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

JOSEPH KEELING, Plaintiff, v. SHERIFF OF LAKE COUNTY, ILL., LAKE COUNTY, ILL., and LAKE COUNTY CORRECTIONAL OFFICER DOE, Defendants.	Case No. 23 CV 3442 Judge Steven C. Seeger Magistrate Judge Young B. Kim

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiff's response brief lays bare the problems with his complaint. Plaintiff has now explained that he is pleading a separate alternative ADA claim against the Sheriff and a separate §1983 claim against the Doe correctional officer. But this distinction is not in his complaint and he provided no statutory or constitutional basis for the §1983 claim other than the ADA. Plaintiff now asserts that he is bringing a state law "willful and wanton negligence" claim -- a phrase that appears nowhere in his complaint. Plaintiff's claims should be dismissed and he should replead to meet minimal notice pleading.

I. The Plaintiff's ADA claim operates to preclude his § 1983 claim.

Plaintiff claims be alleging alternative theories of ADA violation and a §1983 violation. He cites cases permitting alternative pleadings, but none of those cases involve §1983 claims premised upon ADA violations. Plaintiff ignores precedent that explicitly denies this approach. (*See* Dkt. # 9, at 3). Plaintiff is not permitted to seek ADA's statutory damages and Section §1983's damages because it represents "two bites at the precisely same apple." *Jones v. Reg'l Transport. Auth.*, 2012 WL 2905797, at *6 (N.D. Ill. July 16, 2012).

Plaintiff claims that his ADA claim is not being brought under §1983, but rather as a completely separate claim. (Dkt. #14, at 8). A §1983 claim seeks damages for

"deprivation of any rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C § 1983. Plaintiff does not specify any constitutional or statutory right underlying his §1983 claim; the only predicate statutes even mentioned in the complaint are the ADA and Rehabilitation Act. Defendants have a right to notice of the actual statutory or legal basis for his §1983 claim.

II. Plaintiff Must Meet the Illinois Pleading Standards by Supplying a Physician's Affidavit

Defendants concede that Plaintiff may have the opportunity to provide an §5/2-622 affidavit prior to a court-imposed deadline, pursuant to *Young v. United States*, 942 F.3d 349 (7th Cir. 2019) -- although the court there addressed a *pro se* plaintiff, unlike here (see *id.* at 351). In any case, Plaintiff is incorrect that he never needs to meet that pleading standard. (Dkt. #14, at 9).

Because Illinois courts construe "healing art malpractice" broadly, even a complaint cast as an action for ordinary negligence must include a certificate if the applicable standard of care involves "distinctively medical knowledge or principles, however basic[.]" *Woodard v. Krans*, 234 Ill. App. 3d 690, 705 (2d Dist. 1992). Here, the Plaintiff alleges that his injury was brought about by a deviation of "the standard of care" by McHenry County, who misdiagnosed plaintiff's medical condition. Plaintiff claims that that deviation from the standard of care was proximately caused by Lake County defendants (¶¶ 23–24.) Therefore, to establish damages for aggravating medical malpractice, plaintiff must prove that medical malpractice actually occurred. Plaintiff cannot simply say "medical malpractice" and ask that the Court take his word for it without meeting the minimal pleading standard. If the damages/injury invokes medical malpractice

or a heightened standard of care, plaintiff must still (eventually) meet the pleading requirements of a physician's affidavit supporting his claim.

III. Plaintiff's response brief demonstrates the failure to meet the notice pleading standard.

Notice pleading requires that a plaintiff "give the defendant fair notice of what claim the plaintiff is making and what the basis for that claim is." *McCray v. Wilkie*, 966 F.3d 616, 620 (7th Cir. 2020). Notice pleading under Rule 8(a)(2) requires plaintiff to give enough detail to enable defendant to prepare an answer. *Marshall v. Knight*, 445 F. 3d 965, 968 (7th Cir. 2006). Defendants are unable to formulate an answer or assert appropriate affirmative defenses, because they are left to guess as to what claims plaintiff intends to bring.

Plaintiff claims that defendants are on adequate notice of his state law claims because he "brings a claim under state law for willful and wanton negligence against the Sheriff and defendant Doe." (Dkt. #14, at 3.) This allegation illustrates the problem with plaintiff's complaint; nowhere does it allege a cause of action for "willful and wanton negligence." Is plaintiff alleging that a "willful and wanton negligence" action is based upon the failure to transmit medical records to McHenry County? Such a claim would be subject to dismissal pursuant to absolute immunity provided under Section 4-103 of the Illinois Local Government and Government Employee Tort Immunity Act, 745 Ill. Comp. Stat. 10/1-101 *et seq*. See *Love v. Dart*, 2022 WL 797051, at *7 (N.D. Ill. Mar. 16, 2022) (finding county sheriff absolutely immune for failure to supervise or provide sufficient correctional facilities). Had plaintiff alleged such a claim, defendants would have moved to dismiss on that basis. However, the only state law claims plaintiff actually mentioned in his complaint are "medical malpractice" and vague illusions to "Illinois

common law." (Dkt. #1, at ¶25). Notice pleading requires at least an identification of the operative state law claims.

Similarly, defendants are unable to formulate an answer or affirmative defenses to plaintiff § 1983 claim because the complaint – not his response brief – does not state the law or Constitutional right that plaintiff seeks to vindicate (if, as plaintiff now alleges, it is something separate than the underlying ADA claim). At minimum, plaintiff should be ordered to clarify his claims so that defendants are not unfairly surprised and can adequately answer the complaint and pursue discovery.

Conclusion

For the reasons stated above, the plaintiff's complaint should be dismissed, and the plaintiff should replead his complaint with a pleading that is pursuing and against whom. Further, defendants respectfully request that the court set a deadline for plaintiff to supply the necessary physician's affidavit pursuant to §5/2-622.

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Respectfully submitted,
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