

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

THOMAS JEROME FUSELIER,

Plaintiff,

v.

LA CROSSE COUNTY JAIL,

Defendant.

OPINION AND ORDER

13-cv-650-bbc

Plaintiff Thomas Fuselier, an inmate at the La Crosse County jail, has filed a proposed complaint regarding dangerous conditions in the jail shower. Plaintiff seeks leave to proceed in forma pauperis with his claims and has made an initial partial payment of the filing fee as previously ordered by the court. The next step is to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010). After considering plaintiff's allegations, I conclude that he may proceed on a claim under the Americans with Disabilities Act against La Crosse County.

I draw the following allegations from plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Thomas Fuselier is incarcerated at the La Crosse County jail. Plaintiff is an amputee who wears a prosthetic leg from the knee. The S Block shower room does not have rails to assist a disabled person such as plaintiff. On August 6, 2013, plaintiff was getting out of the shower, slipped and fell. He suffered a concussion and lower back injury. I understand plaintiff to be alleging that jail staff has not fixed the problem. Sergeant Mike Thompson (not a named defendant) "kept medical records for unknown purposes."

OPINION

I understand plaintiff to be alleging that the La Crosse County jail is not equipped to allow a disabled person such as plaintiff to take a shower safely. Plaintiff does not state a legal theory supporting his allegations, but that is not required. Small v. Chao, 398 F.3d 894, 898 (7th Cir. 2005). I conclude that his allegations state a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134. (Plaintiff might also state a claim under the Rehabilitation Act of 1973, 29 U.S.C. §§ 794(a), but that law requires that the defendant receive federal funding, which plaintiff does not plead. In any case, the contours of the two claims are identical, Jaros v. Illinois Department of Corrections, 684 F.3d 667, 671 (7th Cir. 2012), so I need not consider this claim.)

The ADA prohibits discrimination against qualified persons with disabilities. Title II of this law states that "no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services,

programs, or activities of a public entity" 42 U.S.C. § 12132. A person is "qualified" if he is able to participate in the program, activity or service with a reasonable accommodation. 42 U.S.C. § 12131(2). I understand plaintiff to allege that he is disabled because of his amputated leg and that La Crosse County is violating the ADA by refusing to install shower rails or make other accommodations to enable plaintiff to take a shower safely. The term "public entity" is defined to include any instrumentality of state or local government, § 12131(1), which includes county jails. Although incarceration itself is not a program or activity, showers made available to inmates are. Jaros, 684 F.3d at 672 (7th Cir. 2012) (inmate stated claim for prison's failure to accommodate his access to meals or showers). Accordingly, I conclude that plaintiff has stated an ADA claim against La Crosse County. (Plaintiff formally names the La Crosse County jail as the defendant, which is a building that cannot be sued, but I understand plaintiff to mean that he is suing the county government and thus will amend the caption to name La Crosse County as defendant.) However, plaintiff should be aware that as the case proceeds to summary judgment or trial, he will have to provide evidence showing that a shower rail or some other accommodation is reasonable, and that the county's failure to provide him such an accommodation excluded him from meaningful access to the shower.

It is possible that plaintiff means to bring claims under the Eighth Amendment as well. Prisoners can state a claim under the Eighth Amendment by alleging facts suggesting that jail officials knowingly disregarded a substantial risk of serious harm to the prisoner. Farmer v. Brennan, 511 U.S. 825, 837 (1994). This means that the plaintiff must allege facts supporting an inference that defendants were personally aware of facts from which an

inference could be drawn that the showers posed a substantial risk of serious harm and that defendants actually drew that inference. Id.

Several courts have concluded that “slippery floors” by themselves do not pose a significant risk of serious harm to a prisoner’s health or safety because slippery floors constitute a risk faced by members of the public at large and the possibility of falling on them does not constitute a substantial risk of serious harm. E.g., Reynolds v. Powell, 370 F.3d 1028, 1031 (10th Cir. 2004) (“[S]lippery floors constitute a daily risk faced by members of the public at large. . . . [T]here is nothing special or unique about plaintiff’s situation that will permit him to constitutionalize what is otherwise only a state-law tort claim.”) (internal quotations omitted); LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993) (holding that requiring prisoner to shower in handcuffs and shackles “[did not] create[] a sufficiently unsafe condition . . . [because] [e]ven if the floors of the showers are slippery and [the prisoner] might fall while showering, ‘slippery prison floors . . . do not state even an arguable claim for cruel and unusual punishment.’”) (citation omitted); Bell v. Ward, 88 Fed. Appx. 125, 126-27 (7th Cir. 2004) (affirming dismissal of prisoner’s slip and fall claim and noting that “although wet floors do present a possibility that inmates might slip, [plaintiff’s] allegations do not suggest a *substantial* risk of serious harm. . . .”)

Cases in which courts *have* found that a slippery surface poses a substantial risk of serious harm usually involve hazardous factors in addition to the slippery surface, such as when a prisoner has a disability and prison officials are aware of a prisoner’s repeated falls and injuries on a shower floor. E.g., Johnson v. Martinez, 2003 WL 21437585 (9th Cir.

June 17, 2003) (unpublished memorandum disposition) (holding that prisoner stated claim for constitutional violation on basis of allegations that he used a cane, had requested accommodations after he slipped and fell twice and prison officials did nothing before prisoner fell and injured himself again); Frost v. Agnose, 152 F.3d 1124, 1129 (9th Cir. 1998) (finding a triable issue of fact on prisoner's claim that defendant failed to protect him from slippery floor in situation in which prisoner had a leg cast, used crutches and had fallen and injured himself repeatedly).

Because I understand plaintiff to be alleging that he faces an increased risk of falling in the shower because of his disability, I am inclined to think that he could bring Eighth Amendment claims against jail staff who was aware of the risk plaintiff faced and failed to take steps to help plaintiff. However, plaintiff does not name any individuals as defendants, so I will not allow him to proceed on any such claims.

Similarly, plaintiff may not proceed on Eighth Amendment claims against La Crosse County. To state a claim against the county, plaintiff would have to allege facts suggesting that the county had an express policy or widespread "custom" of similar violations or that an official with final decision making authority committed the violation. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978). Plaintiff does not include these types of allegations in his complaint. Plaintiff remains free to amend his complaint to include Eighth Amendment claims against either the county or individuals, but he will have to name those parties as defendants and explain why he thinks those parties have violated his rights.

Finally, I note that plaintiff alleges that Sergeant Mike Thompson "kept medical records for unknown purposes." However, this allegation is extremely vague and plaintiff does not name Thompson as a defendant, so I do not presume that he is attempting to sue Thompson regarding this incident. If plaintiff intends to bring a claim about these events, he will have to amend his complaint to name Thompson as a defendant and provide more explanation of the events.

ORDER

IT IS ORDERED that

1. The caption is amended to replace defendant La Crosse County jail with La Crosse County.

2. Plaintiff Thomas Fuselier is GRANTED leave to proceed on an Americans with Disabilities Act claim against La Crosse County for failure to properly accommodate his disability to enable him to shower safely.

2. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

3. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

4. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the sheriff informing him of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

5. A summons and copies of plaintiff's complaint, dkt. #1, and this order are being forwarded to the United States Marshal for service on defendant.

Entered this 20th day of March, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge