IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID J. CLARK,

Plaintiff,

v.

GAIL STEVENSON, JOHN JONES
JAMIE L. JACOBS and WANDA W.
BALDWIN,

Defendants.

OPINION and ORDER

06-C-419-C

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In an order dated August 24, 2006, I granted plaintiff David Clark, a patient at the Wisconsin Resource Center in Winnebago, Wisconsin, leave to proceed in forma pauperis on his claim that defendants Gail Stevenson, John Jones, Jamie Jacobs and Wanda Baldwin issued him "warnings" and "counsels" for alleged rule violations in retaliation for his filing a lawsuit against defendant Baldwin. Plaintiff was denied leave to proceed in forma pauperis on several additional claims.

Now before the court are plaintiff's motion for leave to file an amended complaint, motion for reconsideration of the August 24 order and "Motion for Interlocutory Injunction and/or Speedy Trial." Because plaintiff's proposed amended complaint does not contain any

allegations that would support the addition of proposed defendant Amy Bump to this lawsuit, he will be denied leave to file an amended complaint. Plaintiff's motion for reconsideration will denied without prejudice to his refiling it again because it unclear from plaintiff's complaint whether plaintiff may have been treated more harshly than similarly situated patients. Finally, because plaintiff has not met his burden of showing that an injunction is proper, his "Motion for Interlocutory Injunction and/or Speedy Trial" will be denied also.

A. Proposed Amended Complaint

Plaintiff has submitted a proposed amended complaint, which I will construe as including a motion for leave to file the amended complaint. Plaintiff's proposed complaint differs from his original complaint by only one paragraph, which reads:

> On 11/10/05 shortly before 11:45 hours Defendant Amy J. Bump communicated to Jones an allegation of Clark "soliciting staff" because he made a constructive, legitimate request to her.

On the basis of this paragraph alone, plaintiff proposes to add Bump as a defendant in this lawsuit. It is impossible to infer from plaintiff's allegations that Bump violated any of plaintiff's constitutional rights by "communicating to Jones" the statements plaintiff allegedly made to her, regardless how she characterized them. Because amending the complaint to include the proposed new material would be futile, I will deny plaintiff's

request for leave to file his amended complaint.

B. Motion for Reconsideration

In his motion for reconsideration of the court's August 24, 2006 order, plaintiff asserts that

> . . . the court misapprehended [his] claim as to dismissed defendants (Colleen Collier, Byron Bartow, Christi Barmejo, Sinikka Santala, James D. Yeadon). Plaintiff claims that the dismissed defendant denied equal protection by denying him the relief granted two other patients in the cited grievance decision digest (Compl. ¶¶ 10-15, 19, 22) and referred to in the text of the complaint (and exhibited grievance/appeals) generally as due process/14th Amendment . . .

Dkt. #6, at 1. The cited portions of plaintiff's complaint are difficult to understand. It appears that on September 26, 2005, respondent Stevenson gave plaintiff a "counsel" for not wearing a robe over his nightwear when he walked from his room to the bathroom. On October 2, 2005, respondent Stevenson gave plaintiff a "counsel" for wearing his robe and nothing else when he walked from his room to the bathroom. At the time plaintiff was given these counsels, the Wisconsin Resource Center patient handbook stated:

> Bath robes, pajamas, or other suitable nightwear may be worn to and from the bathroom and shower room only. Pajamas, gym shorts, sweat pants or greens may be worn underneath a robe.

Shortly after plaintiff received the counsels, he filed a grievance in which he alleged that the counsels amounted to discipline without notice, in violation of Wis. Admin. Code

§ HFS 94.24(2)(h) ("No patient may be disciplined for a violation of a treatment facility rule unless the patient has had prior notice of the rule."), because the Wisconsin Resource Center Handbook did not make clear that plaintiff was required to wear *both* a robe and underclothes each time he went from his room to the bathroom.

Although it is not clear, it appears that plaintiff obtained a copy of two other patients' administrative grievance decisions, in which the patients "won" their grievances on the ground that they had not been given notice of certain rules before having adverse action taken against them. Plaintiff contends that he was denied equal protection because the other patients' grievances were affirmed, while his was dismissed.

An equal protection violation occurs only when different legal standards are arbitrarily applied to similarly situated individuals. Smith on Behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). Although equal protection claims are most commonly brought by members of disfavored classes of citizens or by citizens attempting to enforce fundamental rights, courts have recognized that successful equal protection claims can be brought by a "class of one," when a plaintiff alleges that he "has been intentionally treated differently from others similarly situated without a rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A "class of one" plaintiff may demonstrate that he has suffered intentional, irrational, and arbitrary treatment "either by showing that he was treated differently from identically situated persons

for no rational reason, or that he was treated worse than less deserving individuals for no rational reason." Bell v. Duperrault, 367 F.3d 703, 707 (7th Cir. 2004).

The administrative grievance decisions to which plaintiff refers are not publicly-available, published decisions and he has provided no facts about the cases they addressed. Therefore, it is impossible to know whether the patients in those cases were given "counsels" for conduct similar to plaintiff's and whether the patients' appeals were won on grounds similar to those raised by plaintiff in his grievance. Because plaintiff's complaint does not provide the court with information from which it can determine whether he has stated an equal protection claim, I will deny his motion for reconsideration without prejudice to his bringing it again. If plaintiff wishes to pursue his equal protection claim, he should submit copies of the grievance decisions to which he refers in his complaint, so that the court can determine whether plaintiff may have been similarly situated to the patients involved in those cases.

C. "Motion for Interlocutory Injunction and/or Speedy Trial"

At the same time plaintiff filed his initial complaint in this lawsuit, he filed a "Motion for Interlocutory Injunction and/or a Speedy Trial," which I construe as a request for a preliminary injunction. (The motion was overlooked inadvertently at the time plaintiff's complaint was screened.) Plaintiff asks the court to order defendant Bartow to expunge "all

references to all counsels, warnings or any notations at all related thereto in all records at WRC or any location to where such might have been sent," so that the records may not be used against him at his civil commitment trial, scheduled for November 2, 2006. In the alternative, plaintiff asks the court to hold trial in this case before his scheduled commitment trial.

When deciding whether to grant or deny a preliminary injunction, a court must consider whether the moving party has demonstrated (1) some likelihood of prevailing on the merits, (2) the absence of an adequate remedy at law, and (3) irreparable harm if preliminary relief is not granted. Ferrell v. United States Dept. of Housing and Urban Development, 186 F.3d 805, 811 (7th Cir. 1999). If these factors are established, then the court must balance the harms to both parties using a "sliding scale" analysis: the greater the moving party's likelihood of prevailing on the merits, the less strongly it must show that the balance of harms weighs in its favor. Id. The court must also consider the public interest by weighing the effect that either granting or denying the injunction will have on non-parties. Id.

There is little question that the records in question could be harmful if used against plaintiff in his commitment proceedings. Therefore, it is understandable that he would like that the negative information expunged before his November 2 trial date. However, on the record now before the court, there is no ground upon which this court could grant plaintiff's

request for an injunction.

In this case, plaintiff is proceeding on one, narrow claim: that defendants Stevenson, Jones, Jacobs and Baldwin issued him "warnings" and "counsels" in retaliation for his filing Winnebago County Case No. 05SC3163 against defendant Baldwin on September 23, 2005. Although plaintiff survived screening on this claim, he has not attempted to show that he will prevail on its merits, and the allegations contained in his complaint border on implausible. Without some evidence that plaintiff is likely to prevail on the merits of his claim, his motion for a preliminary injunction must be denied. (For plaintiff's information, I am enclosing a copy of this court's Procedures to be Followed on Motions for Injunctive Relief, in the event he deems it appropriate to file a new motion for a preliminary injunction.)

That leaves plaintiff's request for a "speedy trial." Although this court prides itself on timely adjudication of the cases that come before it, justice cannot be administered overnight. Under the Federal Rules of Civil Procedure, defendants have the right to engage in discovery and file pretrial motions before defending themselves at trial. See, e.g., Fed. R. Civ. P. 26, 56. At this point in the lawsuit, defendants have not even accepted service of plaintiff's complaint. An October trial is out of the question.

ORDER

IT IS ORDERED that

1. Plaintiff David J. Clark's request for leave to file an amended complaint is DENIED;

2. Plaintiff's motion for reconsideration of the court's August 24, 2006 screening order is DENIED without prejudice to plaintiff refiling his motion with supporting documentation; and

3. Plaintiff's "Motion for Interlocutory Injunction and/or Speedy Trial" is DENIED.

Entered this 22nd day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge