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

TERRANCE MOORE,
DONALD ALFORD-LOFTON,
CINCRONE D. GRESHAM,

Plaintiffs,

v.

DAVID J. MAHONEY,
DANE COUNTY SHERIFF
DEPARTMENT AND ITS INSURER,

Defendants.

OPINION AND ORDER

Case No. 18-cv-930-wmc

Pro se plaintiffs Terrance Moore, Donald Alford-Lofton and Cincrone Gresham bring this action under 42 U.S.C. § 1983 against former Dane County Sheriff David J. Mahoney, the Sheriff's Department and their insurer. Specifically, plaintiffs claim that while incarcerated in the Dane County Jail they were exposed to such horrific conditions that their constitutional rights were violated. After screening the complaint under 28 U.S.C. § 1915(e)(2), the court concludes that plaintiffs have articulated a Fourteenth Amendment due process claim related to alleged environmental hazards to which they were exposed, and therefore, they may proceed against defendant Mahoney and his insured, although plaintiffs are cautioned that similar claims have run into substantial proof problems at summary judgment. *Coleman v. Mahoney*, No. 18-cv-902-wmc, 2021 WL 3128856 (W.D. Wis. July 23, 2021); *Shields v. Mahoney*, No. 17-cv-267-wmc, 2020 WL 4431741(W.D. Wis. July 31, 2020). The remaining defendant will be dismissed because the Sheriff's department is not a suable entity.

OPINION

Plaintiffs allege that each of them were being held at the Dane County Jail when they filed their complaint in November of 2018. Plaintiffs complain that they have been subjected to a variety of environmental hazards, including asbestos, black mold, lead in the water and sewage flies.[1]

While not apparent in their complaint, the court will infer for purposes of screening that plaintiffs were pretrial detainees, rather than convicted prisoners, during their time at the jail, so their claims are governed by the due process clause of the Fourteenth Amendment. *Smith v. Dart*, 803 F.3d 304, 309–10 (7th Cir. 2015). Conditions of confinement claims brought by pretrial detainees are governed by the due process clause of the Fourteenth Amendment under the standard set forth by the United States Supreme Court in *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015). *Hardeman v. Curren*, 933 F.3d 816, 821-22 (7th Cir. 2019). Accordingly, the failure to provide adequate conditions of confinement violates the Due Process Clause if: (1) the defendants acted with purposeful, knowing, or reckless disregard of the consequences of their actions; and (2) the defendants' conduct was objectively unreasonable. *Miranda v. Cty. of Lake*, 900 F.3d 335, 353 (7th Cir. 2018). While it is not enough to show negligence, the plaintiff is not required to prove the defendant's subjective awareness that the conduct was unreasonable. *Id.* at 353.

Plaintiffs point to four, specific problematic conditions during their confinement: (1) exposure to asbestos, (2) lead in the water, (3) mold, and (4) pests. First, with respect to both the presence of asbestos and lead in the water, plaintiffs' few allegations regarding

exposure appear to be sufficient to infer that they may have been subjected to a serious risk of injury, at least under the generous standard to which *pro se* litigants are entitled at the screening stage. Indeed, whether or not sufficient here, it is beyond peradventure that exposure to friable asbestos and lead in drinking water cause significant health issues. While plaintiffs do not allege details about their own side effects to date, nor how Mahoney knows about their particular exposure to these hazards, it is reasonable to infer at this stage that Mahoney was aware of the lead in the water at the jail. *See Mitchell v. Dane Cty. Sheriff Dept.*, No. 16-cv-352, slip op. at *6 (W.D. Wis. Dec. 2, 2016). Likewise, at this early stage, the court will infer that defendant Mahoney's inaction and decision to continue to place inmates in a position to have to drink that water permits a reasonable inference of an objectively unreasonable response to the potential harm of lead exposure.

That said, however, plaintiff cannot proceed against the Dane County Sheriff's Department. 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 forms a *part* of county government, they still serve the county, and they are not "legal entit[ies] separable from the county government"; thus, they are not subject to suit. *Whiting v. Marathon Cty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004). The court will, therefore, dismiss this defendant.

This is not to hold that plaintiffs may not be able to proceed against the jail's insurer 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 negligence of another under the terms of the policy), but that is not what plaintiff currently pleads. Plaintiffs may seek discovery from defendants to obtain the name of the jail's insurer, then seek leave to amend their complaint to add that entity as a defendant. For now, however, since they have not listed the actual name of the insurer, the court will not grant them leave to proceed against this defendant on this record beyond any obligation to indemnify or provide a defense to Mahoney.

As plaintiffs proceed with their claim that they have been exposed to lead in the water in particular, they should be aware that they face an uphill battle. This court has already determined in two different lawsuits that Mahoney and Dane County, among others, were not liable for constitutional violations related to the presence of lead in the water at the jail because of significant remediation efforts taken at the jail starting in 2016, and because the plaintiffs made no showing that they suffered injury as a result of lead exposure. *Coleman v. Mahoney*, No. 18-cv-902-wmc, 2021 WL 3128856 (W.D. Wis. July 23, 2021); *Shields v. Mahoney*, No. 17-cv-267-wmc, 2020 WL 4431741(W.D. Wis. July 31, 2020). Absent a showing that plaintiffs actually suffered an injury associated with elevated levels of led in the, water *and* some evidence that Dane County Jail officials failed to take appropriate action to remediate the risk to plaintiffs' health during their confinement at the jail, it is highly unlikely that this claim will survive summary judgment.

Finally, plaintiffs' allegations about flies and mold do not support a constitutional claim as currently pled. Indeed, plaintiffs provide no details about how pervasive the insects or mold has been, much less where in the jail they were exposed to these conditions. For example, if they saw a few bugs in their cell every day, that would not give rise to a reasonable inference that they were subjected to objectively unreasonable conditions of confinement. *Compare Smith v. Dart*, 803 F.3d 304, 312-13 (7th Cir. 2015) ("[T]he mere presence of a laundry list of pests, without more, is ***not*** sufficient to state a constitutional claim.") (emphasis added) *with Sain v. Wood*, 512 F.3d 886 (7th Cir. 2008) (while unpleasant, allegation of cockroach infestation spanning six years, including being bitten twice, did not give rise to a constitutional violation), *and Antonelli v. Sheahan*, 81 F.3d 1422, 1431 (7th Cir. 1996) (prisoner stated claim under the Eighth Amendment by alleging that "cockroaches were everywhere, crawling on his body (along with mice) and constantly awakening him, and causing the environment to be unsanitary") (internal quotations omitted). While plaintiffs may seek leave to amend their complaint to provide additional details about the severity of their bug and mold problems, or to sue the County directly, along with its insurance carrier, for failure to follow established policies and procedures, the court will not grant him leave to proceed on Fourteenth Amendment claims related to bugs or mold or to a nonentity at this stage.

ORDER

IT IS ORDERED that:

1. Plaintiffs Terrance Moore, Donald Alford-Lofton and Cincrone Gresham are GRANTED leave to proceed on Fourteenth Amendment conditions of confinement claims based on their alleged exposure to lead and asbestos, against defendant Sheriff Dave Mahoney and his insurance carrier.

2. Plaintiffs are DENIED leave to proceed on any other claim, and defendants Dane County Sheriff's Department and its insurer are DISMISSED.

3. The clerk's office will prepare summons and the U.S. Marshal Service shall effect service upon defendant.

4. For the time being, plaintiffs must send defendant a copy of every paper or document they file with the court. Once plaintiffs have learned what lawyer will be representing defendant, they should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiffs unless plaintiffs show on the court's copy that they sent a copy to defendant or to the defendant's attorney.

5. Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do not have access to a photocopy machine, they may send out identical handwritten or typed copies of their documents.

6. If a plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claim may be dismissed for failure to prosecute.

Entered this 20th day of September, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge