

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

NATANAEL RIVERA,

Plaintiff,

v.

CORRECTIONAL OFFICER FRANCOIS,
MINNING, LINDMEIER, ROUSE,
PETERSON, COMMING, DR. BREEN,
RN TREMEL, JOHN DOE 1-20 and JANE DOE 1-20,

Defendants.

OPINION AND ORDER

12-cv-520-bbc

Pro se plaintiff Natanael Rivera is proceeding on a claim that defendant Lindmeier and the John Doe defendants kept him in six-point restraints and leg shackles for more than 12 hours, in violation of the Eighth Amendment. I dismissed the complaint as to several other defendants for plaintiff's failure to state a claim upon which relief may be granted. Dkt. #6.

Defendant Lindmeier has filed a motion to dismiss the case for improper venue. Dkt. #11. Also before the court are several motions filed by plaintiff, including a motion for sanctions, two motions for appointment of counsel and a "motion to deny" defendant's motion to dismiss. Dkt. ##13, 16, 18 and 26. Finally, plaintiff has filed a proposed amended complaint, which I construe as a motion for leave to file an amended complaint. Dkt. #15.

In his motion, defendant argues that venue is improper in the Western District of Wisconsin because neither he nor any of the officials named in the complaint live or work in this district and none of the events relevant to the lawsuit occurred here. 28 U.S.C. § 1391(b) (venue is proper in district in which “any defendant resides” or “a substantial part of the events or omissions giving rise to the claim occurred”). Rather, the events occurred at the Green Bay Correctional Institution, which is in the Eastern District of Wisconsin.

In response, plaintiff does not dispute any of this, but he says that the case should stay in this district because he wants to supplement his complaint to include Merian Moorgen, who he says is a “PREA official” in Madison, Wisconsin. However, venue is generally determined at the time the complaint is filed. Flowers Industries v. FTC, 835 F.2d 775, 776 n. 1 (11th Cir. 1987); Exxon Corp. v. FTC, 588 F.2d 895, 899 (3d Cir. 1978); A.J. Taft Coal Co., Inc. v. Barnhart, 291 F. Supp.2d 1290, 1303 (N.D. Ala. 2003). Further, plaintiff does not allege that Moorgen was involved in the alleged constitutional violation. He says that he complained to her *after* the incident occurred and she failed to take action, but that is not sufficient to state a claim upon which relief may be granted. Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting “contention that any public employee who knows (or should know) about a wrong must do something to fix it”); George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007) (rejecting argument “that anyone who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution himself”); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002) (“[T]he Constitution . . . does not require states to prosecute persons accused of wrongdoing.”).

Plaintiff's supplement to his complaint also includes new allegations about some of the officials I dismissed in the screening order. Because none of those officials reside in this district, those allegations would have no bearing on defendant's motion even if I were allow him to supplement his complaint.

Plaintiff argues in several different documents that defendant attempted to prevail on his motion by "lying" that plaintiff resides at the Green Bay Correctional Institution and by mailing the motion to dismiss to that facility rather than the Wisconsin Resource Center, where plaintiff actually resides. This argument is misconceived for multiple reasons. First, as defendant points out, plaintiff alleged in his own complaint that he is "currently a state prisoner confined at the Green Bay Correctional Institution," so he cannot blame defendant for the mistake. Second, plaintiff was not prejudiced in any way by the mailing mistake because he received a copy of it and was able to respond to it. In any event, plaintiff's residence has no bearing on venue, so there would be no need for defendant intentionally to misrepresent plaintiff's place of confinement.

When venue is improper, the district court may transfer the case to the district where venue is proper rather than dismiss the case. 28 U.S.C. § 1406(a); Mostly Memories, Inc. v. For Your Ease Only, Inc., 526 F.3d 1093, 1098 (7th Cir. 2008); Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986). Particularly because plaintiff is representing himself, dismissal would be a harsh sanction. Cf. Continental Ins. Co. v. M/V ORSULA, 354 F.3d 603, 608 (7th Cir. 2003) (affirming dismissal rather than transfer because "filing in the Northern District of Illinois was an obvious mistake made by a sophisticated party with

representation”). Defendant argues that dismissal is proper because plaintiff was “forum shopping,” but defendant has no evidence to support that allegation. Three other cases plaintiff filed in this district ended with judgments in the defendants’ favor, Rivera v. Johnson, 10-cv-286-bbc (W.D. Wis.); Rivera v. Grams, 11-cv-89-bbc (W.D. Wis.); Rivera v. Dinse, 12-cv-59-bbc (W.D. Wis.), so there is no reason to believe that plaintiff chose this district because of a belief that he would receive a more favorable ruling. Accordingly, I will transfer this case to the Eastern District of Wisconsin.

Because I am transferring the case, I will deny plaintiff’s motions for appointment of counsel without prejudice, along with his motion for leave to amend his complaint. Plaintiff is free to renew his motions in the Eastern District of Wisconsin.

ORDER

IT IS ORDERED that

1. Defendant Lindmeier’s motion to dismiss for improper venue, dkt. #11, is DENIED. This case is TRANSFERRED under 28 U.S.C. § 1406(a) to the Eastern District of Wisconsin.

2. Plaintiff Natanael Rivera’s “motion to deny” defendant’s motion to dismiss, dkt. #13, motion for leave to amend his complaint, dkt. #15, motions for appointment of counsel, dkt. ##16 and 26, and motion for sanctions, dkt. #18, are DENIED. If plaintiff still wishes to amend his complaint or be appointed counsel, he will have to renew those

motions in the Eastern District of Wisconsin.

Entered this 4th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge