

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

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MARCELLOUS L. WALKER, ERIC HENDRICKSON,  
DANIEL ARENDS, FREDICK LEE PHARM,  
SHERMELL TABOR, EDWIN JONES,  
BRANDEN SUSTMAN and JOSHUA ROGERS,

Plaintiffs,

v.

KEVIN R. HAYDEN, DHFS Secretary; and  
STEVE WATTERS, SRSTC Director,

Defendants.

ORDER

3:07-cv-00675-bbc

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In an order dated January 10, 2008, I directed plaintiffs to serve defendants Kevin Hayden and Steve Watters with their amended complaint. (Plaintiffs' original complaint was dismissed because it violated Fed. R. Civ. P. 8.) Because plaintiff Marcellous Walker appears to be the individual drafting all of the documents filed in this action to date, I sent him a memorandum explaining how to obtain waivers of service of a summons from the defendants, together with all of the necessary forms, and I instructed Walker to file proof of service of the complaint on the defendants no later than February 28, 2008. In response

to the court's order, plaintiffs have submitted a letter in which they state that they "do not wish to waive the costs of service of the complaint and summons" and ask that the court make copies of their original and amended complaints and direct the United States Marshal to serve them on the defendants. On January 24, 2008, they filed a proposed second amended complaint. Both plaintiffs' letter request and the proposed second amended complaint are presently before the court.

As an initial matter, I note that the record suggests and plaintiffs are aware that they did not properly serve defendants with their original complaint, because they did not include with their complaint summonses issued by the clerk of court. This matter became moot, however, when I dismissed the original complaint because it did not comply with Fed. R. Civ. P. 8. The only operative pleading in the case at the time this court ordered plaintiffs to serve the defendants was the first amended complaint and that is the only complaint that was to be served. Now, however, plaintiffs have presented a second amended complaint to the court for filing.

Ordinarily, a plaintiff may amend his complaint only once as a matter of right. Fed. R. Civ. P. 15(a). Subsequent amendments require the court's permission, which will be granted freely "when justice so requires." Fed. R. Civ. P. 15(a)(2). In this instance, plaintiff's proposed second amended complaint appears to be a considerably pared down version of the first amended complaint. The claims are essentially the same. However, the

factual allegations in the second amended complaint number only 116 paragraphs as opposed to the 250 paragraphs of facts listed in the first amended complaint. Because simpler is better when it comes to complaints, see Fed. R. Civ. P. 8, I will allow plaintiffs to file their second amended complaint. However, a few related matters require comment.

First, I will not entertain any further motions to amend from plaintiffs. As this case shows, it is impossible to move a case forward until there is in place a complaint with which the defendants can be served and to which they can file an answer. This case was filed originally in November of 2007, and service of process has yet to be accomplished. I will accept no further delays brought about by plaintiffs making proposed amendments to their pleading.

Second, plaintiffs should be aware that in permitting the second amendment, I have not reviewed the merits of any of their individual claims. Defendants remain free to move to dismiss any one or more of the claims should they believe those claims to be legally meritless.

Third, for reasons unexplained, plaintiff Marcellous Walker has not signed the second amended complaint and the second amended complaint is not dated. Therefore, I am enclosing to plaintiff Walker a copy of the last page of the complaint on which he must affix his signature and a date and then return it to the court. If plaintiff Walker fails to sign the second amended complaint as Fed. R. Civ. P. 11 requires, the complaint will be stricken as

to him and he will be dismissed from the case.

Finally, because I am granting plaintiffs' request for leave to file a second amended complaint, the second amended complaint is now the operative pleading in the case. Thus, this is the complaint that must be served on the defendants.

I turn then to plaintiffs' request that the court direct the United States Marshal to serve their complaint on the defendants. District courts are authorized to order the marshal to serve a complaint only in cases in which the plaintiff is indigent and proceeding in forma pauperis under 28 U.S.C. § 1915. A plaintiff not proceeding in forma pauperis must either seek a waiver of service of summons as explained in Fed. R. Civ. P. 4(d)(2) or arrange to have a person over the age of 18 serve the complaint on each defendant personally as explained in Fed. R. Civ. P. 4(c).

Plaintiffs did not seek pauper status when they filed their complaint. They paid the filing fee in full. Their statement they "do not wish to waive the costs of service of the complaint and summons" is perplexing. The only cost to plaintiffs of asking the defendants to waive formal service of a summons is the cost of postage, as explained in the memorandum already sent to plaintiff Walker. It will be far more expensive for plaintiffs to hire a private process server, if that is what they have to do, in order to arrange to have the second amended complaint served on the defendants personally. Because plaintiffs may wish to reconsider the decision to refrain from seeking waivers of personal service of process

from the defendants, I will grant them a short extension of time within which to submit waiver forms signed by the defendants. In the event plaintiffs remain adamant about arranging for personal service of process however, and in the interest of moving this case forward as rapidly as possible, I am enclosing to plaintiffs with this order two summons forms that have been issued by the clerk of court. (I am also enclosing to plaintiff Walker the extra copy of the second amended complaint he sent to the court. Before he arranges for service of this complaint on the defendants, he should make sure to attach to it a copy of the signature page that includes his signature in conformance with Rule 11.)

#### ORDER

IT IS ORDERED that:

1. Plaintiffs' request that the court arrange with the United States Marshal for service of their second amended complaint upon the defendants is DENIED.
2. Plaintiff's request for leave to file a second amended complaint is GRANTED.
3. Plaintiff Walker may have until February 11, 2008, in which to return to the court the enclosed copy of the last page of the second amended complaint, on which he is to affix his signature and a date. If, by February 11, 2008, plaintiff Walker fails to sign the complaint as required by Fed. R. Civ. P. 11, the complaint will be stricken as to him and he will be dismissed from the case.

4. Plaintiffs may have an enlargement of time to March 28, 2008, in which to submit proof of service of the second amended complaint (and this order) on the defendants. Proof may consist either of waiver forms signed by the defendants which were provided to plaintiff Walker earlier or the affidavit of a person over the age of 18 averring that the second amended complaint and a summons was served personally on each defendant, together with an indication where and when such service took place. If, by March 28, 2008, plaintiffs fail to file proof of service of their second amended complaint on the defendants, this case may be subject to dismissal for plaintiffs' failure to prosecute.

Entered this 28th day of January, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge