

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

WILLIE C. SIMPSON,

Plaintiff,

v.

GOV. SCOTT WALKER, GARY H. HAMBLIN,
M.S. OLSEN, T. LE BRECK and W. BURNS,

Defendants.

ORDER

11-cv-838-bbc

Plaintiff Willie C. Simpson, a prisoner at Wisconsin Secure Program Facility, brought this civil action for monetary and injunctive relief pursuant to 42 U.S.C. § 1983, alleging that defendant state officials violated the Constitution's ex post facto clause when they eliminated the possibility that he could be considered for parole by retroactively applying Wisconsin's truth-in-sentencing law to sentences for sexual assault of a child. In a March 5, 2012 order, I dismissed the case as barred under Preiser v. Rodriguez, 411 U.S. 475 (1973), and Heck v. Humphrey, 512 U.S. 477 (1994). Now plaintiff has filed a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59, arguing that the dismissal was erroneous because neither Preiser nor Heck applies to cases in which a prisoner challenges state parole procedures.

I conclude that plaintiff is correct that Preiser and Heck do not apply to his claims. In Wilkinson v. Dotson, 544 U.S. 74, 82 (2005), the Court concluded that a prisoner could bring claims challenging the constitutionality of state parole procedures in a § 1983 action. In the present action, as in Wilkinson, a ruling in plaintiff's favor would provide only for a review of his parole eligibility under the appropriate standard—it “would not necessarily spell immediate or speedier release” for plaintiff. Id. at 81. Accordingly, I will allow plaintiff to proceed on his ex post facto claim.

The next issue is identifying which defendants are properly part of this case. In his amended complaint, dkt. #6, plaintiff alleges that defendants M.S. Olsen, T. Le Breck and W. Burns (all employed by the Department of Corrections Bureau of Classification and Movement) retroactively applied the truth-in-sentencing law to his parole eligibility and that defendant Department of Corrections Secretary Gary Hamblin approved this decision after plaintiff filed a complaint about it. Accordingly, plaintiff will be allowed to proceed against each of these defendants on his ex post facto claim.

Plaintiff attempts to include defendant Governor Scott Walker as part of this claim, stating that the governor “authoriz[ed] and approv[ed]” the truth-in-sentencing law and is “responsible [and] liable as policymaker.” Plaintiff cannot sue defendant Walker in his individual capacity. Liability under 42 U.S.C. § 1983 must be based on a defendant's personal involvement in the constitutional violation, Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995), and plaintiff does not

allege that the governor was involved personally in any specific decision about plaintiff's parole.

To the extent that plaintiff tries to sue defendant Walker in his official capacity, he cannot bring a claim for monetary damages against the governor because "neither a State nor its officials acting in their official capacities are 'persons'" who can be sued for monetary damages under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). For the time being, Walker will remain in the case regarding plaintiff's claim for injunctive relief in his official capacity, but as the case moves forward, plaintiff will have to explain what custom or policy Walker controls regarding plaintiff's parole. He will be dismissed from the case if it becomes apparent that injunctive relief can be granted regarding a policy controlled by the Department of Corrections defendants rather than Walker.

ORDER

IT IS ORDERED that

1. Plaintiff Willie Simpson's motion to alter the March 6, 2012 judgment dismissing this case, dkt. #15, is GRANTED, and that judgment is VACATED.
2. Plaintiff is GRANTED leave to proceed on his ex post facto claim against defendants M.S. Olsen, T. Le Breck, W. Burns and Gary Hamblin, and his claim for injunctive relief against defendant Scott Walker in his official capacity.
3. Plaintiff is DENIED leave to proceed on his ex post facto claim against defendant Walker in his individual capacity and his claim for monetary damages against Walker in his official capacity.
4. The strike recorded under 28 U.S.C. § 1915(g) for this case is RESCINDED.

5. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

6. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, he should serve the lawyers directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 7th day of June, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge