

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

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WILLIE C. SIMPSON,

Plaintiff,

v.

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

Defendants.  
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ORDER

11-cv-838-bbc

Plaintiff Willie C. Simpson, an inmate at the Wisconsin Secure Program Facility, brought this civil complaint under 42 U.S.C. § 1983, alleging that defendant state officials violated the Constitution's ex post facto clause by retroactively applying Wisconsin's Truth-in-Sentencing law to his sentences for sexual assault of a child and thereby eliminating his parole eligibility. In a November 29, 2012 order, I denied plaintiff's motion for preliminary injunctive relief and sua sponte dismissed the case for plaintiff's failure to state a claim upon which relief may be granted. Judgment was entered on November 30, 2012.

Now plaintiff has filed a motion under Fed. R. Civ. P. 59 to alter or amend the judgment as well as a notice of appeal and motion for leave to proceed in forma pauperis on appeal. In his Rule 59 motion, plaintiff argues that it was not proper to dismiss the case because such action can be taken only if it is clear that no relief could be granted plaintiff under any set of facts consistent with the allegations. See, e.g., Walker v. Thompson, 288

F.3d 1005, 1008 (7th Cir. 2002).

After considering plaintiff's motion, I conclude that he is correct. Because I relied on materials outside the pleadings (such as the parole documents submitted by the parties in conjunction with plaintiff's motion for preliminary injunctive relief) in dismissing the case, I erred in characterizing plaintiff's complaint as failing to state a claim. The November 29, 2012 order is more properly characterized as granting summary judgment to defendants based on the relevant documents showing that plaintiff's parole eligibility was not revoked.

Although the court has the authority to grant summary judgment sua sponte to defendants, it cannot do so without giving plaintiff notice that it is considering this option and giving him an opportunity to present evidence in opposition. Acequia, Inc. v. Prudential Insurance Co. of America, 226 F.3d 798, 807 (7th Cir. 2000); see also Fed. R. Civ. P. 56(f). Magistrate Judge Stephen Crocker accomplished the first part of this requirement by warning the parties in his August 9, 2012 order that the briefing on plaintiff's preliminary injunction motion might resolve the case. However, this warning came after plaintiff filed his motion, and pursuant to this court's procedures to be followed on motions for injunctive relief, plaintiff was not provided an opportunity to file materials in reply. Therefore, he was not given a proper chance to respond to the court's warning that the case might be resolved by sua sponte grant of summary judgment.

Accordingly, I will vacate the November 30, 2012 judgment in order to give plaintiff an opportunity to provide any facts and argument that he believes supports his claim. In particular, plaintiff should submit responses to defendants' proposed findings of fact and a

reply brief. Plaintiff will have until February 7, 2013 to submit these materials.

That leaves plaintiff's notice of appeal, which becomes operative with the court's disposition of plaintiff's Rule 59 motion. Plaintiff has filed a motion for leave to proceed in forma pauperis on appeal, which I will deny as moot since the judgment plaintiff is appealing has been vacated.

#### ORDER

IT IS ORDERED that

1. Plaintiff Willie C. Simpson's motion to alter or amend the November 30, 2012 judgment in this case, dkt #40, is GRANTED; that judgment is VACATED.

2. Plaintiff may have until February 7, 2013 to submit summary judgment materials as outlined above.

3. Plaintiff's motion for leave to proceed in forma pauperis on appeal, dkt. #43, is DENIED as moot.

Dated this 10th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge