

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

DAVID LEE GREEN,

Plaintiff,

v.

WARDEN, MCC CHICAGO,
CASE MANAGER MS. CHRISTMAS and
SUPERVISOR MR. HARRIS,

Defendants.

ORDER

07-C-37-C

In this civil action for money damages, plaintiff alleges that defendants failed to protect him from an assault by another prisoner and then retaliated against him when he complained about it. In an order dated February 21, 2007, I allowed plaintiff to proceed on claims for violations of his Eighth Amendment right to be free from cruel and unusual punishment and his First Amendment rights to free speech and to petition to government for redress of grievances.

In the February 21 order, I emphasized that, under the Eighth Amendment, plaintiff would have to show that defendants were aware that petitioner was at a substantial risk of serious harm. It would not be enough for plaintiff to show that defendants *should have* been

aware of a risk, or, in other words, that they were negligent in failing to protect him. I informed plaintiff that if he believed that officials were negligent, he would have to sue the United States under the Federal Tort Claims Act.

Now, plaintiff has filed a document that I construe as a motion to supplement his complaint to assert a claim under the Federal Tort Claims Act against the United States. The Federal Tort Claims Act, 28 U.S.C. § 2671-2680, provides in part that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Cognizable claims under the act include those that are: (1) against the United States; (2) for money damages; (3) for injury or loss of property; (4) caused by the negligent or wrongful act or omission of any employee of the Government; (5) while acting within the scope of his office or employment; (6) under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994) (claim against United States is cognizable under Act if it alleges six elements outlined above).

Plaintiff alleges that federal employees acting in the scope of their employment were negligent in failing to prevent him from being physically injured by another prisoner. This is sufficient to state a claim against the United States under the Federal Tort Claims Act.

Also, it appears from the documents attached to his addendum that petitioner has satisfied the administrative exhaustion requirement of the Act. Deloria v. Veterans Administration, 927 F.2d 1009, 1011 (7th Cir. 1991) (concluding without discussion that exhaustion under FTCA is “jurisdictional prerequisite” to federal lawsuit). But see Jones v. Bock, 127 S.Ct. 910, 919 (2007) (noting that “the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense”).

Accordingly, IT IS ORDERED that plaintiff’s motion to supplement his complaint to add the United States as a party is GRANTED. Copies of plaintiff’s complaint and the supplement will be forwarded to the U.S. Marshal for service on the United States in accordance with Fed. R. Civ. P. 4(i). Although the other defendants have not yet filed an answer, it is ordinarily the case that the United States attorney represents federal employees. Therefore, a copy of plaintiff’s supplement and this order will be forwarded to the United States Attorney for service on the other defendants. In accordance with Fed. R. Civ. P. 12(a)(3)(A), all defendants may have 60 days from the date of service on the United States

in which to file an answer.

Entered this 16th day of March, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge