

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

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NEIL T. NOESEN,

Plaintiff,

v.

MEMORANDUM and ORDER  
06-C-071-S

MEDICAL STAFFING NETWORK, INC.,  
WAL-MART STORES, INC. and STATE  
OF WISCONSIN,

Defendants.

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Plaintiff Neil T. Noessen commenced this civil action against defendant Medical Staffing Network, Inc., Wal-Mart Stores, Inc. And the State of Wisconsin under Title VII and 42 U.S.C. §§ 1983 and 1985. He alleges in his complaint that he was terminated as a pharmacist because he sought to avoid the distribution of contraceptive articles and that the defendants violated his First Amendment rights.

Defendant Medical Staffing Network, Inc. (MSN) moved to dismiss Counts 2 and 3 of plaintiff's complaint which allege violations of 42 U.S.C. §§ 1983 and 1985. Pursuant to this Court's April 6, 2006 scheduling order plaintiff's brief in opposition to this motion was to be filed not later than May 1, 2006 and has not been filed to date.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

#### MEMORANDUM

To state a claim under 42 U.S.C. § 1983 plaintiff must allege that his constitutional rights were violated by a person acting under color of state law. See Gayman v. Principal Fin. Services, 311 F.3d 851, 852 (7<sup>th</sup> Cir. 2005), cert. denied, 457 U.S. 943 (2003). Plaintiff has not alleged that MSN is a state actor. Accordingly, plaintiff's 42 U.S.C. § 1983 claim will be dismissed.

To state a claim under 42 U.S.C. § 1985(3) plaintiff must allege a conspiracy for the purpose of depriving any person the equal protection of the laws, an act in furtherance of the conspiracy and an injury to the person. Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court limited the application of the statute's first clause to conspiracies motivated to deprive

a plaintiff of rights constitutionally protected against private (and not just governmental) deprivation. In Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 297 (1993), the Court defined the rights which were protected against private action as only the constitutional right of interstate travel and the rights granted by the Thirteenth Amendment. Plaintiff has not alleged a conspiracy to deprive him of either of these rights. Accordingly, plaintiff's claim under 42 U.S.C. § 1985(3) will be dismissed.

ORDER

IT IS ORDERED that the motion of defendant Medical Staffing Network, Inc. to dismiss counts 2 and 3 of plaintiff's complaint is GRANTED.

Entered this 5<sup>th</sup> day of May, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge