

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

FREDERICK ROGERS,

Plaintiff,

ORDER

v.

01-C-589-C

C.O. LOCKWOOD,

Defendant.

In October 2001, plaintiff filed this lawsuit against defendant C.O. Lockwood, alleging that Lockwood deliberately exposed him to second hand cigar smoke, knowing that plaintiff had been tortured with cigars as a child and that the smell of cigar smoke caused him great mental anguish and pain. In August 2002, judgment was entered dismissing this case without prejudice. The dismissal was warranted under Fed. R. Civ. P. 4(m), because well over 120 days had passed since plaintiff filed his complaint and he had not been able to serve the defendant with his complaint. Indeed, it appeared to this court that all reasonable efforts to locate and serve the defendant had been exhausted when the Marshals Service filed a receipt and return form dated July 30, 2002, indicating that the deputy marshal who had attempted for a second time to serve plaintiff's complaint had learned from a tenant residing at Lockwood's former address that Lockwood had moved to Minnesota in January of 2002. Now plaintiff has filed a document entitled "Amended Complaint," which I construe to include a motion to

reopen this case. The motion will be denied.

In his amended complaint, plaintiff repeats the claim he raised in his original complaint: that his Eighth Amendment right to be free from cruel and unusual punishment was violated when he was exposed to environmental tobacco smoke maliciously produced by defendant Lockwood's cigars. However, instead of naming C.O. Lockwood as a defendant, plaintiff now has named as defendants Lockwood's supervisors and high officials at the prison where plaintiff was confined during the time at issue, the Dodge Correctional Institution. Plaintiff alleges for the first time in his proposed amended complaint that he complained to these supervisors and high officials about Lockwood's smoking and that "respondents notes Lockwood's actions [described] in the complaint . . . as 'moot' (of little or no practical value or meaning)."

At this late date, I am unwilling to allow plaintiff to reopen a case that is more than a year old and that has been closed for nearly five months, for the purpose of amending the complaint to add defendants he could have sought to add long ago. If plaintiff wants to claim that Lockwood's supervisors and other high officials at the Dodge Correctional Institution violated his constitutional rights by failing to take action on his complaints about Lockwood's conduct, then he is free to file a new lawsuit. Before he files a new action, however, I suggest that plaintiff explore more thoroughly what prison officials may have meant when they dismissed his complaints about Lockwood on the ground that his complaints were moot. Generally, an issue that is moot when it is no longer active or alive. If plaintiff did not complain to high officials about Lockwood's conduct until after the conduct had ceased, whether because Lockwood was no longer employed at the prison or for some other reason, then there

would be no legal basis for a federal claim against the officials who dismissed his complaints as moot. High officials are not liable in federal court for violations of a constitutional right under a theory that they had a duty to supervise their subordinates. Such persons are liable under 42 U.S.C. § 1983 only if the plaintiff can show that the high officials were aware of the offending action at the time it was occurring and failed to correct it or that they directed the action be taken in the first place.

ORDER

IT IS ORDERED that plaintiff's motion to reopen this case is DENIED. Plaintiff is

free to file a new lawsuit if he wishes to pursue his claim against persons other than C.O. Lockwood.

Entered this 14th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge