

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

MARK D. MARSHALL,

Plaintiff,

v.

JANEL NICKEL; SEAN SALTER;
GREG GRAMS, Warden at CCI;
C/O JAMES; C/O T. BITTELMAN;
C/O NEUMAIER, Medical Doctor SULIENE;
ICE MARY LEISER; ICE BURT TAMMINGA;
RN. NANCY HAHNISCH; LT. LIPINSKI;
RN. SUE WARD; RN. LINDY MUCHOW;
2nd Shift SGT. FINK; RN. KIM CAMBELL;
MIKE VANDENBROOK; and JANET WALSH,

Defendants.

ORDER

06-C-617

This is a civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Mark D. Marshall is a prisoner who is currently housed at Waupun Correctional Institution. On January 30, 2007, I screened plaintiff's complaint and granted him leave to proceed in forma pauperis on many of his claims. Dkt. #5. However, I dismissed Matthew Frank and Dana Diedrich from the lawsuit because I found that plaintiff had not alleged their personal involvement in any unconstitutional act.

Now plaintiff has filed a “Motion for Reconsideration of Dismissed Proposed Said Named Defendants,” which I construe as two motions: (1) to supplement his complaint with additional allegations; and (2) for the court to reconsider its dismissal of two of the defendants in light of the additional allegations. I note that plaintiff does not appear to have served his motion on defendants. Generally, the court will not consider documents unless they were served on all parties. In this case, however, it is not clear whether counsel for defendants had made an appearance in the case at the time plaintiff prepared his motion. Accordingly, along with this order, a copy of plaintiff’s motion will be forwarded to Assistant Attorney General John Glinski, who represents all defendants other than defendant Sue Ward, and defendant Sue Ward.

In his motion, plaintiff alleges additional facts regarding Dana Diedrich’s involvement in the psychiatric care he received while at the Columbia Correctional Institution. When I screened plaintiff’s complaint, I understood him to allege that defendant Janet Walsh, the chief psychologist at the Columbia Correctional Institution, directed Diedrich not to treat plaintiff for his mental health needs. Therefore, I determined that Diedrich did not exhibit deliberate indifference in her care of plaintiff and did not violate the Eighth Amendment. In his motion, plaintiff alleges the following additional facts: Diedrich (1) was not acting at defendant Walsh’s direction, (2) told plaintiff that he would “regret” his refusal to take “psychotic medicine,” (3) would not prescribe plaintiff medication when he reconsidered his

prior refusal, and (4) would not see or treat plaintiff in spite of his repeated requests for treatment and medication for his declining mental health.

As I noted in the January 30 screening order, to state an Eighth Amendment claim regarding medical care, a prisoner must plead facts from which it may be inferred that his health problems constitute a serious medical need and that prison officials responded with deliberate indifference to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). I have determined already that plaintiff's mental health problems may constitute a serious medical need under the Eighth Amendment. Dkt. #5 at 15-16. Therefore, the question is whether, given the additional facts included in plaintiff's supplement, he has stated a claim under the Eighth Amendment against Diedrich.

Plaintiff alleges that Diedrich knew that his mental health was declining, that he was asking for treatment and that she refused to provide any treatment to him. This is sufficient to state an Eighth Amendment claim against Diedrich. Therefore, plaintiff's motions to supplement and for reconsideration will be granted with respect to Diedrich and she will be included as a defendant in this lawsuit.

Next, I dismissed Department of Corrections Secretary Matthew Frank from this lawsuit because plaintiff did not include any allegations in his complaint regarding Frank's actions. In his motion for reconsideration, plaintiff contends that Frank is "constitutionally liable in his official capacity" because, under Wis. Stat. § 301.29, he is required investigate

inmate complaints submitted to the office of the secretary. Wis. Stat. § 301.29(3) states that “[t]he department shall investigate complaints against any institution under its jurisdiction or against the officers or employees of the institutions.”

If Frank failed to carry out his responsibility under the Wisconsin statutes, plaintiff may have a state law claim against him, although it is not clear that the statute in question is enforceable by individual prisoners in any setting. However, I need not consider that issue. Federal courts such as this one may have jurisdiction over state law claims only when: (1) the parties are citizens of different states and the amount in controversy is greater than \$75,000, 28 U.S.C. § 1332; or (2) a state law claim is part of the same case or controversy as a federal law claim, 28 U.S.C. § 1367. In this case, the parties are all citizens of Wisconsin, so diversity jurisdiction does not exist. Moreover, because plaintiff’s claim is factually unrelated to the claims that plaintiff is proceeding with in this case, I will decline to exercise supplemental jurisdiction. Although plaintiff is proceeding on claims related to the alleged assault, the facts regarding the alleged assault are quite different from those surrounding the investigation, or non-investigation, of the assault. Consequently, I will deny plaintiff’s motion for reconsideration of my decision to dismiss respondent Frank from this lawsuit.

ORDER

IT IS ORDERED that

1. Plaintiff Mark D. Marshall's motion to supplement his complaint with additional allegations is GRANTED;

2. Plaintiff's motion for reconsideration regarding the dismissal of Dana Diedrich from this lawsuit is GRANTED; plaintiff is GRANTED leave to proceed in forma pauperis on his claim that Diedrich violated his Eighth Amendment right to be free from cruel and unusual punishment when she refused to treat his mental health conditions;

3. Plaintiff's motion for reconsideration regarding the dismissal of Matthew Frank from this lawsuit is DENIED.

4. Pursuant to an informal service agreement between the Attorney General and this court, a copy of plaintiff's complaint, plaintiff's motion for reconsideration and this order are being sent today to the Attorney General for service on Diedrich.

Entered this 12th day of March, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge