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

ROY MITCHELL,

Plaintiff,

v.

DANE COUNTY SHERIFF DEPARTMENT, et al.

Defendants.

OPINION & ORDER

Case No. 16-cv-352-wmc

Plaintiff Roy Mitchell brings this action under 42 U.S.C. § 1983, alleging that the Dane County Jail violated her constitutional rights by housing her in a facility with environmental hazards, such as asbestos, lead and black mold. Since filing her initial complaint, Mitchell has filed multiple supplements to her complaint, which the court will construe together for purposes of screening. The court will also grant her request to amend her complaint to add additional defendants. (Dkt. #99.) However, as her complaint should be encapsulated in one document the defendants can answer, the court will not consider any additional "supplements" filed after the date of this order to be a part of her complaint. Mitchell has also filed multiple, repetitive motions for injunctive relief.

Having been permitted to proceed *in forma pauperis*, Mitchell's complaint and supplements are now before this court for screening pursuant to 28 U.S.C. § 1915A. After review, the court concludes that Mitchell may proceed against some defendants on a Fourteenth Amendment claim related to the environmental hazards. However, Mitchell's motions for injunctive relief (dkts. #61, #75, #76) will be denied. Finally, her

request for "issuance of a subpoena" to obtain discovery materials (dkt. #111) will be denied as premature. After the complaint has been served and defendants have had an opportunity to respond, the court will schedule a Preliminary Pretrial Conference with Magistrate Judge Crocker at which time plaintiff will receive instructions on how to obtain discovery in accordance with the Federal Rules of Civil Procedure.

ALLEGATIONS OF FACT[1]

While biologically a male, Roy Mitchell identifies as a female. At the time she filed her complaint, she was housed at the Dane County Jail. Mitchell names as defendants the Dane County Sheriff's Department, Sheriff Dave Mahoney, WIMIC Insurance Company, the Dane County Board of Supervisors and Dane County Executive Joe Parisi. In an amendment to her complaint (dkt. #99), she names Dane County Captain Anhalt, Sergeant Olsen, Sergeant Skerpenski and Deputy Merrill.

Substantively, Mitchell alleges that a portion of the jail – specifically, the 6th and 7th floors -- is outdated and contains environmental hazards that violate current law. In particular, she alleges that inmates and staff are being exposed to lead paint and asbestos, which is being circulated through the jail's air vents. She also alleges that the cells have black mold and "sewage flies." She further alleges that the named defendants know about these hazards, but refuse to remove them. Mitchell also states that she has complained about the sewer system, which has outdated pipes.

[1] Courts must read allegations in *pro se* complaints generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). The court assumes the facts above based on the allegations made in Mitchell's complaint.

In support of her claims, Mitchell has attached several news articles to her complaint. According to these articles, Dane County officials received a recommendation from consultants in May of 2016 to close portions of the Dane County Jail located in Madison's City-County Building due to, among other issues, the potential environmental hazards.

Unrelated to her claims related to the conditions of the jail itself, Mitchell also alleges that the jail is not meeting the requirements of the Prison Rape Elimination Act ("PREA"), which has exposed her to a "high risk of assaults."

OPINION

Plaintiff claims that the environmental hazards and failure to follow PREA regulations amount to constitutional violations, entitling her to injunctive and monetary relief. As an initial matter, however, plaintiff cannot proceed against the Dane County Sheriff's Department or the Dane County Board of Supervisors under § 1983. Although Wisconsin municipalities may be sued, *see* Wis. Stat. § 62.25, agencies and departments may not. *See Best v. City of Portland,* 554 F.3d 698, 698 n.1 (7th Cir. 2009) (noting that "a police department is not a suable entity under § 1983"); *Buchanan v. City of Kenosha,* 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999) (collecting cases). To the extent that the Dane County Sheriff's Department and the Dane County Board of Supervisors form a part of the county government that they serve, they are not "legal entit[ies] separable from the county government," so they are not subject to suit. *Whiting v. Marathon Cnty.*

Sheriff's Dep't, 382 F.3d 700, 704 (7th Cir. 2004). The court will, therefore, dismiss the claims against these defendants.

As it appears that plaintiff was a pretrial detainee at the Dane County Jail during her incarceration there, her claim falls under the Due Process Clause of the Fourteenth Amendment, which provides that "a pretrial detainee may not be punished." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Thus, the issue becomes whether plaintiff was detained under conditions amounting to "punishment in the constitutional sense of that word." *Id.* at 538.

Like claims alleging denial of adequate medical care brought by convicted prisoners, the Eighth Amendment standard applies to the plaintiffs' due process claim. *Smith v. Dart*, 803 F.3d 304, 310 (7th Cir. 2015) ("There is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions of confinement claims, and . . . such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test.") (citing *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013)).[2] The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To constitute cruel and unusual punishment, conditions of confinement must be extreme. *Id.*

[2] After *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), there remains a question whether a "cruel and unusual punishment" standard is applicable to Fourteenth Amendment due process claim relating to a detainee's conditions of confinement, but the Seventh Circuit continues to treat "the protection afforded under [the Due Process Clause] [a]s functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners." *Smith v. Dart*, 803 F.3d at 310. Accordingly, the court applies this standard for purposes of screening.

To demonstrate that prison conditions violate the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Lunsford v. Bennett,* 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions were sufficiently serious so that "a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," *Farmer,* 511 U.S. at 834, or "exceeded contemporary bounds of decency of a mature, civilized society," *Lunsford,* 17 F.3d at 1579. The subjective component requires an allegation that prison officials acted wantonly and with deliberate indifference to a risk of serious harm to plaintiff. *Id.*

I. Environmental Hazards

While quite vague, plaintiff's allegations that she was exposed to hazardous materials at the Dane County Jail appear sufficient to permit an inference that she was subjected to conditions that create a serious risk of injury, at least under the generous standard to which *pro se* litigants are entitled at the screening stage. Exposure to asbestos, lead, and black mold can lead to significant health issues. Given that plaintiff alleges that she was exposed to these elements, she has alleged sufficient facts to suggest that she faced a serious risk of harm.

Plaintiff's complaint is particularly vague about each defendants' involvement in failing to remediate the environmental hazards at the jail, but she does allege that each knew about the issues. In her filings, plaintiff includes (1) recent news articles that describe the recommendation of the consultants; (2) Sheriff Mahoney's involvement in the inspection process; (3) the fact that Joe Parisi did not include any improvement costs

in the 2015 budget; and (4) allegations that Anhalt, Olsen, Skerpenski and Merrill were aware of the black mold issues. Plaintiff further alleges that Joe Parisi has the authority to enact policies to address the unsafe environment of the jail, and that the other defendants had the authority to at least order that the jail cells be cleaned or repaired. Thus, there is enough to infer that Mahoney, Parisi, Anhalt, Olsen, Skerpenski and Merrill were aware of the environmental hazards at the jail. The question, therefore, is whether these defendants' responses to learning about the conditions at the jail amount to deliberate indifference.

At this early stage, the court will infer that these defendants' alleged actions (or inactions) may amount to deliberate indifference. As to Mahoney, it appears that since at least 2014, when he proposed building a new jail, he has been taking the condition of the jail seriously by advocating for plans to improve the conditions of, or close, the jail. What is not yet apparent is whether he could have taken other actions, in the meantime, to ensure the safety of inmates housed in unsafe portions of the jail and failed to do so. As to Parisi, plaintiff's allegations suggest that although he has been informed about the condition of the jail, he failed to make Mahoney's proposed improvements a part of the budget. As for the other defendants, plaintiff's allegations suggest that Anhalt, Olsen, Skerpenski and Merrill could have taken steps to clean the cells or address the black mold, but failed to do so. Accordingly, this claim will proceed past the screening phase for further factual development.

At the same time, plaintiff does *not* include any allegations that would suggest WIMIC, or any representative of WIMIC, has been personally involved in decisions

regarding the environmental hazards present in the jail. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000); *Walker v. Taylorville Correctional Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997) (noting that "personal involvement" is required to support a claim under § 1983). Nor does plaintiff suggest that WIMIC actually insures the jail and could thus be joined as a party under Wis. Stat. § 632.24 (providing for a direct action against an insurer in actions where the insurer of a bond or insurance policy may be liable for the for negligence of another under the terms of the policy). Accordingly, this defendant will be dismissed.

II. Failure to Protect

Plaintiff's complaint and supplements also include allegations that the defendants violated the PREA, which was created to address the widespread problem of sexual assault and harassment in prisons. Unfortunately, PREA does not provide inmates with a private cause of action. *See Rivera v. Drake*, No. 09-cv-1182, 2010 WL 1172602, at *3 (E.D. Wis. Mar. 23, 2010) ("Nothing in the Act suggests that it was intended to create a private cause of action ….").

While Mitchell's allegations leave open the possibility that jail officials acted with deliberate indifference to her risk of sexual assault, also in violation of the Fourteenth Amendment, she has not alleged sufficient facts to infer that: (1) she was actually at risk of sexual assault or harassment; or (2) the named defendants were aware of that risk *and* personally acted with deliberate indifference to the need to protect her.[3] As such,

[3] While also not apparent, the court will infer that Mitchell wishes to name the same defendants in her sexual harassment claim as in her environmental hazard claim. As such, the court has

plaintiff's allegations related to PREA failure to protect fail to meet the requirements of Federal Rule of Civil Procedure 8.

Rule 8(a) requires a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). To demonstrate liability under 42 U.S.C. § 1983, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in a constitutional deprivation. *See Walker v. Taylorville Correctional Ctr.*, 129 F.3d at 413 (noting that "personal involvement" is required to support a claim under § 1983). Dismissal is proper "if the complaint fails to set forth 'enough facts to state a claim to relief that is plausible on its face.'" *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Here, plaintiff offers only the conclusory statement that the jail does not follow PREA regulations; she provided no facts that would support an inference that: specific jail officials failed to follow PREA; nor otherwise failed to protect her; nor has she provided any facts suggesting that she actually experienced a risk of sexual assault, much less that jail staff was deliberately indifferent to her need for protection. Accordingly, while plaintiff may amend her complaint to include more specific allegations against individual defendants, the court will not permit her to proceed on a Fourteenth

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concluded that her complaint does not violate Fed. R. Civ. P. 20. If, however, Mitchell amends her complaint and it is apparent that there is no overlap between the defendants named under her environmental hazard and her failure to protect claim, the court will likely conclude that her amended complaint violates Rule 20 and require her to choose between those claims for purposes of going forward in this case.

Amendment claim related to a failure to protect claim based on the allegations in her complaint alone.

III. Motions for Injunctive Relief (dkts. #61, #75, #76).

Finally, turning to Mitchell's requests for injunctive relief, they will be denied. In each request, Mitchell states that in addition to continual exposure to the asbestos, lead and mold hazards described in her complaint, she has been suffering psychologically since learning of the environmental hazards. She thus seeks an order requiring the defendants to (1) stop using the hazardous portions of the jail, and (2) bring her to the University of Wisconsin-Madison hospital for testing to assess the levels of hazardous materials in her body.

Mitchell's motions appear to be moot, as she is no longer housed at the Dane County Jail and does not suggest that there is a likelihood she will return there in the near future. Even assuming her requests for injunctive relief are not moot, however, her motions are procedurally defective because they fail to comply with this court's procedure for obtaining preliminary injunctive relief, a copy of which will be provided to her with this order. Under these procedures, a plaintiff must file and serve proposed findings of fact that support her claims, along with any evidence that supports those proposed findings of fact. While Mitchell has declared under oath her health and psychological concerns, she has submitted no proposed findings of fact as to the merits of her Fourteenth Amendment claim.

Even Mitchell's motions were not facially flawed, the court would have to deny it on the merits at this time. To prevail on a motion for a preliminary injunction, Mitchell must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. *See Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007).

Mitchell's Fourteenth Amendment claim has sufficient merit to proceed past the screening stage, as well as permit service of the complaint on the named defendants. She has not, however, established that her claim is likely to succeed. At this point, the court has taken as true plaintiff's statements that the Dane County Jail has exposed inmates and staff to hazardous materials.

To succeed on a motion for a preliminary injunction (and ultimately at summary judgment or trial), however, plaintiff would need evidence beyond just her own statements or statements in a newspaper article. She would also need facts showing that the defendants' response to learning about these hazards amounts to deliberate indifference. Beyond her own statements, Mitchell has provided nothing that suggests that the defendants have either completely ignored the conditions or have failed to respond. Those submissions fall far short of the showing necessary to receive the extraordinary relief she seeks. Accordingly, Mitchell is not entitled to injunctive relief.

ORDER

1. Plaintiff Roy Mitchell's motion to amend her complaint (dkt. #99) is GRANTED.

2. Plaintiff Roy Mitchell is GRANTED leave to proceed on a Fourteenth Amendment claim relating to hazardous jail conditions against defendants Sheriff

Dave Mahoney, Joe Parisi, Captain Anhalt, Sergeant Olsen, Sergeant Skerpenski and Deputy Merrill.

3. Plaintiff is DENIED leave to proceed on all other claims. The Dane County Sheriff's Department, Dane County Board of Supervisors and WIMIC Insurance Company are DISMISSED.

4. Plaintiff's motion for issuance of a subpoena (dkt. #111) is DENIED.

5. For the time being, plaintiff must send defendant a copy of every paper or document she files with the court. Once plaintiff has learned what lawyer will be representing the 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 the defendant's attorney.

6. 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 his documents.

7. The clerk's office will prepare summons and the U.S. Marshal Service shall affect service upon the defendants.

8. If plaintiff is transferred or released while this case is pending, it is her obligation to inform the court of her new address. If she fails to do this and defendants or the court are unable to locate her, her case may be dismissed for failure to prosecute.

Entered this 2nd day of December, 2016.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge