

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

ROY MITCHELL,

Plaintiff,

ORDER

v.

15-cv-108-wmc

EDWARD F. WALL, *et al.*,

Defendants.

On April 7, 2015, this court granted plaintiff Roy Mitchell leave to proceed under 42 U.S.C. § 1983 on an Eighth Amendment claim against defendants Dr. Kevin Kallas and Dr. Dawn Laurent for their alleged failure to treat Mitchell for Gender Identity Disorder (“GID”) while she was incarcerated in the Wisconsin Department of Corrections. At the same time, the court denied Mitchell leave to proceed against the remaining defendants, who are employed as parole or probation agents. Mitchell also filed a motion for temporary restraining order or preliminary injunction, which the court denied on April 8, 2015. Mitchell appealed the court’s order denying the preliminary injunction, and that appeal is now pending in the Court of Appeals for the Seventh Circuit.

When the court granted Mitchell’s request to proceed with her appeal *in forma pauperis*, the court administratively closed this matter pending Mitchell’s appeal. Since then, however, Mitchell has filed several motions: Motion to Strike Answer (dkt. #39); Motion for Sanctions and supplement (dkt. #40, #50); Motion for Assistance in

Recruiting Counsel and supplements (dks. #42, #44, #46); Motion for Change of Judge (dkt. #47); and a Motion to Amend Complaint and supplement (dks. #49, #51, #52).¹

Since the court still has jurisdiction over Mitchell's Eighth Amendment claim against defendants Dr. Kevin Kallas and Dr. Dawn Laurent, there is no reason to delay resolution of pending motions or these proceedings generally. Accordingly, the court will reopen this matter to rule on the pending motions and set this matter on a schedule to proceed with discovery, dispositive motions and, if necessary, trial.

Turning to the pending motions, both the Motion to Strike Answer (dkt. #39) and Motions for Sanctions (dks. #40, #50) object to the content of the defendants' Answer. These motions claim that the defendants' answer is fraudulent. As plaintiff's motions are wholly unsupported, they will be denied, and plaintiff is reminded that it is not necessary to respond to defendants' Answer further. *See* Fed. R. Civ. P. 7.

In the Motion for Assistance in Recruiting Counsel and supplements (dks. #42, #44, #46), plaintiff seeks recruitment of counsel in light of the conditions of her confinement at the Dane County Jail, as well as her physical and mental health issues. Before deciding whether it is necessary to recruit counsel, however, a plaintiff must have made reasonable efforts to find a lawyer on her own and has been unsuccessful, or that she has been prevented from making such efforts. *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). To prove that she has made reasonable efforts to find a

¹ Some of those filings have included unredacted personal identifying information. Mitchell is reminded that filings containing social security numbers, date of birth, taxpayer information numbers, financial account numbers, and names of minor children are to be redacted in accordance with Fed. R. Civ. P. 5.2(a).

lawyer, plaintiff must specifically give the court the names of at least three lawyers who denied plaintiff's request for representation. Mitchell has submitted just one letter from an attorney declining to represent her. (Dkt. #46-2.) As she has not yet complied with the requirement to make reasonable efforts to find a lawyer, this motion will be denied.

What is more, Mitchell has been representing herself relatively capably thus far in this matter. So even if Mitchell had shown sufficient unsuccessful efforts at retaining an attorney, the court would not grant this motion. *See Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007) (the central question in deciding whether to request counsel for an indigent civil litigant is "whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself").

In the Motion for Change of Judge (dkt. #47), Mitchell requests a new judge because she fears that this court is biased against her due to its previous orders in this matter, as well as certain decisions in her lawsuit in *Mitchell v. Price*, Case No. 11-cv-260-wmc. Under 28 U.S.C. § 455, recusal is necessary in a number of circumstances, including when a judge's impartiality might reasonably be questioned or when he or she has a personal bias or prejudice concerning a party. Nothing in this case nor in Case No. 11-cv-260-wmc lead the court to believe that its impartiality can reasonably be questioned, and the court assuredly holds no personal bias or prejudice against Mitchell. The motion for recusal is, therefore, denied.

Finally, Mitchell filed a motion to amend her complaint, and a supporting supplement and letter. (Dkts. #49, 51, 52.) The handwriting is difficult to decipher, but plaintiff appears to request that the court permit her to amend her complaint to add ADA and Rehabilitation Act claims against all the defendants named in her original complaint.

Where, as is the case here, a responsive pleading has been filed, the court has discretion to grant or deny motions to amend. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995). As it is apparent that Mitchell has no claim under either the ADA or Rehabilitation Act, the motion will be denied as futile. *CogniTTest corp. v. Riverside Pub. Co.*, 107 F.3d 493, 499 (7th Cir. 1997) (leave to amend may be denied “where amendment would be futile”). Moreover, the proper defendant for claims under the ADA and the Rehabilitation Act is generally the relevant state agency or its director in his official capacity. *See* 42 U.S.C. § 12131(1)(b); *Jaros v. Illinois Dep’t of Corrections*, 684 F.3d 667, 670 n.2 (7th Cir. 2012) (noting that because individual capacity claims are not available, the proper defendant is the agency or its director in his official capacity). Accordingly, Mitchell cannot proceed against any of the defendants named individually in this lawsuit.

In fairness, she did name defendants Wall and Hamblin in their official capacities, but Mitchell may not proceed against them because GID is specifically excluded as a disability under the ADA and Rehabilitation Act. 29 U.S.C. § 705(20)(F) (“Disability does not include ... gender identity disorders not resulting from physical impairments”);

42 U.S.C. § 12211 (“the term ‘disability’ shall not include ... gender identity disorders not resulting from physical impairments”).

ORDER

IT IS ORDERED that this matter is REOPENED. Plaintiff’s Motion to Strike Answer (dkt. #39), Motion for Sanctions (dkt. #40), Motion for Assistance in Recruiting Counsel (dkt. #42), Motion for Change of Judge (dkt. #47) and Motion to Amend Complaint (dkt. #49) are DENIED. The clerk’s office is DIRECTED to set this matter for a preliminary pretrial conference before Magistrate Judge Stephen Crocker.

Entered this 6th day of August, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge