

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Basil Mohandie,)
)
Plaintiff,)
) No. 17-cv-50355
-vs-)
) (*Judge Johnston*)
John Varga, et al.,)
)
Defendants.)

RESPONSE TO ORDER TO SHOW CAUSE (ECF NO. 96)

Plaintiff, by counsel, responds to the order to show cause as follows:

**I. Plaintiff Has a Viable Damages Claim under the
Rehabilitation Act**

The Eleventh Amendment is not a bar to plaintiff's claim for money damages under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).

42 U.S.C. § 2000d-7 provides in pertinent part: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973."

The Supreme Court described § 2000d-7 in *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) as having "expressly abrogated States' sovereign immunity." *Id.* at 280. The Seventh Circuit applied this rule in *Barrett v. Wallace*, 570 F. App'x. 598, 600 n.1 (7th Cir. 2014). The rule that the Eleventh Amendment does not bar damage claims under the Rehabilitation Act

is now well established. *See, e.g., Reed v. Illinois*, 798 F. App'x 932 (7th Cir. 2020):

The State waived sovereign immunity under the Rehabilitation Act in exchange for the receipt of federal funds, see *Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 671–2 (7th Cir. 2012).

Id. at 935.

The Court should therefore rule on the merits of the Warden's motion to dismiss plaintiff's Rehabilitation Act claim.

II. Defendant Warden Has the Burden to Show that Plaintiff's Claim for Injunctive Relief Is Moot

The Department of Corrections transferred plaintiff from Dixon Correctional Center to the Joliet Treatment Center during the pendency of this case. Unlike *Daugherty v. McClusky*, No. 3:18-cv-50088, 2021 U.S. Dist. LEXIS, 46358, at *10 (N.D. Ill. Mar. 12, 2021), where the plaintiff was released from custody, plaintiff remains in the Department of Corrections.

Defendant Warden has “the formidable burden” to show that plaintiff's transfer to the Joliet Treatment Center means “that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

If the Warden meets his burden, plaintiff's federal claim for injunctive relief against the Warden and Wexford will be moot. The order to show

cause, however, mistakenly places this burden on plaintiff. (ECF No. 96 at 2-3.)

III. Plaintiff's Claims against Wexford Presents a Justiciable Controversy

A fair reading of plaintiff's second amended complaint (ECF No. 54) is that plaintiff suffered harm because of the negligence of a Wexford employee (a state law claim set out in Paragraphs 14-21 of the Second Amended Complaint) and because of Wexford's failure "to have adopted and enforced policies to require accurate appraisals by its employees of the ability to engage in conversation and express concerns and needs." (A Section 1983 claim set out in Paragraph 23 of the Second Amended Complaint.)

Plaintiff does not allege with specificity how the defendants' conduct "harmed him, or that he was at imminent risk of harm because of the defendant's action." (ECF No. 96 at 4.) The Federal Rules of Civil Procedure identify in Rule 9 the items that a plaintiff must allege with specificity and do not include damages, which need only be alleged "generally." *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018).

In a Section 1983 case involving the alleged deprivation of a constitutional right, the plaintiff is entitled to an award of nominal damages without any showing of harm other than the constitutional violation. *Carey v. Phiphus*, 435 U.S. 247, 266 (1978). Such an award does not run afoul of *Spokeo*,

Inc. v. Robins, 136 S.Ct. 1540 (2016) when, as in this case, a plaintiff's claim is based on “a completed violation of a legal right.” *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801–02 (2021) (upholding nominal damages establishing a justiciable controversy).

The Seventh Circuit recently addressed the question presented here in *Wells v. Caudill*, 967 F.3d 598 (7th Cir. 2020):

The district court also took the view that Mr. Wells had to prove specific damages as part of his case on liability. The case law clearly establishes that such proof is not an element of the cause of action. “Damages are not an element of liability in a deliberate indifference claim.” *Cotts v. Osafo*, 692 F.3d 564, 569 (7th Cir. 2012); *See also Calhoun v. DeTella*, 319 F.3d 936, 941–42 (7th Cir. 2003) (explaining the availability of nominal damages for Eighth Amendment violations). Whether there is liability and whether there are damages are two separate inquiries, “with the liability inquiry [being] the threshold one.” *Cotts*, 692 F.3d at 569.

Id. 604-05.

IV. Conclusion

The Court should therefore require the Warden to show, if he can, that plaintiff's transfer to the Joliet Treatment Center means “that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

The Court should proceed to the merits of the motions to dismiss on plaintiff's Rehabilitation Act claim against the Warden and plaintiff's claims against Wexford.

Respectfully submitted,

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 08830399
Joel A. Flaxman
200 South Michigan Ave Ste 201
Chicago, Illinois 60604
(312) 427-3200
Attorneys for Plaintiff