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

Joseph Keeling,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 23-cv-3442
	)	
Sheriff of Lake County, Lake County, Illinois, and Lake County Correctional Officer Doe,	)	*(Judge Seeger)*
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO MOTION TO DISMISS

The Court should deny the motion to dismiss (ECF No. 9) for the reasons set out below.

I. Plaintiff's Claims

Plaintiff, a resident of the Northern District of Illinois, entered the Lake County Jail as a pretrial detainee on June 8, 2022. (ECF No. 1, ¶ 6.) Plaintiff left the Jail the next day when he was transferred to the McHenry County Jail. (ECF No. 1, ¶ 18.)

During medical screening for admission to the Lake County Jail, a registered nurse "correctly determined that plaintiff had a medical condition known as 'recurrent hypertensive crisis' that required, *inter alia*, that he be housed at the Jail in a lower bunk on a lower tier." (ECF No. 1, ¶ 7.) The Seventh Circuit held in *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d

1170 (7th Cir. 2013), that this medical condition is a "disability" because it impairs a major life activity under 42 U.S.C. § 12102(1). (ECF No. 1, ¶ 8.)

Defendant Doe, the officer in charge of assigning a bunk to plaintiff, (ECF No. 1, ¶ 10), knew that a nurse had determined that plaintiff required a bottom bunk.[1] (ECF No. 1, ¶ 11.) Doe refused to follow the medical order (ECF No. 1, ¶ 12), and, when plaintiff protested the bunk assignment, Doe told him that the Jail was not a hotel. (ECF No. 1, ¶ 13.)

Because he had not been assigned to a lower bunk, "plaintiff became ill while assigned to the top bunk and had a grand mal seizure that required emergency treatment at the Vista East Hospital." (ECF No. 1, ¶ 16.) Plaintiff returned to the Jail after treatment at the hospital. (ECF No. 1, ¶ 17.)

Doe's failure to assign plaintiff to an upper bunk gives rise to two federal claims: First, an ADA/RA claim against the Sheriff, *Brown v. Meisner*, ___ F.3d ___, 7th Cir., No. 22-2458, 2023 WL 5498739 (Aug. 25, 2023).[2] Second, a Section 1983 claim against Doe, *Bolling v. Carter*, 819 F.3d 1035, 1036 (7th

[1] Doe has not yet appeared; defendant Sheriff is seeking to identify the female correctional officer who placed plaintiff in the upper bunk on June 8, 2022. (ECF No. 11, Section H.)

[2] The ADA and the RA "are materially identical." *A.H. by Holzmueller v. Illinois High Sch. Assn.*, 881 F.3d 587, 592 (7th Cir. 2018) (cleaned up).

Cir. 2016). Plaintiff also brings a claim under state law for willful and wanton negligence against the Sheriff and defendant Doe.[3]

Plaintiff was transferred to the McHenry County Jail on June 9, 2022 (ECF No. 1, ¶ 18) and remained there until August 5, 2022. (ECF No. 1, ¶ 20.) "In accordance with the standard operating procedure at the Lake County Jail," plaintiff arrived in McHenry without records showing that he had had a grand mal seizure on June 8, 2022. (ECF No. 1, ¶ 19

While at the McHenry County Jail, plaintiff suffered injuries from a variety of serious health problems, including "nervousness, anxiety, restlessness, sweating, heat intolerance, tremor, weight loss, palpitations, and tachycardia." (ECF No. 1, ¶ 21.) Plaintiff alleges that a proximate cause of these health problems was medical malpractice by "[t]he health care providers at the McHenry County Jail [who] misdiagnosed plaintiff as experiencing symptoms of detoxification and did not provide the appropriate treatment for these symptoms of 'recurrent hypertensive crisis.'" (ECF No. 1, ¶ 22.) Plaintiff's complaint expressly states that these allegations are intended to provide

[3] Plaintiff relies on "conventional tort principles and the immunity protection afforded by statutes." *Coleman v. E. Joliet Fire Protec. Dist.*, 2016 IL 117952, ¶ 61, 46 N.E.3d 741, 758 (2016); *see also Glover v. City of Chicago*, 2023 IL App (1st) 211353, ¶ 49, ___ N.E.3d ___, ___ (2023).

notice of plaintiff's intent to invoke "common law principles of causation" that defendants Sheriff of Lake County and Doe "are responsible for the aggravation of injuries" caused by medical malpractice at the McHenry County Jail. (ECF No. 1, ¶ 25.) Defendants mistakenly ask the Court to construe this claim against the Sheriff and Doe as a state law medical malpractice claim against personnel at the Lake County Jail. (ECF No. 9 at 4.) Plaintiff, however, does not make any allegation of medical malpractice by personnel at the Lake County Jail.

II. The Motion to Dismiss Is Without Merit

A. An ADA/RA claim and a Section 1983 claim may be raised in the same complaint

The first argument advanced by defendants is that plaintiff may not assert an ADA/RA claim in the same complaint as constitutional claims brought under 42 U.S.C. § 1983. (ECF No. 9 at 3-4.) This argument is contrary to Rule 8(d)(3) of the Federal Rules of Civil Procedure, which allows a party to "state as many separate claims or defenses it has." This Court applied Rule 8(d)(3) in *Hill v. Cook County*, 463 F. Supp. 3d 820, 848 (N.D. Ill. 2020); defendants are unable to explain why the Court should disregard the rule in this case.

Defendants are also unable to explain why plaintiff may not, as in *Alamo v. Bliss*, 864 F.3d 541 (7th Cir. 2017), join statutory and state-law claims with a Section 1983 claim. Instead, defendants rely on cases holding that "the

comprehensive enforcement schemes adopted by Congress in the ADA and the Rehabilitation Act of 1973 preclude [a plaintiff] from seeking to enforce a violation of either statute through 42 U.S.C. section 1983." *Silk v. City of Chicago*, 95 C 0143, 1996 WL 312074, at *19 (N.D. Ill. June 7, 1996), aff'd 194 F.3d 788 (7th Cir. 1999) (cited by defendants at ECF No. 9 at 3 n.2.) This rule has no application here because plaintiff is not seeking to enforce the ADA or the RA through Section 1983.[4] Plaintiff brings separate claims under the ADA/RA and under Section 1983.

In contrast to the complaint in *Dargis v. Sheahan*, 02 cv 6872, 2005 WL 946909 (N.D. Ill. Mar. 25, 2005), *aff'd*, 526 F.3d 981 (7th Cir. 2008) (ECF No. 9 at 3 n.2), plaintiff does not seek to use Section 1983 to impose individual liability for a violation of the ADA. *Id.* at *9. Plaintiff makes plain in his complaint that his ADA/RA claim is against the Sheriff of Lake County (ECF No. 1, ¶ 3) and not against any individual. Defendants are mistaken in their reliance on *Dargis*.

Defendants also contend that plaintiff may not complain about the same wrongdoing in his Section 1983 claim against defendant Doe as in his

[4] The "private judicial right of action" in the ADA and the RA appears to foreclose using Section 1983 to enforce either of these statutes. *Health and Hosp. Corp. of Marion County v. Talevski*, 143 S. Ct. 1444, 1460 (2023)

ADA/RA claim against the Sheriff. (ECF No. 9 at 3.) This Court rejected this meritless argument in *Douglas v. Alfasagma USA, Inc.*, 19-CV-2272, 2021 WL 2473790 (N.D. Ill. June 17, 2021):

> At the pleading stage, a plaintiff does not have to pick a horse. A plaintiff can offer different theories in the alternative. *See* FED. R. CIV. P. 8(d)(2) (permitting a party to "set out 2 or more statements of a claim...alternatively or hypothetically, either in a single count or defense or in separate ones," and providing that "[i]f a party makes alternative statements, the pleading is sufficient if any one of them is sufficient"); *see also Alamo v. City of Chicago*, 2018 WL 5830763, at *4 (N.D. Ill. 2018) (rejecting the defendant's argument that the plaintiff "has failed to state a claim because he advances the mixed-motive theory that he was discriminated against both for his disability and for his race and national origin" because the defendant "has offered, and this Court is aware of, no authority establishing that alleging multiple forms of illegal discrimination constitutes an improper mixed-motive theory"). So, a plaintiff can allege that the defendant took a particular action solely because of race, or the defendant took a particular action solely because of sex. Or maybe both.

Id. at *14.[5] As another district judge explained in rejecting the same argument:

> Additionally, Defendant argues that Plaintiff cannot state a claim for both breach of contract (Count I) and breach of express warranty (Count II), as they rely on the same underlying facts. [27] at 3. Defendant is incorrect. Although Count I (breach of contract) and Count II (breach of express warranty) rely on the

[5] At summary judgment, the Court counted five claims in *Douglas*, including one claim that bonus payments were discriminatory on the basis of sex or, in a separate claim, on the basis of race. *Douglas v. Alfasigma USA, Inc.*, 19-CV-2272, 2022 WL 18027518, at *2 (N.D. Ill. Dec. 30, 2022).

> same facts, at the pleading stage, Plaintiff is not required to choose one avenue for recovery over the other.

Solvay USA v. Cutting Edge Fabrication, Inc., 521 F.Supp.3d 718, 725 (N.D. Ill. 2021).

1. Plaintiff's ADA claim

Plaintiff states an ADA claim because he is a "qualified individual with a disability"—here, "recurrent hypertensive crisis"—who was denied the reasonable accommodation of a lower bunk. As the Seventh Circuit recently stated in *Brown v. Meisner*, ___ F.3d ___, 7th Cir., No. 22-2458, 2023 WL 5498739 (Aug. 25, 2023):

> To state a claim under Title II of the ADA, Brown needed only to plead facts suggesting that he is a "qualified individual with a disability" who "by reason of such disability" was "denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. An allegation that the defendants failed to make reasonable accommodations can state a violation of Title II of the ADA. *E.g.*, *Shaw v. Kemper*, 52 F.4th 331, 334 (7th Cir. 2022), citing § 12132 and 28 C.F.R. § 35.130(b)(7)(i) (reversing dismissal of prisoner's Title II claim).

Id. at *2.

The plaintiff in *Brown* stated a "plausible claim for relief under Title II of the ADA" because his "alleged knee injury renders him disabled within the meaning of the ADA," and because "[d]espite knowledge of his condition … prison officials 'kept him in imminent danger by denying him reasonable accommodation." *Id.*

In this case, plaintiff's "recurrent hypertensive crisis" rendered him disabled under the ADA; plaintiff was denied a "reasonable accommodation" when defendant Doe rejected the nurse's order that plaintiff be assigned to a lower bunk. And this denial kept plaintiff in imminent danger. Doe is not an appropriate defendant in the ADA/RA claim because "there is no personal liability under Title II of the ADA." *Stanek v. St. Charles Community Unit School Dist. No. 303*, 783 F.3d 634, 644 (7th Cir. 2016). Plaintiff therefore asserts his ADA/RA claim against only defendant Sheriff in his official capacity. This claim is different than plaintiff's Section 1983 claim against defendant Doe.

2. Plaintiff's Section 1983 claim against defendant Doe

Plaintiff's section 1983 claim against defendant Doe is identical to the claim approved by the Seventh Circuit in *Bolling v. Carter*, 819 F.3d 1035 (7th Cir. 2015).

In *Bolling*, a jail physician ordered that a pretrial detainee be assigned to a lower bunk. *Bolling*, 819 F.3d at 1036. Jail officials ignored the physician's order, causing plaintiff to aggravate a pre-existing back injury. *Id.* The Seventh Circuit held that these allegations stated a Section 1983 claim against the jail officials and reversed a grant of summary judgment "with respect to the plaintiff's claim of willful indifference to an acute medical need." *Id.* at 1036-37.

The willful indifference standard of *Bolling* did not survive *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018). Under *Miranda*, plaintiff must show that defendant Doe's conduct was objectively unreasonable. *Id.* at 352. That claim, like the claim in *Bolling*, is different than plaintiff's ADA claim of failure to accommodate a disability. The Court should reject defendants' contrary arguments.

B. The complaint does not advance a state law medical malpractice claim

The Court should reject defendants' request to view the complaint as raising a state law medical malpractice claim and then dismiss the complaint for failing to attach an affidavit from a physician that "there is a reasonable and meritorious cause" for the action. 735 ILCS 5/2-622.

First, in *Young v. United States*, 942 F.3d 359 (7th Cir. 2019), the Seventh Circuit set out a black-letter rule "that a complaint in federal court cannot properly be dismissed because it lacks an affidavit and report under § 5/2-622." *Id.* at 351. The procedural vehicle for a party complaining about the absence of the affidavit and report is to file an answer and a motion for summary judgment. *Id.* at 352.

Second, plaintiff does not bring a medical malpractice claim against any defendant. Plaintiff's claims are about what happened at the Lake County Jail. Plaintiff alleges that the defective medical treatment he received at the

McHenry County Jail aggravated the injuries he received at the Lake County Jail, but he does not seek relief from the health care practitioners at McHenry in this case. (ECF No. 1, ¶ 25.) The Lake County defendants are liable for "any aggravation of the injury caused by a physician's malpractice." *Gertz v. Campbell*, 55 Ill. 2d 84, 88, 302 N.E.2d 40, 43 (1973). This rule is also part of federal common law and applies to hold the United States "liable when an on-the-job injury is treated negligently at a hospital, magnifying the job-related loss." *Bourke v. United States*, 25 F.4th 486, 489 (7th Cir. 2022).

The Court should therefore reject defendants' request to view this case as including a medical malpractice claim against any of the defendants.

III. The complaint satisfies pleading standards

In a terse and undeveloped discussion (ECF No. 9 at 6-7), defendants assert two arguments about the complaint:

1. Plaintiff fails to state what claim he is asserting against each defendant; and
2. Plaintiff's complaint also fails to elucidate what substantive rights he seeks to vindicate under § 1983.

(ECF No. 9 at 7.)

The Court should reject this meritless argument.

Plaintiff alleges in paragraph 3 of his complaint that "Defendant Sheriff of Lake County is the appropriate defendant on plaintiff's ADA and RA claims." (ECF No. 1, ¶ 3.)

In the same paragraph, plaintiff states that he "sues the Sheriff under the doctrine of respondeat superior on plaintiff's supplemental state-law claim and as the potential indemnitor of defendant Doe on plaintiff's Section 1983 claim." (*Id.*)

Plaintiff discussed the sufficiency of his ADA/RA claim above at page 6 and demonstrated that the recent decision of the Seventh Circuit in *Brown v. Meisner*, 22-2458, 2023 WL 5498739, at *2 (7th Cir. Aug. 25, 2023), requires that the Court reject defendants' challenge to the sufficiency of his ADA/RA allegations.

Plaintiff provides notice of his claims against defendant Doe in paragraphs 13-16 of his complaint:

> 13. Plaintiff protested this bunk assignment to Doe, but Doe refused to follow the health care provider's order, telling plaintiff that the Jail was not a hotel.
>
> 14. Defendant Doe acted in an objectively unreasonable manner in refusing to follow the health care provider's order to assign plaintiff to a bottom bunk.
>
> 15. Defendant Doe acted in a willful and wanton manner in refusing to follow the health care provider's order to assign plaintiff to a bottom bunk.
>
> 16. As a result of defendant Doe's conduct, plaintiff became ill while assigned to the top bunk and had a grand mal seizure that required emergency treatment at the Vista East Hospital.

(ECF No. 1, ¶¶ 13-16.) These paragraphs provide notice of the alleged wrongdoing of defendant Doe and the way it caused injury to plaintiff.

Plaintiff demonstrated at page 6 above that his section 1983 claim against defendant Doe is supported by the Seventh Circuit's opinion in *Bolling v. Carter*, 819 F.3d 1035 (7th Cir. 2015.)

"In the era of notice pleading," *Chaitoff v. Experian Information Solutions, Inc.*, No. 21-2632, ___ F.3d __, 2023 WL 5200125 at *8 (7th Cir. Aug. 14, 2023), defendants' terse challenge to the sufficiency of the complaint is meritless and should be denied.

IV. Conclusion

The Court should therefore deny the motion to dismiss.

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