IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL FOLEY,

Plaintiff,

v.

VILLAGE OF WESTON,
DOUGLAS SANN and
CITY OF WAUSAU,

Defendants.

OPINION and ORDER

06-C-350-C

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In this civil action for monetary relief, plaintiff Michael Foley, proceeding pro se, contends that his Fourteenth Amendment rights were violated when defendant Douglas Sann, a police officer employed by defendant Village of Weston, used excessive force against him and when police officers employed by defendant City of Wausau failed to offer him medical assistance or provide him with documentation he requested from them. Jurisdiction is present under 28 U.S.C. § 1331.

Before the court is defendant City of Wausau's unopposed motion to dismiss, which mirrors a successful motion by former defendant Marathon County. Dkt. #11. Defendant City of Wausau contends that the allegations of plaintiff's complaint do not permit the

inference that the city (or its agents, for that matter) engaged in any actions that violated plaintiff's constitutional rights. The city is correct; therefore, its motion will be granted.

The following facts are drawn from plaintiff's complaint, construed liberally in plaintiff's favor.

FACTUAL ALLEGATIONS

A. Parties

Plaintiff Michael Foley is a citizen of the state of Wisconsin.

Defendant Douglas Sann is a citizen of the state of Wisconsin and a police officer employed by defendant Village of Weston. Defendants Village of Weston and City of Wausau are Wisconsin municipalities. Defendant Marathon County is a municipal unit of government with a business address in the state of Wisconsin.

B. July 1, 2003

On July 1, 2003, plaintiff was at work preparing food at Little Italy Restaurant in Wausau, Wisconsin, when he heard banging on the front glass door. (The restaurant was closed and locked at the time.) Plaintiff went to the door and opened it slightly, continuing to hold the door's handle. Immediately, defendant Douglas Sann, a D.C. Everest police officer, grabbed the door with both hands and pulled it open, flinging plaintiff toward Sann.

Without provocation, defendant Sann proceeded to "body slam" plaintiff into the door jamb.

As defendant Sann attacked plaintiff, plaintiff ran to the telephone to call 911. The call was interrupted by defendant Sann's threat to "take plaintiff down." Shortly thereafter, the 911 dispatcher called back. Plaintiff reported that he had been assaulted and was in pain. He asked the dispatcher to have the Wausau police remove defendant Sann from the restaurant.

Several minutes later, plainclothes individuals whom plaintiff "believed to be undercover agents from FBI," arrived and escorted defendant Sann from the building. Later, two uniformed officers from the City of Wausau arrived and entered the building. One of these officers observed a red mark on plaintiff's arm. Although plaintiff told the officers that he was in pain, neither officer offered to call an ambulance or offered plaintiff any assistance.

For several days following the incident, plaintiff requested a copy of the "incident report" at the Wausau Police Department and was advised there was no report. Plaintiff made several requests, by certified mail, to the Wausau police chief for a "police report" and received no response. When plaintiff complained about the actions of the police chief and the police department, the city's attorney and ethics committee refused to investigate the matter.

As a result of defendants' actions, plaintiff suffers from back pain and post traumatic

stress disorder.

OPINION

When considering a motion to dismiss for failure to state a claim, a court must accept as true the well-pleaded factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990). Because plaintiff is unrepresented by a lawyer, the court must construe his complaint liberally. Haines v. Kerner, 404 U.S. 519, 521(1972). A complaint will survive a motion under Fed. R. Civ. P. 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

A. Federal Due Process Claims

As I explained in the November 28, 2006 order dismissing defendant Marathon County from this lawsuit, dkt. #23, at 5-6, plaintiff's complaint is brought under 42 U.S.C. § 1983. Under that statute, individuals may sue in federal court when their rights under federal law have been violated by any "person" acting under color of state law. Local governments may qualify as "persons" to whom § 1983 applies, but only when the government itself is at fault for the alleged violation. Monell v. Dept. of Social Services of

the City of New York, 436 U.S. 658, 690 (1983); Galdikas v. Fagan, 342 F.3d 684, 693 (7th Cir. 2003). A municipality may not be held liable for the errors of its employees unless it is clear that it caused the alleged deprivation of plaintiff's constitutional rights by maintaining an unconstitutional policy or custom that its employees followed when plaintiff's rights were violated. Monell, 436 U.S. at 694.

The Supreme Court has made it clear that federal courts must not apply a heightened pleading standard in civil rights cases alleging § 1983 municipal liability. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993); McCormick v. City of Chicago, 230 F.3d 319, 323 (7th Cir. 2000). To survive a motion to dismiss, "a pleading must only contain enough to allow the court and the defendant to understand the gravamen of the plaintiff's complaint." McCormick, 230 F.3d at 323-24. Nevertheless, courts have held that to plead "enough" in the context of a suit against a municipality, a plaintiff must

> allege that (1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority.

Id. at 324 (citing McTigue v. City of Chicago, 60 F.3d 381, 382 (7th Cir. 1995)).

Plaintiff's claims against defendant City of Wausau appear to be premised on two

events: the failure of Wausau police officers to render him medical assistance on the night of July 1, 2003 and the police department's failure to provide him with a copy of its report of that night's events. As was the case with defendant Marathon County, plaintiff has not suggested that the City of Wausau had any custom or policy of failing to provide medical assistance to injured persons or of refusing to disclose police reports to citizens when doing so was appropriate. More fundamental, however, is plaintiff's failure to allege facts from which it might be inferred that defendant City of Wausau or its officers violated plaintiff's constitutional rights as he contends.

1. Failure to offer medical assistance

Plaintiff contends that the Wausau police officers' failure to provide him with emergency medical assistance violated his due process rights under the Fourteenth Amendment. The due process clause applies to situations in which a state actor deprives a person of an identifiable and protected interest in life, liberty or property. Polenz v. Parrott, 883 F.2d 551, 555 (7th Cir. 1989).

Plaintiff was not taken into custody and none of his property was seized; therefore, his only due process claim can be that defendant City of Wausau violated his liberty interest in bodily integrity. However, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or

property." DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989); see also Archie, 847 F.2d at 1221 (the Fourteenth Amendment is "not a plausible source of mandatory rescue services"). Unless a citizen is in the custody of the state, DeShaney, 489 U.S. at 200, or a defendant has created a dangerous situation that renders the plaintiff more vulnerable to danger than he would have been otherwise, Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993), municipalities and their agents are under no *constitutional* obligation to provide medical services to injured persons. Therefore, the failure of City of Wausau police officers to offer plaintiff medical assistance for injuries caused allegedly by defendant Sann did not violate plaintiff's rights under the Fourteenth Amendment.

Furthermore, even if the officers had been obligated to provide appropriate assistance, it is difficult to see how their actions could be characterized as inappropriate. By plaintiff's own admission, when City of Wausau police officers arrived at the Little Italy restaurant, they noted only that plaintiff's arm had "a red mark" on it, and plaintiff reported he was in pain. Plaintiff does not suggest that he sustained any apparent physical injury, required emergency medical attention or suffered needlessly because he was deprived of emergency treatment.

2. Failure to provide copies of police reports

Plaintiff complains that the city failed to provide him with copies of the police reports regarding the events of July 1, 2003, but because he had no constitutional right to the reports, plaintiff has failed to state a claim against defendant City of Wausau. When persons are the subject of criminal prosecution by the state, they have a right to obtain from the state evidence that may prove useful in their defense. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Such information may include police reports.

However, persons who are not the subject of criminal prosecution have no corollary constitutional right to obtain police reports. Although the information may be accessible through state open records requests or other means, its release is not guaranteed by the Constitution. Because plaintiff had no constitutional or federal right to obtain the police report, the failure of the City of Wausau police department to provide it to him is not actionable under § 1983.

B. State Law Claims

Although it is not clear, plaintiff may have intended to bring claims against defendant City of Wausau that arise under state law. If so, he may not do so in the context of this

federal lawsuit. Federal courts may sometimes exercise jurisdiction over state law claims; however, they may do so only when the state claims are brought in the same case as related federal claims and "are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367; see also United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Before the court may exercise pendent jurisdiction, it must be clear that a federal claim exists. Without "original jurisdiction" over at least one claim, the court does not possess jurisdiction over the suit at all. Khan v. State Oil Co., 93 F.3d 1358, 1366 (7th Cir. 1996) (relinquishing jurisdiction over state law claims is preferred course to avoid federal intrusion into areas of purely state law), vacated on other grounds, 522 U.S. 156, 173 (1997). As explained above, I am dismissing each of plaintiff's federal claims against defendant City of Wausau. Therefore, plaintiff's state law claims against the city must be dismissed as well.

ORDER

IT IS ORDERED that defendant City of Wausau's motion to dismiss is GRANTED.

Entered this 29th day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge