IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN P. COLE,
EDWARD J. YOUNGBLOOD,
MACK D. HILL,
LOUIS NIEVES,
ANDREW COLLETTE,
BARNEY A. GUARNERO,
VINCENT D. WHITAKER,
JASON TYRRELL,
KENTA FINKLEY,
RODNEY REED,
JEFF DAKE,
KARRY HILLEY,
ESAW P. HARNESS, JR.,
TERRY COMMODORE, JR.,

ORDER

Plaintiffs,

04-C-116-C

v.

JON E. LITSCHER;
MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS;
JOHN DOES 1, 34, 35, 36, 37, 39, 82, 84, A, D and E;
and GERALD A. BERGE,

Defendants.

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Plaintiffs, previously all inmates at the Wisconsin Secure Program Facility in

Boscobel, Wisconsin, filed this action in the United States District Court for the Eastern District of Wisconsin in July of 2002. On February 27, 2004, it was transferred to this district when District Judge Lynn Adelman granted the motions for a change of venue filed by defendants Berge, Bartels, Catalano and Prison Health Services, Inc. On that same date, Judge Adelman directed the clerk to forward plaintiffs' complaint to the United States Marshal for service on defendant Litscher. He ordered as well that plaintiffs identify the Doe defendants no later than March 29, 2004. He left undecided plaintiff Cole's November 17, 2003 motions for appointment of counsel and "to have access to law library and necessities" (Dkt. # 80, 81) and a motion by plaintiffs Karry Hillery for permission to withdraw as a party to this action (Dkt. #97).

The fact that this case is nearly twenty months old and is still in its infant stage is attributable in large part to plaintiffs' decision to file their action as a group complaint consisting of multiple claims against more than one hundred defendants, the vast majority of whom are John Does.

In this district, prisoner plaintiffs are not allowed to file group complaints. Many of the reasons justifying this policy becomes apparent by reviewing just a portion of the record history of this case.

As I noted above, plaintiffs filed their complaint in the Eastern District on July 31, 2002. At the time, there were only two plaintiffs, Jonathan Cole and Edward Youngblood,

and 25 defendants (defendant Berge and 24 Doe defendants). Before the court could decide whether Cole and Youngblood would be allowed to proceed in forma pauperis with their claims, plaintiffs filed an amended complaint on September 10, 2002 and paid the $150 filing fee. The proposed amended complaint listed thirteen new plaintiffs and 90 new defendants, 86 of whom are Doe defendants. Subsequently, one of the plaintiffs, Kurtis King, requested permission to withdraw from the case. His request was granted on October 9, 2002. Plaintiff Youngblood wrote to the court shortly thereafter to advise that he had been transferred to the Green Bay Correctional Institution. Plaintiff Nieves asked for permission to withdraw on January 27, 2003, was terminated from the suit, and was reinstated at his request on March 7, 2003. On February 13, 2003, plaintiff Rodney Reed informed the court of his release from prison and his new street address in Milwaukee, Wisconsin. On February 24 and March 31, 2003, the court's mail sent to plaintiff Kenta Finkley at his last known address was returned as undeliverable. Also in February 2003, plaintiff Mack Hill wrote twice to the court requesting an order directing that the complaint be served on the defendants promptly and plaintiff Cole wrote purportedly on behalf of all the other plaintiffs to beg the court's pardon for Hill's demanding communications.

On March 7, 2003, Judge Lynn Adelman screened plaintiffs' amended complaint pursuant to § 1915A and allowed plaintiffs to proceed on a host of claims, including some claims that overlap with claims raised in a class action lawsuit in this court, Jones'El v. Berge,

00-C-421-C. In the order, he directed plaintiffs to serve each defendant with a copy of the complaint as required by Fed. R. Civ. P. 4. On March 14, 2003, plaintiff Cole wrote to the court to advise that no plaintiff had a copy of the complaint to serve on defendants. Three months later, on June 25, 2003, Judge Adelman directed the clerk to return to plaintiff Cole five surplus copies of the amended complaint from the court's file.

On March 20, 2003, plaintiff Mack Hill wrote the court a letter stating that he would be "taking on all signatures, orders, filings" for plaintiff Nieves while Nieves was away from Waupun attending to other legal matters. On March 28, Hill wrote again to advise the court that Nieves was back and could represent himself. On June 16, 2003, plaintiff Hill requested production of documents.

On July 15, 2003, plaintiff Barney Guarnero wrote to the court to complain that he was being denied legal loans for postage, which prevented him from corresponding with the court and the defendants. On July 28, 2003, Judge Adelman wrote to Wardens Berge, McCaughtry and Bertrand respectively at the Boscobel, Waupun and Green Bay penal institutions, noting that a number of plaintiffs had written to complain about their inability to communicate with one another, advising the wardens that this is an active case, and listing the names of all the plaintiffs in the case.

On August 12, 2003, plaintiff Jeff Dake wrote to the court to advise of a change in his address.

On September 4, 2003, plaintiff Youngblood wrote to the court to ask that the court order the return of plaintiff Commodore, Jr.'s legal materials.

On October 2, 2003, plaintiff Cole wrote a letter to the court which states in part:

> . . . . We can't make copies of our documents to support our motion. Our documents mailed to our co-plaintiff or sent by our co-plaintiff are coming up missing. The document we have in our cell are target by staff upon cell search and how can we complain about documents we don't got proof that exist after staff take them and tell you I don't know anything about them?? All the time they won't allow us to make copies.
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> * * *
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> We are upset at these tactic, and with 2 plaintiffs at Waupun, 2 at Green Bay and one at Racine Correctional Institution and 2 at home in Milwaukee County, are hurting our ability to just communicate to put our self together. And we seek help! [sic]

On October 27, 2003 and again on December 29, 2003, plaintiff Nieves advised the court of changes in his address. On January 27, 2004, Nieves asked the court to order prison officials to allow him to communicate with his co-plaintiffs. On January 29, the court advised the warden of the Iowa prison in which Nieves is presently confined that this case is active.

On December 4, 2003, plaintiff Barney Guarnero complained to the court that counsel for defendants Prison Health Services, Bartels and Catalano had served only plaintiff Cole with a copy of defendants' brief in opposition to plaintiffs' motion for appointment of

counsel. Guarnero requested an order directing counsel to serve all plaintiffs with submissions in accordance with Fed. R. Civ. P. 5.

On February 12, 2004, plaintiff Karry Hilley requested permission to withdraw as a plaintiff.

Most recently, on March 8, 2004, plaintiff Barney Guarnero asked for permission to withdraw as a party plaintiff. Also, on March 11, 2004, plaintiff Cole submitted documents that he had failed to serve on plaintiffs Esaw Harness and Andrew Collette for the stated reason that their "whereabouts [are] unknown." According to Cole, each time he mails something to them it is returned.

Not surprisingly, defendants have made little procedural progress. Defendants Berge and Litscher filed a notice of appearance on April 3, 2003; on April 16, 2003, defendant Berge moved for a change of venue; and on May 20, 2003, defendant Berge answered plaintiffs' complaint. On April 17, 2003, defendants Bartels, Catalano and Prison Health Services, Inc. moved to dismiss for improper venue and alternatively to transfer venue. It was not until February 27, 2004 that plaintiffs' complaint was transmitted to the United States Marshal for service on defendant Litscher and that plaintiffs were given 30 days in which to identify the Doe defendants.

OPINION

At the outset, I will grant the motions of plaintiffs Karry Hilley and Barney Guarnero to withdraw as plaintiffs from this action. Their claims will be dismissed without prejudice.

Also, I will order plaintiff Kenta Finkley to show cause why he should not be dismissed from this action for his failure to prosecute. Finkley's mail from the Eastern District court was twice returned as undeliverable because Finkley changed his address without notifying the court or opposing counsel of a new address. Finkley has not filed any independent paper in this case that reflects an address outside the Wisconsin Secure Program Facility. According to the court's records, he may not have received a number of filings from the court, his co-plaintiffs or the defendants because of confusion over his whereabouts. At the time Assistant Attorney General John Glinski filed a notice of appearance in the case on April 3, 2003, Finkley's address was listed as the Milwaukee Secure Treatment Facility, 1015 North 10th Street, Milwaukee, WI, 53205. On April 15, 2003, when Glinski filed defendant Berge's motion for a change of venue, he showed Finkley's address to be 4572 North 23rd St., Milwaukee, Wisconsin, 53212 (the record does not show how Glinski knew this was Finkley's address). Nevertheless, the court's order of May 1, 2003, granting plaintiffs an enlargement of time in which to oppose Berge's motion was mailed to Finkley at the Milwaukee Secure Treatment Facility. When the order was returned marked, "not here," court staff mailed the order to Finkley at the Wisconsin Secure Program Facility in Boscobel. Only three documents in the record are purported to bear

Finkley's signature. One document is the proposed amended complaint plaintiff Cole filed on September 10, 2002. The misspelled name "Kenta Finkey" is signed over the line designated for "Kenta Finkley." A second document showing a signature for Finkley is plaintiffs' motion for a protective order, also filed on September 10, 2002. The signature on this document is in a handwriting style significantly different from the signature on the amended complaint. The third document purportedly bearing Finkley's signature is plaintiffs' "objection to defendants' motion to dismiss for improper venue and motion for change of venue," which is written in plaintiff Cole's hand and was filed with the court on May 29, 2003. Finkley's signature on this document is suspect. According to the last page of this submission, in one day (May 26, 2003), just five days before the court received the document, Rodney Reed and Finkley purportedly signed the objections from their private residences in Milwaukee, Wisconsin, Cole and seven other plaintiffs signed the document at the Wisconsin Secure Program Facility and two co-plaintiffs signed the document at the Green Bay Correctional Institution. Before Finkley will be allowed to continue as a plaintiff in this action, he will have to confirm his address and positively affirm his desire to prosecute his claims.

As for the remaining plaintiffs, I will order their claims to be severed and prosecuted in separate lawsuits. In Lindell v. Litscher, 212 F. Supp. 2d 936 (W.D. Wis. 2002), I explained why group prisoner petitions are rife with potential problems:

1. It is all too easy for one inmate with some purported knowledge of the law to persuade others to join a complaint, whether or not it is in the best interests of the other inmates to do so. The ability to prepare a complaint can be a means of gaining prestige or power or more tangible rewards, such as money or contraband, or of spreading the cost of the filing fee.

2. The court has only limited ability to monitor the prosecution of the complaint to insure, for example, 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.

3. The Prisoner Litigation Reform Act imposes severe consequences on prisoners who file frivolous suits. Prisoners whose names are added to group complaints may find that they have lost their right to file lawsuits without prepayment of the entire filing fee, even though they are unaware of much if not all of the claims of the complaints they have joined.

4. It would be irresponsible to ignore the possibility that some inmates will add other inmates to their lawsuits for the sole purpose of financing the filing of their complaints, particularly if the "lead" plaintiff has lost his right to file a lawsuit without prepayment of the entire filing fee.

5. It is far easier for the court and the parties to deal with separate complaints than with one joint complaint. It is rare in prisoner litigation that all of the claims in any

complaint are common to every one of the named petitioners. Requiring separate complaints encourages each plaintiff to limit his complaint to the claims that are specific to him. The effect is conservation of judicial resources.

In this case, it appears that plaintiff Cole is the "lead" plaintiff. Although I make no judgment about plaintiff Cole's motivation in bringing a group complaint, he is well aware of the consequences of being persuaded to join a complaint that is not in his best interest. On September 24, 2001, plaintiff Cole received a strike under 28 U.S.C. § 1915(g) in this court when a group complaint written and filed by inmate Hashim a/k/a John Tiggs was dismissed as legally frivolous. See Hashim v. Berge, 01-C-314-C.

Moreover, it is almost a certainty that each plaintiff in this case does not have a copy of the group complaint in this case. Not only is the amended complaint long (71 pages) and thus expensive to photocopy, but plaintiff Cole has admitted in the court's record that none of the plaintiffs were furnished with a copy of the amended complaint. Although five surplus copies of the complaint eventually were sent to plaintiff Cole, I doubt that he made additional copies at that time for each of his co-plaintiffs. In other words, there is no guarantee that each plaintiff knows what is being advanced on his behalf in the amended complaint. Finally, I am not persuaded that each plaintiff in this case is receiving a copy of every document or pleading filed with the court, or is approving the submission, or is capable of understanding the submissions made on his behalf. Many of the submissions filed

by individual plaintiffs bear no indication that they have been served on co-plaintiffs. In addition, as noted above, there is reason to believe that some of the plaintiffs' signatures may have been forged.

A district court has inherent authority to manage its cases and is vested with discretion to bring or drop a party. 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1688 (1972); see also Arrington v. Fairfield, 414 F.2d 687, 693 (5th Cir. 1969) ("[t]he provisions for permissive joinder under Rule 20 are very broad and the court is given discretion to decide the scope of the civil action and to make such orders as will prevent delay or prejudice").

Under Fed. R. Civ. P. 20, joinder of claims, parties and remedies is strongly encouraged. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966). However, where joinder is inappropriate, claims may be severed pursuant to Fed. R. Civ. P. 21. The trial judge has broad discretion to determine when joinder or severance are appropriate. See Thompson v. Boggs, 33 F.3d 847, 858 (7th Cir. 1994); Intercon Research Assoc. Ltd. v. Dresser Industries, 696 F.2d 53, 56 (7th Cir. 1982). Rule 20(a) imposes two requirements for proper joinder: 1) the right to relief must be asserted by each plaintiff or defendant and must arise out of the same transaction, occurrence or series of transactions; and 2) some question of law or fact common to all the parties must arise in the action. See Intercon, 696 F.2d at 57.

The permissive joinder doctrine is animated by several policies, including the promotion of efficiency, convenience, consistency, see Hohlbein v. Heritage Mutual Ins. Co., 106 F.R.D. 73, 78 (E.D. Wis. 1985), and fundamental fairness. See Intercon, 696 F.2d at 57-58. These policies, not a bright-line rule, should govern whether the "same transaction" requirement imposed by Rule 20 has been satisfied. See 4 James Wm. Moore et al., Moore's Federal Practice § 20.05[1] (3d ed. 1999). Rather than developing a single test, courts evaluate this issue on a case-by-case basis. See 7 C. Wright et al., Federal Practice and Procedure § 1653 at 382 (2d ed. 1986); McLernon v. Source International, Inc., 701 F. Supp. 1422, 1425 (E.D. Wis. 1988).

The complaint in this case is an example of a pleading that includes many different claims that relate to one plaintiff only or to widely different combinations of plaintiffs. For example, Judge Adelman allowed plaintiff Cole to proceed in forma pauperis on 23 separate claims, 12 more claims than any other co-plaintiff. Several of Cole's claims are unique to him, such as his claims that his medical records were improperly disclosed, that he was retaliated against for exercising his constitutional rights, that he was denied medical care, that he was denied milk that is not non-fat despite his body's inability to tolerate non-fat milk and that he was denied access to the courts when insufficient library access deprived him of the ability to file a brief in state court. Plaintiff Nieves was allowed to proceed on 11 claims, including claims unique to him such as being denied a rosary and subjected to

unsanitary cell conditions in September 2000. Plaintiff Collette is proceeding on 7 claims, including a claim unique to him that his Eighth Amendment rights were violated when he was placed in control status for six months with no clothes and freezing temperatures. Two plaintiffs are suing defendant Berge for subjecting them to cross-sex surveillance for the sole purpose of harassment; the other plaintiffs are not advancing such a claim. This is just a sampling of the variety of claims on which each plaintiff is proceeding.

The only claim common to the entire group of plaintiffs on which Judge Adelman allowed plaintiffs to proceed is that the level system at the Wisconsin Secure Program Facility deprives plaintiffs of all reading material except a dictionary and religious text in Level 1 and certain other personal property, newspapers and magazines in Level 2.

In Williams v. Lomen, 02-C-70-C, 2003 WL 23163053 (W.D.Wis., Jan 27, 2003), I granted defendants' motion for summary judgment on plaintiff's claim that the Wisconsin Secure Program Facility's level system restrictions on reading materials deprived him of his First Amendment rights. In that case, I found that the facility uses a five-tier level system to encourage inmates to improve their conduct by granting more privileges on each level, including the ability to possess an increased number of written materials, and that this progressive structure provides inmates with an incentive for rehabilitation by offering rewards for improved behavior. I concluded that incentive programs designed to encourage inmates to improve their conduct is a legitimate penological interest and that prison officials

at the facility do not violate an inmate's constitutional rights by subjecting them to such a program. Because I already have ruled that a First Amendment challenge against restrictions imposed by the level system is not constitutionally viable, I will dismiss the claim from this lawsuit.

Given the numerous sound reasons for requiring plaintiffs in this case to litigate their claims in their own individual lawsuits, I will sever their claims pursuant to Fed. R. Civ. P. 21. This means that plaintiff Cole will be prosecuting only his own claims in one lawsuit, plaintiff Nieves will be prosecuting his claims in another separate lawsuit, and so on. This raises the question how each case file will be constructed.

As I have noted previously, plaintiffs' complaint is 71 pages long. A large portion of the complaint describes plaintiff Cole's claims. It makes little sense for the court or the individual plaintiffs to incur the expense of photocopying the entire complaint for each separate file. In addition, it does not make sense to require the defendants who have not yet filed a responsive pleading to respond to the full complaint in what will become twelve separate files, or thirteen files if plaintiff Finkley shows cause why his claims should not be dismissed. Most of the plaintiffs have been allowed to proceed on relatively few claims. Although there is evidence in the record that plaintiffs do not each have a copy of the complaint, each should know on what claims they were allowed to proceed. Judge Adelman did a meticulous job of setting out the claims in his March 7, 2003 order, and a copy of the

order was mailed to each plaintiff. Therefore, I will require each plaintiff other than plaintiff Cole to reallege the claims on which he wishes to continue to proceed in a written submission that will become the operative pleading in his lawsuit. In this submission, each plaintiff is to identify as a defendant every person allegedly responsible personally for the alleged unconstitutional acts on which that plaintiff's claims are based. If plaintiffs are unable to identify the defendants they described originally as Doe defendants despite having had more than 18 months to learn their identities, I will dismiss the claims for which no defendant has been identified.

Defendant Gerald Berge has answered plaintiffs' full complaint in a document that is 120 pages long. Although I regret that it will be necessary for him to file an amended answer to each amended pleading that individual plaintiffs file, I will retain his answer in this file, where it will be designated as his response to plaintiff Cole's complaint.

With respect to plaintiff Cole, I am asking the clerk of court to schedule a hearing before the court at which he must describe in person and under oath how he obtained signatures for the plaintiffs whose signatures appear on the amended complaint and on the objection to defendants' motion to dismiss for improper venue. If I am unpersuaded that plaintiff Cole obtained the signatures directly from each individual after the individual had an opportunity to read the respective documents, I will consider dismissing plaintiff Cole's action as a sanction for his having engaged in fraud upon the court.

Plaintiff Cole's motion for appointment of counsel will be denied, as will his alternative motion to allow him meaningful access to the law library. Although plaintiff Cole has raised numerous claims of constitutional injury, he has exhibited through his many filings in the record that he has the aptitude to prosecute his claims and the ability to conduct legal research and obtain legal supplies. The problems he describes that are endemic in prosecuting a group lawsuit no longer exist.

ORDER

IT IS ORDERED that

1. The motions of plaintiffs Karry Hilley and Barney Guarnero to withdraw as plaintiffs in this action is GRANTED. Plaintiff Hilley's and plaintiff Guarnero's claims are dismissed.

2. Plaintiff Kenta Finkley may have until March 26, 2004, in which to show cause why the complaint should not be dismissed as to him for his failure to prosecute. If, by April 2, 2004, plaintiff Finkley fails to advise the court in writing that (1) he wants to prosecute his claims; and (2) he can identify what those claims are and who the defendants are, he will be dismissed from the case.

3. Plaintiffs' claim that the Wisconsin Secure Program Facility's level system restrictions on reading materials deprive them of their First Amendment rights is

DISMISSED on the court's own motion pursuant to 28 U.S.C. § 1915A.

4. The claims of the remaining plaintiffs are severed pursuant to Fed. R. Civ. P. 21. The clerk of court is directed to assign new case numbers and open new files for plaintiffs Edward J. Youngblood, Mack D. Hill, Louis Nieves, Andrew Collette, Vincent D. Whitaker, Jason Tyrrell, Rodney Reed, Jeff Dake, Esaw P. Harness, Jr., and Terry Commodore, Jr. The number of this case and the papers previously filed herein will constitute the file for plaintiff Jonathan P. Cole's case.

5. Plaintiffs Edward J. Youngblood, Mack D. Hill, Louis Nieves, Andrew Collette, Vincent D. Whitaker, Jason Tyrrell, Rodney Reed, Jeff Dake, Esaw P. Harness, Jr., and Terry Commodore, Jr. may have until April 9, 2004, in which to submit individual proposed pleadings setting forth only those claims on which they have been allowed to proceed and identifying all defendants who allegedly committed the acts about which they complain. Upon receipt of the amended pleadings, I will review them to insure that each is limited to the claims for which this court and Judge Adelman have allowed plaintiffs to proceed and, if it is, I will direct that the relevant document be filed as the operative pleading in each case and direct that all new defendants be served and that the previously named defendants file a response to the amended pleading. If plaintiffs are unable to identify the defendants they described originally as Doe defendants, I will dismiss the claims for which no defendant has been identified.

6. Plaintiff Jonathan P. Cole's motion for appointment of counsel or alternative motion to allow plaintiff meaningful access to the law library is DENIED. Further, IT IS ORDERED that the clerk of court issue a writ of habeas corpus ad testificandum for a date and time that is available on the court's calendar directing that plaintiff Cole appear in person to explain under oath how he obtained signatures from the plaintiffs whose names appear on the amended complaint and on the objection to defendants' motion to dismiss for improper venue that he filed in this case. Until the hearing is held, all other proceedings in Cole's action are STAYED.

Entered this 15th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge