IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL FOLEY,

Plaintiff,

OPINION AND ORDER

v.

06-C-350-C

VILLAGE OF WESTON,
DOUGLAS SANN,
CITY OF WAUSAU,
MARATHON COUNTY,
INSURANCE COMPANIES A through Z,
DOES 1 through 20,
and CORPORATIONS 1through 20,

Defendants.

- -

This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983 for alleged violations of the Fourteenth Amendment arising from an incident involving plaintiff Michael Foley and defendant Douglas Sann. This case is before the court on defendant Marathon County's motion to dismiss the action against it pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Jurisdiction is present under 28 U.S.C. § 1331.

Because plaintiff's complaint fails to allege the existence of an unconstitutional policy or custom maintained by defendant Marathon County and fails to state a valid

constitutional claim against the county, Marathon County's motion to dismiss will be granted.

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). Furthermore, in addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521(1972).

I note that plaintiff's response to defendant Marathon County's motion to dismiss was due on October 5, 2006, but was not filed until November 8, 2006. In light of plaintiff's untimeliness, it would be fair to disregard his response. Nevertheless, for the sake of fairness, I have reviewed plaintiff's opposition brief to determine whether it provides a basis for denying defendant Marathon County's motion to dismiss. It does not. It merely sets out plaintiff's objection to defendant's filing its motion to dismiss before the deadline for dispositive motions set in the preliminary pretrial order. The deadline is intended to be the last day on which motions may be filed; it does not prevent the parties from filing dispositive motions earlier. Finally, I note that both parties attached documents to their briefs. Ordinarily, that would trigger a requirement to convert the motion to dismiss to a motion for summary judgment. However, it is

unnecessary to consider the documents in deciding this action, so there is no need to treat Marathon County's motion as anything but a motion to dismiss.

For the sole purpose of deciding the motion to dismiss, I accept as true the following facts alleged in plaintiff's complaint.

ALLEGATIONS OF FACT

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.

In early July 2003, plaintiff was working at Little Italy Restaurant in Wausau, Wisconsin. The restaurant was closed, but was scheduled to open later that day. After hearing banging on the front door, plaintiff went to the restaurant's front entrance where he saw defendant Sann pacing back and forth and motioning for plaintiff to open the door. As plaintiff unlocked the door, defendant Sann "savagely tore open the door," flinging plaintiff toward Sann. Sann then "body slammed" plaintiff into a second glass door behind plaintiff. As Sann charged plaintiff, plaintiff ran to a telephone to call 911. Plaintiff also called a co-worker "to come and watch what was about to happen," but the co-worker was already

watching. After Sann yelled that he "would take plaintiff down," plaintiff "blindly hung up the phone in fear." Sann then called for backup.

A defendant Marathon County dispatcher called plaintiff back after receiving his 911 call. Plaintiff told the dispatcher that he had been assaulted and that he was in pain and in danger from defendant Sann. Plaintiff asked that Wausau police remove Sann from the restaurant. The dispatcher did not ask whether an ambulance should be called to assist plaintiff.

"Within a few moments" of the 911 call, several individuals, including FBI agents, escorted defendant Sann out of the restaurant. Two City of Wausau police officers then entered the restaurant. Although plaintiff told the officers he was in pain, they did not give him any assistance or ask whether an ambulance should be called. Plaintiff suffers from back pain and psychological trauma as a result of the attack.

Plaintiff submitted several requests to the Wausau Police Department for a copy of the incident report, but was told that "the incident was not reportable." He also mailed several requests to "Police Chief Brandimore," but received no response. In addition, plaintiff submitted several requests to Marathon Country's Sheriff's Department and to "Sheriff Hoenish" for a copy of his 911 call, but he has not been provided a copy in its entirety.

OPINION

A. Liability of Defendant Marathon County

In his complaint, plaintiff broadly asserts that all named defendants violated his due process rights under the Fourteenth Amendment. Federal law provides a remedy to individuals whose rights secured by the Constitution or laws of the United States have been violated by any "person" acting under color of state law. 42 U.S.C. § 1983. The Supreme Court has held that local governments are among the "persons" to which § 1983 applies. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 690 (1983). However, § 1983 does not automatically impose liability on local governments whose employees violate a plaintiff's constitutional rights. Id. at 691 ("municipalities cannot be held liable under § 1983 on a *respondeat superior* theory"). Rather, liability under § 1983 is predicated upon fault. Galdikas v. Fagan, 342 F.3d 684, 693 (7th Cir. 2003). Therefore, plaintiff must show that the local government, in this case, defendant Marathon County, caused the alleged deprivation of plaintiff's constitutional rights by maintaining an unconstitutional policy or custom which its employees followed when plaintiff's rights were violated. Monell, 436 U.S. at 694. Unconstitutional policies or customs can take three forms:

> (1) an express policy that, when enforced, causes a constitutional deprivation;
> (2) 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" with the force of law; or
>
> (3) an allegation that the constitutional injury was caused by a person with final policy-making authority.

Palmer v. Marion County, 327 F.3d 588, 595 (7th Cir. 2003).

Although plaintiff's constitutional claim against defendant Sann and Sann's employer, defendant Village of Weston, derives directly from Sann's use of force against plaintiff, the basis of plaintiff's claim against defendant Marathon County is less clear. Reading the complaint liberally, plaintiff appears to contend that a dispatcher employed by defendant Marathon County violated plaintiff's constitutional rights by failing to send an ambulance after defendant Sann's alleged attack. Setting aside for a moment whether the dispatcher's failure to act amounts to a constitutional violation, plaintiff's complaint fails to allege any facts suggesting that defendant Marathon County maintained a policy or custom of not sending ambulances to those in situations like plaintiff's. First, plaintiff has not identified any relevant policies expressly authorized by defendant Marathon County. Second, a single incident of unconstitutional conduct does not imply that defendant Marathon County has a custom of encouraging its employees to engage in unconstitutional acts. Strauss v. City of Chicago, 760 F.2d 765, 768 (7th Cir. 1985); Palmer, 327 F.3d at 596. Finally, it is unreasonable to infer that the dispatcher had final policy making authority for defendant Marathon County. Archie v. City of Racine, 847 F.2d 1211, 1214 (7th Cir. 1988) (911

dispatcher who failed to send an emergency squad was not a city's policy maker).

If plaintiff's failure to allege the existence of an unconstitutional policy or custom were only an inadvertent omission, it may be appropriate to allow him to amend his complaint to correct the deficiency. However, as discussed in detail below, plaintiff's complaint also fails to state a valid constitutional claim against either defendant Marathon County or the dispatcher. Therefore, defendant Marathon County's motion to dismiss plaintiff's action against it will be granted.

B. Constitutional Claim

Plaintiff appears to contend that the dispatcher's failure to send an ambulance violated his due process rights under the Fourteenth Amendment. To state a claim of a violation of due process, it must appear that a state actor deprived plaintiff of an identifiable and protected interest in life, liberty or property. Polenz v. Parrott, 883 F.2d 551, 555 (7th Cir. 1989). In addition, the plaintiff must allege facts showing that the state actor's conduct was reckless or characterized by deliberate indifference. Archie, 847 F.2d at 1219. Reckless conduct is conduct that reflects complete indifference to a known, significant risk of harm to another. Id. Merely negligent conduct does not amount to a constitutional violation. Id.

Since plaintiff has been deprived of neither life nor property, the only conceivable basis for his constitutional claim is his liberty interest in bodily integrity. However, a state is generally under no constitutional duty to provide ambulatory services for its citizens even when their lives may be in considerable danger. Hill v. Shobe, 93 F.3d 418, 422 (7th Cir. 1996); DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989) ("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"). The purpose of the Fourteenth Amendment is to protect citizens from oppression by state governments, not to provide them governmental services. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); Archie, 847 F.2d at 1221 (the Fourteenth Amendment is "not a plausible source of mandatory rescue services").

Nevertheless, a state may have an affirmative duty to provide services to its citizens in limited circumstances. DeShaney, 489 U.S. at 198. First, a duty may arise when a state takes a person into custody through incarceration, institutionalization or another similar restraint of personal liberty. Id. at 200. Second, the duty may arise when a state actor creates a dangerous situation or renders a citizen more vulnerable to danger than he or she otherwise would have been. Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993); Martin v. Shawano-Gresham School District, 295 F.3d 701, 708 (7th Cir. 2002).

It is difficult to infer from plaintiff's allegations that the circumstances of his alleged attack imposed a constitutional duty on the state to provide him with ambulatory services. First, it is unreasonable to infer that plaintiff was in custody. At the time the dispatcher failed to send an ambulance, plaintiff was not incarcerated or institutionalized and he was not arrested or charged with a crime. Admittedly, a person may be in custody "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1175 (1997). However, despite plaintiff's understandable fear of defendant Sann, plaintiff did "leave" when he ran to the telephone to dial 911. Although plaintiff "blindly hung the phone up in fear," he was able to call a co-worker "to come and watch what was about to happen" and was later able to speak with the dispatcher when his call was returned.

Second, although plaintiff's allegations make it clear he believed himself to be in danger, defendant Sann created the dangerous situation giving rise to plaintiff's call for help, not the county dispatcher. Furthermore, it is unreasonable to infer from plaintiff's allegations that the dispatcher's failure to send an ambulance rendered plaintiff more vulnerable to danger than if one had been sent. "Within a few moments" of speaking with the dispatcher, danger was averted when defendant Sann was escorted out of the restaurant and two other police officers entered the building. Although plaintiff suffers from back pain and psychological trauma as a result of his alleged attack, it is unreasonable to infer that the

dispatcher's failure to send an ambulance rendered plaintiff more vulnerable to the danger that gave rise to these harms than he otherwise would have been.

Even if the dispatcher were obligated to send an ambulance under these circumstances, a constitutional claim would arise only if the dispatcher's failure to act was reckless or characterized by deliberate indifference. Given that plaintiff has alleged he told the dispatcher he was in pain and in danger from defendant Sann, it is possible to infer that the dispatcher knew of a potentially significant risk of harm to plaintiff. However, plaintiff fails to allege facts from which it is reasonable to infer that the dispatcher deliberately and consciously refused to prevent the risk to plaintiff by failing to send an ambulance. Plaintiff's only allegation is that "neither the police officers [nor] the dispatcher asked if they should call an ambulance to assist the plaintiff." Although this allegation may support the contention that the dispatcher's failure to send an ambulance was negligent, it does not reasonably support the contention that the dispatcher acted recklessly or with deliberate indifference.

Because plaintiff's allegations cannot sustain a constitutional claim, it would be inappropriate to permit him to amend his complaint to allege the existence of a policy or custom maintained by defendant Marathon County. For the same reason, it is unnecessary to provide plaintiff with an opportunity to amend his complaint to name the county dispatcher as a defendant.

C. Other Claims

Plaintiff's remaining allegations against defendant Marathon County fail to state a claim under § 1983. Plaintiff alleges that the Marathon County Sheriff's Department and one of its sheriffs, "Sheriff Hoenish," failed to provide plaintiff with a complete copy of his 911 call. Even if true, the failure to provide information does not rise to the level of a constitutional violation. Travis v. Reno, 163 F.3d 1000, 1007 (7th Cir. 1998). Alternatively, plaintiff appears to contend that the failure to provide information violated his rights under the Freedom of Information Act. 5 U.S.C. § 552. However, the Act applies only to federal agencies. Id. A federal agency is one having the "authority of the Government of the United States." 5 U.S.C. § 551(a). Defendant Marathon County, the Marathon County Sheriff's Department and the sheriff are not federal agencies. It remains possible that the failure to fulfill plaintiff's request violated Wisconsin's public records laws. Wis. Stat. §§ 19.31(1)-19.39. However, violations of state law are not actionable under § 1983. J.H. ex rel. Higgen v. Johnson, 346 F.3d 788, 793 (7th Cir. 2003). Because the failure to provide a copy of plaintiff's 911 call in its entirety did not violate plaintiff's rights under the Constitution or federal laws, this claim must fail.

Finally, to the extent that plaintiff's complaint sets forth any valid claims arising under state law, supplemental jurisdiction over the claims will be denied. A district court

may decline to exercise supplemental jurisdiction over a plaintiff's state law claims if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). In this case, because plaintiff has failed to state any valid claims against defendant Marathon County over which this court has original jurisdiction, supplemental jurisdiction over any valid state law claims against the county will be denied.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendant Marathon County is GRANTED.

Entered this 28th day of November, 2006.

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