IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Plaintiff, ORDER

v. 03-C-0021-C

GERALD BERGE,

Defendant.

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This case is proceeding on plaintiff Berrell Freeman's claim that defendant Gerald Berge violated plaintiff's right to be free from cruel and unusual punishment by depriving him of food. Plaintiff has moved to amend his complaint under Fed. R. Civ. P. 15(a) to include additional defendants that he believes are responsible for the deprivation: Peter Huibregtse, the deputy warden of the Wisconsin Secure Program Facility; Gary Boughton, the security director of the facility; and John Sharpe and Brad Hompe, both of whom are or were unit managers at the facility. In addition, plaintiff wishes to supplement his complaint under Rule 15(d) to include other instances of food deprivation that occurred after he filed his complaint. Defendant objects to the amendment on three grounds: futility, undue delay and unfair prejudice. Foman v. Davis, 371 U. S. 178, 182 (1962) (district court may deny

motion to amend complaint if there was undue delay in bringing the motion, if there is a dilatory motive on the part of the movant or if amendment would be futile or cause unfair prejudice to opposing party); Glatt v. Chicago Park District, 87 F.3d 190, 194 (7th Cir. 1996) (applying same standard to motion to supplement under Rule 15(d)).

I disagree with defendant's arguments that filing a motion to amend would be futile and that plaintiff was dilatory in bringing the motion. Further, any unfair prejudice may be cured by extending the trial date. Accordingly, I will grant plaintiff's motion to amend and supplement his complaint.

Futility

Defendant's futility argument is based on 42 U.S.C. § 1997e(a), which requires prisoners to exhaust any available administrative remedies before they bring suits in federal court challenging prison conditions. Specifically, defendant says that plaintiff has "provided no proof" that he exhausted his administrative remedies with respect to the new defendants and additional instances of food deprivation. As an initial matter, I note that it is defendant and not plaintiff that must "provide proof" of the absence of plaintiff's exhaustion efforts because failure to exhaust administrative remedies is an affirmative defense. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). In any event, even if I assume that plaintiff has not filed any inmate complaints regarding food deprivation besides those that are already in the

record, I cannot conclude that allowing plaintiff to amend his complaint would be futile.

Most of defendant's argument centers on plaintiff's failure to identify the names of the new defendants in his inmate complaints. Curiously, defendant did not make this argument with respect to himself in his earlier motion to dismiss for lack of exhaustion, even though plaintiff's inmate complaints do not identify defendant by name either. Perhaps defendant recognized then what he is trying to challenge now, which is that plaintiff was not required to name the defendants in his inmate complaints.

Defendant relies on Burton v. Jones, 321 F.3d 569 (6th Cir. 2003), and Curry v. Scott, 249 F.3d 493, 504-05 (6th Cir. 2001), in which the court concluded that the prisoner had not exhausted his claims as to a particular defendant because that defendant was not named in the administrative complaint. Although the Court of Appeals for the Seventh Circuit has noted this approach, it has not adopted it. Rather, in Strong v. David, 297 F.3d 646, 647 (7th Cir. 2002), the court held that the level of specificity required in a prison grievance is determined by what the administrative system requires. A review of the Wisconsin Administrative Code reveals that it contains few content-related requirements for inmate complaints. Wis. Admin. Code § DOC 310.09(1) requires the inmate to type or write the complaint legibly, to sign the complaint, to refrain from using abusive or obscene language, to file the complaint under his assigned name and to "clearly identify" the issue that is the subject of the complaint.

Defendant does not suggest that plaintiff failed to comply with any of these requirements. Instead, he argues that the requirement to name each defendant in an inmate complaint can be found in Wis. Admin. Code § DOC 310.05, which provides:

> Before an inmate may commence a civil action or special proceedings against any officer, employee or agent of the department in the officer's, employee's or agent's official or individual capacity for acts or omissions committed while carrying out that person's duties as an officer, employee or agent or while acting within the scope of the person's office, the inmate shall exhaust all administrative remedies that the department of corrections has promulgated by rule.

Although this section includes several references to "officers," "employees" and "agents," it is in the context of discussing *civil actions* against these individuals, *not* the requirements for inmate complaints. The *only* directive in this regulation is that "the inmate shall exhaust all administrative remedies that the department of corrections has promulgated by rule." The regulation does not specify any content-related requirements. No reasonable interpretation of § DOC 310.05 would support a conclusion that the regulation requires inmates to name defendants individually in their inmate complaints.

Defendant points to no other administrative rule that would have required plaintiff to name the defendants individually. "When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Strong, 297 F.3d at 650. The inmate complaints related to plaintiff's food deprivation claim in the record satisfy this standard. In one complaint, plaintiff wrote that

he had been "denied food because I did not have my light on, etc. This is using food as punishment. I have never refused my meals." Offender Complaint WSPF 2002-41916, attached to Aff. of John Ray, dkt. #13, Exh. B. The complaint was dismissed not because plaintiff failed to identify the individuals responsible, but because there was a prison policy that permitted officers to deny meals to inmates when they fail to follow prison rules.

Defendant argues that by failing to name Huibregtse, Boughton, Sharpe and Hompe in his inmate complaint, plaintiff failed to give them notice of his claim. I make two observations in response. First, defendant does not explain why these individuals needed notice of plaintiff's administrative complaint. In the context of the inmate complaint review system, it is not notice to individual actors that is important but notice to the prison administration. The purpose of administrative exhaustion is not to protect the rights of officers, but to give prison officials a chance to resolve the complaint without judicial intervention. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537-38 (7th Cir. 1999) (exhaustion serves purposes of "narrow[ing] a dispute [and] avoid[ing] the need for litigation"). Thus, in determining whether an inmate complaint provides sufficient notice, the question should be whether the prisoner has provided enough information to allow the reviewing authority to resolve the complaint.

In some instances, prison officials might not be able to effectively resolve an inmate complaint unless the prisoner identified the individuals responsible. For example, if a

prisoner were to claim that he had been subjected to excessive force, it would be difficult for prison officials to take any action on the complaint without having some description of the officer who allegedly used excessive force. An inmate complaint that did not include identifying information in this situation might be appropriately rejected, not because of any unfairness to the officer but because the reviewing administrator would not have sufficient information on which to act.

In this case, plaintiff was objecting to a prison policy that was causing him to be denied food. This was sufficient to allow prison administrators to evaluate his complaint and reject it on the ground that they believed the policy to be sound. Defendant does not suggest that plaintiff's complaint would have been handled any differently if he had stated his belief that Huibregtse, Boughton, Sharpe and Hompe were responsible for the deprivation.

Second, even in federal court, in which notice pleading is employed, a pro se complaint is not subject to automatic dismissal when the plaintiff fails to identify a defendant by name. Rather, "when the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint." Donald v. Cook County Sheriff's Dept., 95 F.3d 548, 555 (7th Cir. 1996); see also Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (if prisoner does not know name of

defendant, court may allow him to proceed against administrator for purpose of determining defendants' identity). The reason for this rule is that it would be unfair to penalize a prisoner for failing to identify a defendant by name when the prisoner is unaware of the person or persons who are ultimately responsible for the alleged violation of his constitutional rights. Donald, 95 F.3d at 555.

The rationale of Duncan and Donald apply to this case. Plaintiff's reasoning for amending his complaint to include Huibregtse, Boughton, Sharpe and Hompe is not that they personally denied plaintiff meals but that they were responsible for implementing prison policy. Plt.'s Br., dkt. #150 at 4 ("They are, upon information and belief, officials who were authorized to make decisions regarding plaintiff's meal delivery services or, at the very least, had supervisory authority over such officers and either had knowledge of or acquiesced in the conduct."). It is unlikely that plaintiff could have known to include these individuals in his administrative complaint because he would not have had personal knowledge of the decision making structure within the prison. See Brown v. Sikes, 212 F.3d 1205, 1208 (11th Cir. 2000) (holding that § 1997e(a) does not require inmate complaints to include names of individuals that he "did not know and could not readily ascertain"); Wheeler v. Prince, 318 F. Supp. 2d 767, 771 (E.D. Ark. 2004) (following Brown). The prison officials reviewing plaintiff's inmate complaint would have been in a much better position than he to determine who was responsible for creating and implementing the policy.

As I noted in Franklin v. McCaughtry, 02-C-618-C,(W.D. Wis. May 27, 2003), if defendant were to impose a requirement on inmates to identify alleged wrongdoers by name, he would have to create a corresponding discovery-type system that would permit inmates to learn the names of those responsible within the deadline for filing inmate complaints, which is 14 days. Wis. Admin. Code § DOC 310.09(6). Otherwise, such a requirement would likely be invalid. See Strong, 297 F.3d at 649 ("[N]o prison system may establish a requirement inconsistent with the federal policy underlying § 1983."); see also Spruill v. Gillies, 372 F.3d 218, 232 (3d Cir. 2004) ("a prison's grievance system's procedural requirements [may not] be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a)"). Defendant does not suggest that such a system is employed at the facility or that plaintiff was given any assistance in determining who was responsible for the policy. Accordingly, I conclude that allowing plaintiff to amend his complaint to include Huibregtse, Boughton, Sharpe and Hompe would not be futile. Neither the Wisconsin regulations nor § 1997e(a) required plaintiff to identify these defendants by name in his inmate complaint.

Defendant raises a similar futility objection with respect to plaintiff's motion to supplement his complaint to include new instances of food deprivation that have occurred since he filed his complaint in federal court. However, defendant fails to develop any argument on this point or cite a regulation that would require plaintiff to file separate inmate

complaints for these acts. Accordingly, I conclude that defendant has waived this argument. Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). It is highly unlikely that such a rule exists. It would mean that plaintiff would have to file a separate inmate complaint for each instance of food deprivation that occurred (plaintiff alleges hundreds of missed meals), a result that would thwart rather than further the prison's interest in resolving disputes efficiently.

Even if there were such a rule, it is questionable whether it would withstand scrutiny. Enforcement of the rule would make it impossible for prisoners to obtain full relief in cases involving ongoing constitutional violations without filing additional lawsuits each time a new violation occurred because § 1997e(a) requires prisoners to seek an administrative remedy *before* they file a complaint in federal court. Johnson v. Jones, 340 F.3d 624 (8th Cir. 2003); see Perez, 182 F.3d at 535 ("a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed"). Such a result that would be both wasteful and contrary to the policy behind § 1983 and § 1997e(a). See Jones 'El v. Berge, 172 F. Supp. 2d 1128, 1131 (W.D. Wis. 2001) (concluding that § 1997e(a) required only one inmate in prison class action to exhaust his administrative remedies in part because rule requiring all class members to exhaust would make class actions for injunctive relief impossible). Prison officials had the opportunity to resolve plaintiff's first inmate complaint administratively.

As noted above, they relied on a prison policy in dismissing complaint. There is no reason to believe that their response would be any different now. Id. at 1133 ("As long as prison officials have received a single complaint . . . they have the opportunity to resolve disputes internally and to limit judicial intervention in the management of prisons."). Accordingly, I conclude that defendant has failed to show that it would be futile for plaintiff to supplement his complaint to include additional instances of food deprivation.

Undue Delay and Unfair Prejudice

Defendant emphasizes that trial is currently scheduled for August 23, 2004, and that allowing plaintiff to amend his complaint at this late date would be unfairly prejudicial to the newly named defendants. Normally, I would agree that a motion to amend a complaint brought six weeks before trial is scheduled would be unduly dilatory. However, this is an unusual case. For much of the history of this case, plaintiff was proceeding without counsel. Counsel was not appointed until January 2004, after I denied defendant's summary judgment motion with respect to plaintiff's food deprivation claim. I am persuaded that since that time counsel for plaintiff has acted diligently in becoming educated about the facts of the case and in preparing for trial.

One of the most important issues in this case involves determining the person or persons responsible for denying food to plaintiff. Neither side had developed this issue fully

at the summary judgment stage. During the course of discovery, counsel has discovered facts that led them to believe that defendant was not solely responsible for the alleged deprivation. Now that the case has proceeded as far as it has, it would be a grave injustice if plaintiff were denied any relief, not because no constitutional violation occurred, but because plaintiff failed to realize in time who the appropriate defendants were. The court of appeals has admonished district courts "to take appropriate measures to permit the adjudication of pro se claims on the merits rather their to order their dismissal on technical grounds." Donald, 95 F.3d at 555. This mandate, along with the requirement of Fed. R. Civ. P. 15 to allow amendment "when justice so requires" compels a conclusion that plaintiff's motion to amend his complaint be granted. Although one could argue that plaintiff could have moved to amend his complaint more swiftly after appointment of counsel, I cannot conclude that there has been undue delay, particularly given counsel's agreement to represent plaintiff without any guarantee of compensation despite their busy schedules.

I come to the same conclusion with respect to plaintiff's motion to supplement his complaint under Rule 15(d) to include instances of food deprivation that have occurred since plaintiff filed this action in federal court. If prison officials are continuing to deny plaintiff food, plaintiff should not be denied full relief because he filed his lawsuit too soon.

It is important to note that plaintiff is not trying to amend his complaint to include new legal theories or new claims unrelated to food deprivation. Defendant suggests in his

brief that plaintiff is attempting to create "a rehash of Jones 'El v. Litscher, 00-C-421-C," a case that involved a challenge to the totality of the conditions of confinement at the Wisconsin Secure Program Facility. However, a reading of plaintiff's amended complaint shows that defendant's concern is not well founded. Plaintiff's changes are limited to the number of defendants and the timing of the alleged deprivations; plaintiff is not seeking to bring in claims regarding social isolation and sensory deprivation. (He could not, for the reasons discussed in the June 3, 2003 Op. and Order, dkt. #24.)

In sum, I conclude that justice requires granting plaintiff's motion to amend and supplement his complaint. However, I agree with defendant that it would be unfairly prejudicial to hold a trial less than a month after the scope of the plaintiff's claim has been significantly expanded. Therefore, I will rescind the trial date and direct the clerk of court to set up a new scheduling conference before Magistrate Judge Stephen Crocker. At this conference, the magistrate judge will set expedited deadlines in consultation with the parties for discovery, summary judgment motions and trial. However, because I have concluded already that plaintiff has adduced sufficient evidence to allow a reasonable jury to conclude that he was subjected to a substantial risk of serious harm, I anticipate that any additional summary judgment motions will be limited to the issue of personal involvement, unless there is new evidence that would require judgment as a matter of law in favor of plaintiff or defendants.

ORDER

IT IS ORDERED that plaintiff Berrell Freeman's motion to amend and supplement his complaint to add Peter Huibregtse, Gary Boughton, John Sharpe and Brad Hompe as defendants and to include instances of food deprivation that occurred after January 2003 is GRANTED. Plaintiff should take immediate steps to serve the amended complaint on the new defendants. Defendant Berge may file his response to the amended complaint at the same time that the new defendants file their response. The clerk of court is directed to set up a prompt scheduling conference to be held before the magistrate judge.

Entered this 28th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge