

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

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DAVID LEE GREEN,

Plaintiff,

v.

WARDEN, MCC CHICAGO,  
CASE MANAGER MS. CHRISTMAS,  
SUPERVISOR MR. HARRIS, and  
THE UNITED STATES OF AMERICA,

Defendants.  
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ORDER

07-C-37-C

On February 21, 2007, I granted plaintiff leave to proceed in forma pauperis on two claims arising under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). First, I allowed him to proceed against defendant Harris on a claim that Harris was deliberately indifferent to his safety when he ignored plaintiff's report that he had just been assaulted and allowed plaintiff to be assaulted a second time, in violation of his Eighth Amendment rights. Second, I allowed him to proceed against defendants warden and Christmas on a claim that these defendants retaliated against him because he exercised his constitutional right of access to the courts. Subsequently, on March 16, 2007, I allowed

plaintiff to supplement his complaint to add the United States of America as a defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671-1680, on a claim that defendant Harris was negligent in failing to prevent him from being injured. Now before the court is defendants' motion for a two-week enlargement of time within which to file an answer. The motion will be granted in part and denied in part.

When the United States is sued, or when a federal official is sued in his *official capacity*, the answer to a complaint is due no later than 60 days following the date of service of the complaint on the United States Attorney for the district in which the action is filed. Fed. R. Civ. P. 12(a)(3)(A). (The United States Attorney General in Washington, D.C. and the United States Attorney for the district in which the action is filed are always served with a copy of a complaint naming as a defendant the United States or any federal official, whether the suit is brought against the individual in his or her official or individual capacity or both. Fed. R. Civ. P. 4(i)(1)(A) and 4(i)(2)(A) and (B)). When a federal official is sued in his *individual capacity*, the answer is due no later than 60 days following the date of service of the complaint on the officer or employee, or service on the United States attorney, *whichever is later*. (Emphasis added.) Fed. R. Civ. P. 12(a)(3)(B).

Plaintiff's Bivens claims of constitutional wrongdoing against the individual defendants are claims against each in his or her individual capacity. Glaus v. Anderson, 408 F.3d 382 (7th Cir. 2005) (Like state prisoners suing under 42 U.S.C. § 1983, federal

prisoners raising claims under Bivens sue relevant officials in individual capacity only.) Therefore, defendants Warden, Harris and Christmas's answer is due 60 days following the date of service of plaintiff's complaint upon them.

Defendants note that despite the fact that the court allowed plaintiff to proceed against defendants Warden, Harris and Christmas on February 21, 2007, these defendants were not served with plaintiff's complaint until May 18, 2007. Unfortunately, the record bears this out (with the exception that the service date is one day off). According to the "process receipt and return" forms filed today in this case, it appears that, for reason impossible to imagine, the United States Marshal's Service in Chicago waited three months, until May 17, 2007, to execute service of process of plaintiff's complaint on defendants Warden, Harris and Christmas. That means that these defendants have until July 16, 2007, in which to serve and file their answer.

The answer of the United States was due 60 days from the date of service of the complaint on the United States Attorney for this district. The United States Attorney for this district accepted service of plaintiff's complaint upon the United States as a defendant on March 22, 2007. Therefore, its answer was due on May 21, 2007.

Counsel for defendants explains that he needs more time to answer the complaint on behalf of all of the defendants because he has not yet obtained permission from the Department of Justice to represent the individual defendants. He does not suggest that he

needs permission from the Department of Justice to represent the United States. Nevertheless, I will grant defendants an enlargement of time within which to serve an answer on behalf of the United States. In doing so, I am asking that the United States Attorney speed its answer on behalf of all of the defendants, despite the fact that the answer of defendants Warden, Harris and Christmas is not technically required to be filed before July 16. Counsel suggests in his motion that with a two-week extension, defendants will be prepared to file a combined answer. In light of the disappointing failure of the Chicago marshal's service to perform with due diligence its responsibility to serve the individual defendants in this case, I am asking that an answer on behalf of all of the defendants be filed and served no later than June 7, 2007.

#### ORDER

IT IS ORDERED that defendants' motion for an enlargement of time to June 7, 2007, in which to file an answer on behalf of the defendants in this case is GRANTED with respect to defendant United States of America; it is DENIED as unnecessary with respect to defendants Warden, Harris and Christmas. Defendants are requested, however, to speed the filing of the answer of defendants Warden, Christmas and Harris so that the answer filed

on June 7, 2007 is complete with respect to all of the defendants.

Entered this 24th day of May, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge