

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

SCOTT A. KONITZER,
a/k/a Donna Dawn Konitzer,

Plaintiff,

v.

GARY HAMBLIN, JANEL NICKEL,
JANET MINK, CAPTAIN KELLER,
TINA MARTIN and RANDY BECKER,

Defendants.

OPINION AND ORDER

11-cv-426-slc

Plaintiff Scott A. Konitzer a/k/a Donna Dawn Konitzer, a prisoner at the Columbia Correctional Institution, located in Portage, Wisconsin, alleges that defendants Janel Nickel, Janet Mink, Captain Keller, Tina Martin and Randy Becker failed to protect her¹ from an assault by another inmate. Konitzer also seeks equitable and injunctive relief against defendant Gary Hamblin in his official capacity.

Konitzer asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Konitzer has submitted, the court concludes that she is unable to prepay the full fee for filing this lawsuit. Konitzer has made the initial partial payment of \$44.85 required of her under § 1915(b)(1).

The next step is to determine whether Konitzer's proposed action is (1) frivolous or malicious, (2) fails to state a claim on which relief may be granted, or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because Konitzer's complaint passes this threshold, she will be allowed to proceed against the defendants and the state required to respond.

Finally, I am denying without prejudice Konitzer's motion to appoint counsel.

¹ At Konitzer's request, the court will refer to her using female pronouns.

ALLEGATIONS OF FACT

In addressing a pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In her complaint, Konitzer alleges the following facts, which the court assumes to be true for purposes of this screening order:

- Plaintiff Konitzer is an inmate at the Columbia Correctional Institution ("CCI"), located in Portage, Wisconsin.
- Defendant Gary Hamblin is the secretary of the Wisconsin Department of Corrections. Defendants Janel Nickel, Janet Mink, Captain Keller, Tina Martin and Randy Becker were, at all times material to this action, employed at CCI.
- Konitzer is at a greater risk of being assaulted by other inmates because she has gender identity disorder, takes female hormone therapy and has a female appearance.
- On her arrival at CCI, defendant Nickel informed Konitzer that she would not be double-celled. Konitzer informed Nickel that single-celling her made her a target for an assault. However, Nickel claimed that Konitzer was safer in a single cell.
- Konitzer informed Nickel that Nickel was endangering Konitzer's safety by not allowing her to be double-celled.
- Konitzer repeatedly complained to defendants Becker and Mink about a specific inmate following her around, loitering outside her cell and fixating on washing Konitzer's underwear because he worked in the laundry. This inmate also followed Konitzer into secluded areas out of the view of staff.
- Becker allegedly told the other inmate that what Konitzer had told Becker and Mink.
- Mink repeatedly refused Konitzer's requests to move to different location to avoid the other inmate, who had a history of committing acts of violence against other inmates.

- When Mink refused to move her, Konitzer spoke with Keller confidentially and explained she was afraid of the other inmate. Keller indicated he would talk to Mink and see what could be done.
- Plaintiff told Martin that the other inmate was threatening her. Konitzer also told Martin, “that little fag won’t leave me alone.”
- Late in the evening of November 11, 2010, Martin repeated these statements to the other inmate, whom Konitzer feared.
- On November 12th, the other inmate attacked Konitzer in front of Martin. Konitzer alleges that Nickel, Keller, Mink and Martin knew that the attack was coming because Martin told the attacker what Konitzer had said.
- During the attack Martin yelled “Push the damn button” to the guard working in the unit bubble, but the guard did not open the door to let the responders into the unit.
- While Konitzer was being attacked, Martin did not stop the attack, but yelled and groped at the attacker.
- During the attack, the other inmate punched Konitzer in her left temple and eye area 30 times and smashed her head into the concrete floor with great force at least eight to 10 times. Her injuries and pain were severe. Konitzer had multiple broken bones in her face and pain that required narcotic medication.
- Konitzer requests monetary, declaratory and injunctive relief, to include implementing a policy that would insure the safety of transsexual prisoners, while not restricting their privileges.

OPINION

The Eighth Amendment to the United States Constitution requires the government to “provide humane conditions of confinement; prison officials must . . . ‘take reasonable measures to guarantee the safety of the inmates.’” *Farmer v. Brennan*, 511 U.S. 825, 832, (1994). In *Farmer*, the Supreme Court held that the Constitution requires prison officials to protect

prisoners from “substantial risk[s] of serious harm,” such as a physical assault. 511 U.S. at 825. When prison officials have actual knowledge of a substantial risk of harm, they must take reasonable steps to prevent that harm. *Langston v. Peters*, 100 F.3d 1235, 1237-38 (7th Cir. 1996) (citing *Farmer*, 511 U.S. at 837). Failure to do so constitutes deliberate indifference and violates an inmate’s Eighth Amendment rights. *Id.*

Konitzer alleges that defendants Mink, Keller, Martin and Becker knew that Konitzer feared that a specific inmate would assault her yet they did not take any steps to prevent an assault, which then actually occurred. In addition, Konitzer alleges that defendant Nickel knew that Konitzer was in danger because Konitzer was single-celled. Konitzer’s allegations are sufficient to let her proceed on her failure to protect claim against these defendants.

Konitzer seeks to proceed against defendant Hamblin in his official capacity for injunctive relief. She will be allowed to proceed against Hamblin. *See Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) (proper defendant for purposes of injunctive relief is supervisory official of government agency).

Finally, Konitzer moves for appointment of counsel. She states that she has tried to obtain counsel on her own but has not succeeded. Although this is the first step a plaintiff must take before she is eligible for appointment of counsel, *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992), it is just the first step. This court would appoint counsel in virtually every prisoner lawsuit if it had enough lawyers, but about 200 new prisoner lawsuits get filed in this court every year and only about 10 to 15 attorneys are willing to accept pro bono appointments. This means that the court must determine in each case whether appointment of counsel is necessary and appropriate. *Pruitt v. Mote*, 503 F. 3d 657, 654, 656 (7th Cir. 2007). This

requires the court to determine from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. *Id.* at 655. At this very early stage of the proceedings, the court does not have enough information to determine whether appointment of counsel is warranted in this case. Konitzer's motion for appointment of counsel will be denied without prejudice. She may refile her motion later in this case if she believes she can establish that she is unable to prosecute it on her own.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Konitzer's request to proceed on her failure to protect claim against defendants Gary Hamblin, Janel Nickel, Janet Mink, Captain Keller, Tina Martin and Randy Becker is GRANTED.
- (2) Plaintiff's motion for appointment of counsel is DENIED without prejudice.
- (3) For the time being, plaintiff must send defendants a copy of every paper or document she files with the court. Once plaintiff has learned what lawyer will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendants or to defendants' attorney.
- (4) Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.
- (5) Plaintiff is obligated to pay the unpaid balance of her filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at her institution of that institution's obligation to deduct payments until the filing fee has been paid in full.
- (6) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40

days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 3rd day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge