a danger to the plaintiff or rendered him more vulnerable to an existing danger." Stevens v. Umsted, 131 F.3d 697, 705 (7th Cir. 1997) (emphasis in original). Mere inaction by state officials, even in the face of a known threat, will not suffice. See DeShaney, 489 U.S. at 203 ("the most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them"); Hernandez v. City of Goshen, 324 F.3d 535, 538-39 (7th Cir. 2003) (affirming dismissal of § 1983 claim based on police department's refusal to investigate phoned-in threat); Windle v. City of Marion, 321 F.3d 658, 660-62 (7th Cir. 2003) (upholding summary judgment for police officer who did not intervene for two months after learning about sexually explicit phone conversations between school teacher and student); Stevens, 131 F.3d at 705 (affirming dismissal of claim where school superintendent failed to take action after learning of sexual assaults against student).

Because allegations of mere inaction are insufficient, cases finding or suggesting § 1983 liability under the state-created danger exception are "rare and often egregious." Allen v. City of Rockford, 349 F.3d 1015, 1022 (7th Cir. 2003). The questions to be asked are (1) what actions did the state actor affirmatively take, and (2) what dangers would the victim otherwise have faced? Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1999) (quoting Wallace, 115 F.3d at 430).

In Reed, 986 F.2d at 1123-24, police officers stopped a car and arrested the driver, leaving the car keys and a passenger behind. The passenger was intoxicated and crashed head on into another car several hours later. Assuming that the arrested driver had been sober, the court found possible liability under § 1983 in the officers' action of removing the sober driver and leaving the passenger behind, knowing that the passenger was intoxicated. Id. at 1125. In Monfils, a paper mill worker informed the police that a co-worker was planning to steal some office equipment. Later, when the co-worker made known his intent to discover who informed the police, Monfils made several calls to the police asking that they not release a tape of the conversation to the co-worker. Id. at 513-14. The defendant, a deputy chief in the police department, assured Monfils that the tape would not be released but did nothing more to prevent its release. Id. at 514. After speaking with the defendant, Monfils telephoned the local district attorney's office and spoke with an assistant district attorney. The district attorney then called the defendant, who assured the district attorney

that the tape would not be released. Id. at 515. Despite the defendant's assurances, the co-worker did obtain a copy of the tape and later murdered Monfils. Id. In rejecting the defendant's claim of qualified immunity, the court stated that the defendant had created a danger that Monfils would not otherwise have faced by making assurances that the tape would not be released and then not following through. Id. at 518. By contrast, in Wallace v. Adkins, 115 F.3d 427 (7th Cir. 1997), the court upheld dismissal of a prison guard's § 1983 claim against prison officials who failed to take any actions to prevent an inmate from attacking the guard. After being informed of a threat made by the inmate against the guard, the officials ordered the guard to report for duty. Id. at 428. Although the officials assured the guard that they would take action to insure that the inmate did not come into contact with the guard, they took no such action. The court affirmed dismissal of the guard's § 1983 claim, stating that the defendants had not placed the guard in a position that he otherwise would not have faced. "Even without the actual order that was issued, Wallace would have had a duty to remain on his post whether or not the prison officials said a word." Id. at 430.

In this case, I must determine initially what affirmative actions were taken by the individual defendants. From the amended complaint, it is not clear exactly what affirmative actions the individual defendants took. Plaintiff alleges that the individual defendants (1) approved plaintiff's work schedule requiring her to work late hours; (2) knew or should have known that at least three women had filed complaints against Spicer in the past for "leering

at them and for explicit sexual conduct"; (3) knew that plaintiff was unarmed while at work; and (4) "allowed or were responsible for allowing" Spicer to enter plaintiff's workspace while she was alone. Plaintiff also alleges that, after reporting her concerns about being left alone with Spicer on December 20, she was told by a supervisor that the "situation would not be allowed to happen again." However, plaintiff does not provide the name of the supervisor who made this statement.

The difficulty in analyzing plaintiff's complaint stems from her use of the word "allowed." The word implies passivity, as when a person lets something occur without acting to make it occur. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 39 (4th ed. 2001) (defining "allow" as "to let do, happen"). By using the word "allow," plaintiff's amended complaint can fairly be read to suggest that the individual defendants took no affirmative steps that placed plaintiff in danger. Read this way, the complaint alleges that Thompson, Mixdorf, Bambrough and Johnson are guilty at most of inaction, of not taking steps to protect plaintiff after learning of her concerns about Spicer. Allegations of mere inaction, even in the face of a known threat, would not state a claim for a substantive due process deprivation. See DeShaney, 489 U.S. at 197; Windle, 321 F.3d at 662 ("[a]pellant fails to grasp that she has to establish that the police failed to protect her from a danger *they created or made worse*") (emphasis in original); Stevens, 131 F.3d at 705. Additionally, I note that plaintiff frames several allegations in her complaint in terms of what the individual

defendants "knew or should have known." Plaintiff should be aware that courts finding valid substantive due process claims under the state-created danger theory have noted that the affirmative acts taken by the defendants were taken with *actual knowledge* of the danger they were creating. See Reed, 986 F.2d at 1125 ("It was the police action in removing [the driver], combined with their *knowledge* of [the passenger]'s intoxication, which creates their liability for the subsequent incident") (emphasis added); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992) (discussing prison nurse's allegations that prison officials selected an inmate to work with her despite their knowledge that the inmate would likely assault her).

However, drawing the inferences and resolving the ambiguities in plaintiff's favor, as I must at this stage of the litigation, I conclude that plaintiff has alleged facts sufficient to state a claim. It is arguable that plaintiff will be able to prove that the individual defendants took the affirmative act of assigning Spicer to work in plaintiff's office knowing that (1) Spicer was a dangerous inmate; (2) plaintiff was unarmed while at work; and (3) plaintiff's work schedule required her to remain at work beyond normal business hours. In this light, plaintiff's allegations are similar to those in Grubbs. In that case, a nurse at a correctional facility was kidnapped, assaulted and raped by an inmate who had been chosen to work with her in the facility's medical clinic. She alleged that several prison officials had assigned the inmate to work with her despite knowing the inmate's history of violence against women, the likelihood that he would assault a female if left alone with her and the nurse's

unpreparedness for an attack. Id. at 121. In Grubbs, the court held that plaintiff had stated a claim under § 1983 because she alleged that the officials "affirmatively created a significant risk of harm to her, and did so with a sufficiently culpable mental state." Id. at 123. Plaintiff alleges similar conduct on the part of the individual defendants in the present case. Thus, she has alleged facts sufficient to support her claim.

Finally, I note that both parties have submitted arguments on the question whether qualified immunity applies to the individual defendants. Instead of deciding the qualified immunity question at this time, I believe that the more orderly course is to allow plaintiff's amended complaint to be served on the individual defendants and wait for the individual defendants to raise the affirmative defense of qualified immunity if it applies to them. If the new defendants are represented by counsel for the existing defendant and wish to support a motion to dismiss with the brief already submitted on the qualified immunity question, they have that option.

ORDER

IT IS ORDERED that

1. Plaintiff Georgia Erickson's Motion for Leave to Amend the Complaint and Add Parties Absent Stipulation is GRANTED. Defendant Wisconsin Department of Corrections' Motion to Strike or Declare Invalid the Amended Complaint is DENIED. Plaintiff's

amended complaint will be treated as having been filed as of the date of this order.

2. Plaintiff should arrange promptly to serve her complaint on the new defendants.

3. Defendant Wisconsin Department of Corrections may file its response to the amended complaint at the same time that the new defendants file their responsive pleading.

Entered this 29th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge