IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

SOUVANNASENG BORIBOUNE,
ANTHONY CALIPH STEVENS'EL,
DONDRAS L. HOUSE and EFRAIN
CAMPOS,

Petitioners,

v.

GERALD BERGE, PETER HUIBREGSTE,
VIKI SEBASTION, ELLEN K. RAY and
KELLY COON, as does their individual
capacities,

Respondents.

ORDER

04-C-0015-C

- -

In early 2004, petitioners, each of whom was at the time a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, filed this joint action challenging several conditions of confinement at the Boscobel facility, as well as claims specific to individual petitioners. For example, only petitioner Boriboune alleges that he was deprived of his right as a Muslim to participate in Ramadan and only petitioner Stevens'El alleges that he is being denied mental health care in violation of his Eighth Amendment rights and that he has been returned to the facility in violation of the settlement agreement in Jones-El v. Berge, 00-C-

421-C. In an order dated February 2, 2004, I dismissed this action without prejudice to each petitioner's filing his own separate lawsuit. I advised petitioners that I was requiring separate lawsuits for the reasons expressed in Lindell v. Litscher, 212 F.Supp.2d 936 (W.D. Wis. 2002), in which I set out a number of problems inherent in joint prisoner lawsuits.

Subsequently, petitioners moved for reconsideration of the dismissal pursuant to Fed. R. Civ. P. 59(e). On March 8, 2004, I denied that motion. I reiterated my concerns that 1) one inmate with some purported knowledge of the law could persuade others to join a complaint, whether or not it was in the best interests of the other inmates to do so; 2) the ability to prepare a complaint can be used as a means of gaining prestige or power or more tangible rewards, such as money or contraband; 3) the court has only limited ability to monitor the prosecution of the complaint to insure that each plaintiff receives a copy of each document or pleading submitted to the court and approves the submission or that each plaintiff is capable of understanding the submissions made on his behalf; 4) prisoners may find that they have lost their right to file lawsuits in forma pauperis, even though they are unaware of much if not all of the claims of the complaints they have joined; and 5) some inmates will add other inmates for the sole purpose of financing the filing of their complaints, particularly where the "lead" plaintiff has lost his right to file a lawsuit in forma pauperis under the three strikes provision of the 1996 Prison Litigation Reform Act, 28 U.S.C. § 1915(g). In addition, in a lengthy discussion, I determined that a one-case, one-

prisoner rule furthers the plain language of 28 U.S.C. § 1915 and the intended purpose of the 1996 Prison Litigation Reform Act to curtail abusive litigation by imposing an economic deterrent on every prisoner who wishes to sue government officials over the conditions of his confinement.

Plaintiffs appealed the dismissal of this action to the Court of Appeals for the Seventh Circuit. On December 6, 2004, the court of appeals vacated this court's judgment of dismissal and remanded the case for further proceedings. Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004). The court held that district courts are required to accept joint complaints filed by multiple prisoners if the criteria of permissive joinder under Fed. R. Civ. P. 20 are satisfied. Further, it held that each prisoner in the joint action is required to pay a full filing fee.

The court of appeals discounted this court's concerns about the predatory leanings of some inmates to include other inmates in litigation for their personal gain. The court noted that throughout the history of prisoner litigation, even before enactment of the Prison Litigation Reform Act, "jailhouse lawyers surely overstepped their roles on occasion." Boriboune, 391 F.3d at 854. Also, the court addressed the difficulties in administering group prisoner complaints, stating that "the rules [or civil procedure] provide palliatives," such as severance of the claims pursuant to Fed. R. Civ. P. 20(b), pretrial orders providing for a logical sequence of decision pursuant to Rule 16, orders dropping parties improperly

joined pursuant to Rule 21, and orders directing separate trials pursuant to Rule 42(b). Boriboune, 391 F.3d at 854.

Next, the court of appeals focused on the question whether joint prisoner litigation undermines the system of financial incentives created by the Prison Litigation Reform Act. The court held that Prison Litigation ReformAct did not repeal Rule 20 by implication. That rule permits plaintiffs to join together in one lawsuit if they assert claims "arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to these persons will arise in the action." According to the court, repeal by implication occurs only when the newer rule "is logically incompatible with the older one." Id. In concluding that no irreconcilable conflict exists between Rule 20 and the act, the court of appeals has determined that joint litigation does not relieve any prisoner of the duties imposed upon him under the act, including the duty to pay the full amount of the filing fees, either in installments or in full if the circumstances require it. The court of appeals did not address the question whether Congress intended district courts to disregard 28 U.S.C. § 1915(b)(3), which reads, "[i]n no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action . . . ." 28 U.S.C. § 1914(a) sets the fee for filing a civil complaint at $150.[1]

[1]Pursuant to Pub.L.No. 108-447, 118 Stat. 2809 (December 8, 2004), Congress amended § 1914 to raise the filing fee to $250 effective February 7, 2005.

I can only presume the court of appeals took into account § 1915(b)(3)'s directive and determined nonetheless that it did not present an irreconcilable conflict with the collection of multiple fees.

The court of appeals agreed with this court that there are at least two other reasons a prisoner may wish to avoid group litigation. First, group litigation creates countervailing costs. Each submission to the court must be served on every other plaintiff and the opposing party pursuant to Fed. R. Civ. P. 5. This means that if there are five plaintiffs, the plaintiffs' postage and copying costs of filing motions, briefs or other papers in the case will be five times greater than if there were a single plaintiff.

Second, a prisoner litigating on his own behalf takes the risk that "one or more of his claims may be deemed sanctionable under Fed. R. Civ. P. 11, or may count toward the limit of three weak *forma pauperis* claims allowed by § 1915(g)." Boriboune, 391 F.3d at 854-55. According to the court, a prisoner litigating jointly assumes those risks for all of the claims in the group complaint, whether or not they concern him personally. Indeed, petitioners may wish to take heed that the court of appeals seems to be suggesting that courts may record strikes against prisoners for each *claim* in a complaint that is dismissed as frivolous or malicious or fails to state a claim upon which relief may be granted.

* * *

Likewise, § 1915(g) limits to three the number of IFP complaints or appeals

> that were "dismissed on the grounds that it is frivolous, malicious or fails to state a claim upon which relief may be granted." This language refers to the complaint or appeal as a whole; thus *when any claim in a complaint or appeal* is "frivolous, malicious, or fails to state a claim upon which relief may be granted," all plaintiffs incur strikes. . .One could imagine situations in which joined *claims* lack overlap, and in which it would be inappropriate to attribute Plaintiff A's claim to Plaintiff B for the purpose of "strikes"; but then joinder may be impermissible under Rule 20 itself, or severance appropriate. When *claims* are related enough to be handled together, they are related enough for the purposes of § 1915(g) as well.

Id. at 855. (Emphasis added.) Because the specific language in § 1915(g) suggests that courts are to issue strikes when an "action or appeal" is dismissed, as opposed to when a particular "claim" in the complaint is dismissed, this court's practice is to issue strikes only when an entire action is dismissed for one of the reasons enumerated in § 1915(g). However, it may well be that the court of appeals is anticipating a ruling in the future that interprets § 1915(g) as requiring district courts to issue strikes for legally meritless *claims* within an action. Petitioners may wish to take into account this possibility in determining whether to assume the risks of group litigation in the federal courts of the Seventh Circuit.

Because not every prisoner is likely to be aware of the potential negative consequences of joining group litigation in federal courts, the court of appeals suggested in Boriboune that district courts alert prisoners to the individual payment requirement, as well as the other risks prisoner pro se litigants face in joint pro se litigation, and "give them an opportunity to drop out." Id. at 856. Therefore, in keeping with this suggestion, I will offer each

petitioner an opportunity to withdraw from this litigation before the case progresses further. Each petitioner may wish to take into consideration the following points in making his decision.

1. He will be held legally responsible for knowing precisely what is being filed in the case on his behalf.

2. He will be subject to sanctions under Fed. R. Civ. P. 11 if such sanctions are found warranted in any aspect of the case.

3. He will incur a strike if the action is dismissed as frivolous or malicious or fails to state a claim upon which relief may be granted.

4. In screening the complaint, the court will consider whether his claims should be severed and, if it decides severance is appropriate, he will be required to prosecute his claims in a separate action.

5. Whether the action is dismissed, severed, or allowed to proceed as a group complaint, he will be required to pay a full filing fee, either in installments or in full, depending on whether he qualifies for indigent status under §§ 1915(b) or (g).

ORDER

In accordance with the December 6, 2004, decision of the Court of Appeals for the Seventh Circuit, IT IS ORDERED that the judgment of dismissal of this action is

VACATED.

Further, IT IS ORDERED that each petitioner may have until January 26, 2005, in which to advise the court whether he wishes the court to consider him a petitioner in this group action. If, by January 26, 2005, any one or more of the petitioners advises the court that he does not wish to participate in the action, he will be dismissed from the lawsuit and will not be charged a filing fee.

Finally, IT IS ORDERED that each petitioner who advises the court that he wishes to proceed with the action has until February 2, 2005, to submit a trust fund account statement for the six-month period beginning approximately July 26, 2004 and ending approximately January 26, 2005, so that I may determine his indigent status under 28 U.S.C. § 1915. If, by February 2, 2005, any petitioner fails to submit a current trust fund account statement or show cause for his failure to do so, I will deny his request for leave to

proceed in forma pauperis in this action for his failure to show that he qualifies for indigent status.

Entered this 12th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge