

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

LARRY D. HARRIS, JR.,

Plaintiff,

v.

OPINION & ORDER

14-cv-153-jdp

CARRIE SUTTER, TIM HAINES
SHANNON FARGEN, KELLY TRUMM
and CATHY JESS,

Defendants.

Plaintiff Larry D. Harris, Jr., a Wisconsin Department of Corrections prisoner, has submitted a proposed civil action under 42 U.S.C. § 1983. Plaintiff alleges that employees of the Wisconsin Secure Program Facility (WSPF) and the Department of Corrections (DOC) have deprived him of property without due process of law. Plaintiff alleges that the prison staff changed the prices of commissary items without notice, thus overcharging him, and that the commissary a system miscalculates the sales tax due on purchases.

Plaintiff has paid an initial partial payment of the filing fee as previously directed by the court. Accordingly, the next step in this case is for the court to screen plaintiff's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for monetary damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915(a). In screening any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After review of the complaint with this principle in mind, I conclude that plaintiff has stated due process claims.

Plaintiff's complaint alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Larry D. Harris, Jr., is a prisoner incarcerated at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin. The defendants are: Carrie Sutter, financial program supervisor at WSPF; Tim Haines, the warden of WSPF; Shannon Fargen, a member of the business office staff at WSPF; Kelly Trumm, institution complaint examiner at WSPF; and Cathy Jess, Division of Adult Institutions administrator at the Wisconsin Department of Corrections.

Like other inmates, plaintiff maintains personal funds in a trust account under the control of WSPF. Inmates can use their trust accounts to purchase food and personal items from the prison commissary. Prices for commissary items are published on a “menu” which is distributed to prisoners. Prisoners purchase commissary items by completing a written order form.

The Department of Corrections regulation § DOC 309.52(1)(a)(c) provides that “prices of each item shall be conspicuously posted at each canteen.” This DOC regulation has been in effect for all times relevant to this case. But effective January 13, 2013, the Division of Adult Institutions implemented a new DAI Policy No. 309.52.01, relating to the operations of the inmate canteen at WSPF. Policy section I.V. provides, in pertinent part, that canteen “prices are subject to change without notice.” About April 1, 2013, WSPF changed commissary vendors and implemented a new order system.

Plaintiff ordered six items from the commissary on April 9, 2013, as reflected in Purchase Order No. 96323. Plaintiff filed an inmate complaint, WSPF-2013-7762, in which he complained that two of the items were charged at prices different from those listed on the commissary menu, and that the tax was incorrectly calculated as to two additional items, resulting in over-taxation of \$.01. Plaintiff submitted information/interview requests to support

his complaint. In response, he was informed by defendant Sutter that one of the purchased items had had an issue with the rounding of sales tax, and that a credit would not be issued for the extra tax. An inmate complaint examiner at WSPF rejected the complaint as moot and indicated that plaintiff had been reimbursed \$.01.

But the \$.01 reimbursement did not appear on plaintiff's trust account statement. On May 8, 2013, he filed another complaint, WSPF-2013-8990, in which he complained that the \$.01 reimbursement had not been issued. Defendant ICE Trumm investigated the complaint with defendant Sutter, who reported that "I thought we weren't reimbursing him b/c it was a rounding issue w/tax and he was charged correctly, it was just that the copy of our menu that he has is incorrect. I've been telling him he wasn't getting the reimbursement." Trumm dismissed his complaint. Warden Haines confirmed. Plaintiff appealed and a DOC corrections complaint examiner recommended dismissal of the appeal. However, the DOC secretary did not accept that recommendation, instead affirming plaintiff's appeal, stating: "Based on the previous affirmed complaint, this inmate should be paid \$.01. WSPF has changed the practice and therefore, no further remedy will be offered. This issue has now been corrected."

Plaintiff ordered three commissary items on April 23, 2013, as reflected in Purchase Order No. 07212. Plaintiff contends that the prices charged did not match the prices listed on the commissary menu. Plaintiff attributed some of the difference in the prices charged to sales tax, and he contended that the prison had overcharged him for Wisconsin sales tax. Plaintiff alleges that defendant business office staff member Fargen double checked Purchase Order No. 07212, but she failed to recognize the taxation errors. Plaintiff filed an inmate complaint, WSPF-2013-8601, complaining about the inconsistent pricing and the excessive taxation. Plaintiff submitted an information/interview request to Sutter about the pricing and taxation. Sutter responded that the menus had recently changed and that he would be receiving an

updated menu once additional price changes were implemented. Institution complaint examiner Trumm investigated the complaint, receiving the following response from Sutter:

There have been some issues w/tax amounts and rounding -- the amounts the inmates see on our menus are different than what they are actually charged due to rounding issues. We are fixing them as we find them, but aren't printing new menus each week as there are more items coming soon and some more adjustments. To my knowledge, he is the only inmate complaining and I have him them these are rounding issues or small errors relating to tax on the menus -- he wouldn't receive a credit due to the section in our policy that states "prices are subject to change without notice."

Based on Sutter's explanation, Trumm dismissed plaintiff's complaint. Warden Haines confirmed that decision. Plaintiff appealed to the DOC, where a corrections complaint examiner, and then the secretary, reversed the WSPF decision and affirmed plaintiff's appeal. The secretary ordered that WSPF was to re-examine the charges to plaintiff, correct any errors, and inform him of any correction made to his account.

On June 20, 2013, WSPF implemented a new pricing policy by means of a statement on the canteen menu indicating that "sales tax will vary on multiple quantities purchased causing prices to fluctuate a few cents."

Plaintiff alleges that the practice of charging incorrect sales tax continues and that he has been overcharged tax on eight additional purchases from May to November 2013 and seven additional purchases from January to April 2014.

PLAINTIFF'S CLAIMS

I understand plaintiff to be bringing three claims under the Fourteenth Amendment for the deprivation of his property without due process of law. First, WSPF uses a system that improperly calculates the sales tax on commissary purchases, resulting in overcharges to inmates.

Second, WSPF staff has failed to correct the plaintiff's trust account even after they were informed of the errors. Third, plaintiff contends that the Department of Adult Institutions has adopted an unconstitutional policy pursuant to which commissary prices may change without notice.

ANALYSIS

First a preliminary matter: Plaintiff has moved to supplement and amend his complaint, Dkt. 6 and 7, and he has submitted a proposed amended complaint, Dkt. 8. As we are early in the case, the proposed amendment is not unfairly prejudicial and plaintiff's motions to supplement and amend the complaint will be granted. The amended complaint, Dkt. 8, will be the operative complaint in this proceeding.

Plaintiff has a protectable property interest in the funds in his inmate trust account. *Campbell v. Miller*, 787 F.2d 217, 222 (7th Cir. 1986). Accordingly, under the Fourteenth Amendment, he may not be deprived of the funds in his inmate trust account without due process of law. As a general rule, when a protected property interest is at stake, the Due Process Clause entitles individuals to receive notice and an opportunity to be heard before the government deprives them of property. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993). However, the due process rights of prisoners are not absolute and must be adapted to the legitimate security needs of a corrections institution. *Caldwell v. Miller*, 790 F.2d 589, 608-09 (7th Cir. 1986). Even given the leeway that is accorded to prison officials, WSPF officials cannot overcharge plaintiff for commissary items and refuse to refund his money when errors are pointed out.

But plaintiff's claims do not rise to the level of a constitutional violation if the deprivation of his property was the result of random and unauthorized actions by WSPF

employees, so long as plaintiff has an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 518 (1984). In other words, even if WSPF employees were to steal from his trust account in violation of state policy, plaintiff's constitutional rights are not violated—so long as he has an adequate way of challenging these determinations and getting his money back.

Plaintiff's complaint, if viewed strictly, might not survive a motion to dismiss under Rule 12b(6). Plaintiff attaches to his complaint Purchase Order No. 07212 and commissary menu showing the items that he ordered. The court's review of the menu and the purchase order does not reveal any overcharging for the items purchased. Indeed, the menu price for the earplugs is \$.26 but the invoice shows a purchase price of \$.25. As to the sales tax, it shows tax of \$.09 on a purchase of \$1.74. Given that state tax regulations round sales tax to the nearest full cent, \$.09 tax on plaintiff's purchase appears to be accurate. Nevertheless, viewing the complaint generously, plaintiff alleges that he has been charged prices greater than shown on the commissary menu and that he has been overcharged sales tax, and that such overcharging continues. The court also notes that two of his offender complaints alleging overcharging have been affirmed. Plaintiff has also alleged that even after errors in his account are pointed out, he does not receive the refunds to which he is entitled. At this point, I cannot conclude that defendants' alleged actions were the result of random or unauthorized conduct. Accordingly, plaintiff will be allowed to proceed on his first theory, in which he alleges that he has been systematically overcharged by the institution. He will also be allowed on his second theory, against those individual defendants who he alleges are directly involved in the overcharging and the refusal to grant the refunds.

Plaintiff's allegation that his rights are being violated by DAI Policy No. 309.52.01 presents a closer call. The paragraph providing that commissary prices are subject to change without notice is proper if it means that commissary prices may change without *advance* notice.

But, again reading the plaintiff's complaint generously, plaintiff appears to be claiming that prices change without any notice whatsoever and that the inmates do not know what they will be charged at the time that they place their orders. The examples of the price changes cited in the plaintiff's complaint are very modest, a few cents, but a few cents can matter to an inmate who has little in his trust account. DOC regulations require that the price of commissary items be conspicuously posted and thus the DAI policy allowing price changes without notice appears to conflict with the administrative regulations applicable to Wisconsin prisons generally. Accordingly, plaintiff may proceed on his third theory, his challenge to the DAI regulation. However, to be clear, the court is allowing plaintiff to proceed against the DAI policy only to the extent that it allows the institution to change prices without any notice whatsoever, resulting in price changes *after* an inmate has placed an order. The court will not allow plaintiff to proceed on a claim that inmates are generally entitled to advance notice of any changes to the price of commissary items.

With one exception, plaintiff properly cites the individual involvement of each of the defendants in the allegedly wrongful acts in the complaint. Defendant Sutter is responsible for the system that has overcharged the plaintiff and she has resisted plaintiff's attempts to recoup the improper charges. Defendant Trumm has improperly denied plaintiff's complaints concerning the improper charges and effectuated the improper system of charges. Warden Haines has done the same by confirming Trumm's rejection of plaintiff's complaints. Defendant Jess is responsible for the implementation of the challenged DAI policy. Plaintiff may proceed against each of these defendants.

But plaintiff's complaint will be dismissed as to defendant Fargen. Plaintiff's allegations against Fargen are that she double checked the charges on Purchase Order No. 96323 and that she failed to recognize the tax error. Because plaintiff alleges only that she missed the errors, the

allegations are not sufficient to establish Fargen's personal involvement in the systematic overcharging, the refusal to issue refunds determined to be due, or the DAI policy.

ORDER

IT IS ORDERED that

1. The motions by plaintiff Larry D. Harris, Jr., to supplement and amend the complaint, Dkt. 6 and 7, are GRANTED, and the amended complaint, Dkt. 8, is the operative complaint in this case.

2. Plaintiff is GRANTED leave to proceed on his claims in his complaint, Dkt. 8, that (1) Defendant Carrie Sutter overcharged plaintiff and resisted plaintiff's attempts to recoup the improper charges to his trust account; (2) Defendant Kelly Trumm improperly denied plaintiff's complaints concerning the improper charges and effectuated the improper system of charges; (3) Defendant Warden Tim Haines improperly denied plaintiff's complaints concerning the improper charges and effectuated the improper system of charges by confirming defendant Trumm's rejection of plaintiff's complaints; and (4) Defendant Cathy Jess implemented the challenged DAI policy.

3. Plaintiff's complaint against defendant Shannon Fargen is DISMISSED.

4. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Pursuant to 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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. 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 for defendants.

7. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 9th day of July, 2014.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge