IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

ORDER

Petitioners,

04-C-0015-C

v.

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

Respondents.

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On February 2, 2004, I dismissed this group complaint brought by four prisoners confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, without prejudice, leaving each petitioner free to file his own separate lawsuit. The dismissal was based on the decision in Lindell v. Litscher, 212 F. Supp. 2d 936 (W.D. Wis. 2002), in which I explained why I would not allow prisoners proceeding pro se to prosecute group complaints. Petitioners have filed a "Motion for Reconsideration or Reargument under Fed. R. Civ. P. 59(e)."

In their motion for reconsideration, Souvannaseng Boriboune, the apparent spokesperson for the four petitioners, sets forth the following arguments:

(1) petitioners' lawsuit raises "multiplicious" constitutional violations of living conditions at the Wisconsin Secure Program Facility;

(2) refusing to allow group prisoner complaints deprives the right of access to the courts to inmates who lack the psychological abilities to fully comprehend the law;

(3) there is a legal route system through which inmates may correspond on legal issues freely with each other within the facility which provides the petitioners with "access to each other on a weekly basis regarding legal affairs. . . ."

(4) inmates at the Wisconsin Secure Program Facility are well aware of the "chances they take" in filing joint suits so they should be allowed to do so;

(5) "If all [inmate co-petitioners] agree to the head litigant prosecuting the case," then the co-petitioners cannot complain about the head litigant's filings later on; if this issue does arise, the court has the power to appoint counsel;

(6) all of the co-petitioners in this action have a complete copy of the complaint by carbon copy and "rehand written identical to the original copy."

(7) the co-petitioners are indigent and to force each party in this action to file separate suits would cost more and cause more work than needed;

(8) co-petitioners House and Campos have little knowledge concerning the law. In

addition, co-petitioners Campos and Stevens'El have "mental health issues." Yet Stevens'El "is quite versed in the law" and Boriboune is vaguely versed and can assist Stevens'El in litigating the case. All parties "are well in tune with each other and plan to continue this pattern throughout the remaining of this suit." Petitioners Boriboune, Campos and House will not be able to prosecute their own suits if they are not "teamed up" with Stevens'El to assist them;

(9) because petitioners have "very limited access to sufficient legal materials," each petitioner alone cannot file separate lawsuits; and

(10) this court's rule may result in duplicative forms of litigation and waste judicial resources.

In an affidavit accompanying the Rule 59 motion, petitioner Boriboune makes the following averments:

* * *

> We've all agree to the litigants handling the prosecution of the case as we have agreed that he is the best qualified to carry out such a task, and this litigant is Anthony Caliph Stevens'El and myself.
>
> My co-plaintiffs mainly House and Campos, lack sufficient knowledge and abilities concerning the law and therefor cannot prosecute their own action or suit, not even to the slightest degree.
>
> I accept full responsibilities of prosecuting my and my co-plaintiff's case as one body to very best of my abilities and only to the extent that my knowledge concerning the law will take we to.

> I will be sure to put forth sufficient efforts to keep all co-plaintiff fully inform about all and any circumstances of this case, in addition to taking into consideration their imput, incite and recommendation. (sic)

Although petitioner Boriboune did not set out to demonstrate the reasons for not allowing unrepresented prisoners to file group petitions, he has succeeded in doing just that. As I explained in Lindell, 212 F. Supp. 2d 936, group petitions are rife with potential problems. 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.

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. In this case, it is extremely unlikely that each petitioner has seen a copy of the group complaint, considering its length and the expense that photocopying it would have involved. This makes it impossible to know whether each plaintiff even knows what is being advanced on his behalf. In these circumstances, there is no way to protect the interests of each plaintiff. In previous group

complaints, plaintiffs have made misrepresentations to the court about their communications with co-plaintiffs that came to light only when the court wrote directly to each plaintiff to ask questions about his knowledge of the lawsuit. Even insisting on individual signatures on each filing has not avoided the problem, since some plaintiffs will forge the names of their co-plaintiffs.

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.

Finally, 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.

Petitioner Boriboune's first and last arguments are similar. He notes that the lawsuit he wishes to file raises claims that are common to the group and that it will waste judicial resources to require duplication of the claims in separate lawsuits. He is wrong about the waste of juridical resources. It is far easier to deal with many separate complaints than with one joint complaint. Moreover, if the court finds that consolidation of separate cases makes sense in a particular situation, it may order such a consolidation pursuant to Fed. R. Civ. P.

42(a).

It is rare, however, that all of the claims in any complaint are common to every one of the named petitioners. The complaint in this case is an example of such a pleading. Petitioners allege several claims concerning the physical conditions at the Wisconsin Secure Program Facility that are common to each of them, but 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 1) he was sent out of the Wisconsin Secure Program Facility by court order and returned without due process and in violation of the settlement agreement in Jones-El v. Berge, 00-C-421-C; and 2) his Eighth Amendment right to be free of cruel and unusual punishment is being violated "based on the fact that he has been diagnosed with several mental illnesses and [is] currently taking psychotropic medications." Requiring separate complaints encourages each petitioner to limit his complaint to the claims that are specific to him. The effect is conservation of judicial resources.

The vast majority of petitioner Boriboune's arguments in support of his Rule 59 motion can be distilled into one: because some prisoners are feebleminded or otherwise lack the ability to write a complaint and follow the procedures for prosecuting it, more capable inmates should be allowed to prosecute an action on behalf of these prisoners. Petitioner's argument misses the mark. First, it raises the precise concerns that led to the prohibition on group complaints: the fear that vulnerable inmates will be strong armed into joining such

a complaint. Second, it overlooks the fact that, as far as this court is concerned, inmates are free to assist other inmates in filing and prosecuting a lawsuit. The court's rule merely prevents prisoners from joining together in one lawsuit.

In this action, petitioner Boriboune states that all of the co-petitioners have "a complete copy of the complaint. . . ." If this is true, and if it is true that each petitioner is raising identical claims, it should be a simple matter for each petitioner either to hand copy the complaint or ask prison officials to make a photocopy that he may file with the court as his own separate action.

Finally, petitioner Boriboune argues that he and his co-petitioners are indigent and have limited access to "legal materials," which I take to mean paper, pens, postage and the like. He argues that it will cost more if each petitioner is required to finance his own lawsuit.

There is no question that a rule requiring each prisoner plaintiff to file his own lawsuit will have the effect of requiring each prisoner to pay a $150 filing fee and the costs of his litigation. However, at least two courts have ruled that a one-case, one-prisoner rule furthers the intended purpose of the 1996 Prison Litigation Reform Act and that the plain language of 28 U.S.C. § 1915 requires such a rule. In Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit upheld a district court's dismissal of a multi-plaintiff prisoner suit without prejudice to each petitioner's filing his own separate lawsuit. The court of appeals ruled that Congress intended by the 1996 Prison

Litigation Reform Act and the plain language of the in forma pauperis statute to impose on every prisoner an economic deterrent, that is, a full filing fee, that would curtail abusive litigation over the conditions of confinement. The court held that to the extent that the Prison Litigation Reform Act conflicted with the permissive joinder rule, Fed. R. Civ. P. 20, the rule was repealed. In Clay v. Rice, 2001 WL 1380526 (N.D. Ill. Nov. 5, 2001), a district court for the Northern District of Illinois adopted the Hubbard court's decision, predicting that the Court of Appeals for the Seventh Circuit would follow it.

Two other courts have commented in published orders on the question whether group prisoner complaints are compatible with the requirements of the Prison Litigation Reform Act. In Burke v. Helman, 208 F.R.D. 246 (C.D. Ill. 2002), the defendants moved the court for an order requiring each prisoner plaintiff in a group lawsuit to pay the full filing fee. The motion was presented to a magistrate judge in the context of a case that had been allowed to proceed as a group complaint. The only question was the propriety of taxing each plaintiff the full $150 fee. Magistrate Judge Gorman noted that in Hubbard and Clay, neither court had decided whether it is proper to require each one of multiple plaintiffs in a *single* suit to pay the entire filing fee. In holding that it was not, the magistrate judge relied entirely on the language of 28 U.S.C. § 1915(b)(3), which states that, "In 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 or criminal judgment." In apparent dicta,

Magistrate Judge Gorman stated that he saw no conflict between the Prison Litigation Reform Act and Fed. R. Civ. P. 20 and predicted that the Court of Appeals for the Seventh Circuit would not follow Hubbard.

The Court of Appeals for the Sixth Circuit has addressed the issue of group prisoner complaints following enactment of the Prison Litigation Reform Act in In Re Prison Litigation Reform Act, 105 F.3d 1131 (6th Cir. 1997). In an "Administrative Order" to guide the district courts in the circuit in the administration of prisoner cases, the court of appeals set down rules to achieve uniformity in the processing of prisoner complaints. With respect to group prisoner complaints, the court of appeals stated,

> The statute [§ 1915] does not specify how fees are to be assessed when multiple prisoners constitute the plaintiffs or appellants. Because each prisoner chose to join in the prosecution of the case, each prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court or the court of appeals may impose shall be equally divided among all the prisoners. This procedure also will permit easier accounting for the district courts and prison officials.
>
> In cases involving class actions, the district courts are not to assess fees and costs to each member of the class. As a class action certification is normally made long after the complaint is filed, the responsibility to pay the required fees and costs shall rest with the prisoner or prisoners signing the complaint. In class actions on appeal, the prisoner or prisoners signing the notice of appeal shall be obligated to pay all appellate fees and costs.

Id. at 1137-1138.

With respect, I question whether the Sixth Circuit would have chosen this procedure

had it been able to predict the complications that arise in attempting to apply the fee provisions of the statute equally to petitioners who file group prisoner complaints and the instances in which the "equal assessment" method would directly contradict the requirements of § 1915. In an order entered in Tiggs v. Berge, 01-C-314-C (W.D. Wis. June 14, 2001), I noted that the complaint listed 86 proposed petitioners seeking leave to proceed in forma pauperis in a group complaint. In attempting to devise a method of applying the fee provisions of § 1915 in this action, I made the following observations:

> Equal division of the fee among the petitioners is not a desirable choice. That method ignores Congress's direction that the assessments be made using the specific formula it describes in the statute, and that inmates who do not have the means to pay the fee may proceed without paying an initial partial payment. If I calculate an initial partial payment for each petitioner with the means to pay such a payment using the required formula, however, I will arrive at an amount to be collected that is greater than the total of the amount owed for the filing fee. Therefore, I have calculated initial partial payments from the trust fund account statements of the first petitioners submitting them whose statements reveal the petitioner has the means to pay an initial partial payment. I have calculated the initial partial payments using the formula set out in § 1915(b)(1). When the sum of the assessed amounts totaled $150, I stopped calculating assessments. This means that there are petitioners proceeding in this action with means to pay an initial partial payment who are not required to pay . . . .

Id. at 3.

In an earlier case, Dangerfield v. Litscher, 99-C-480-C (W.D. Wis. August 11, 1999), I implemented another "common sense" method of dividing the fee among 11 proposed prisoner petitioners, after discovering that by calculating initial partial payments for each

petitioner as Congress directs in § 1915, the total would amount to $744.79, a sum well in excess of the $150 filing fee. Instead of requiring each petitioner to pay an initial partial payment of 20% of the average monthly balance in his prison account, I reduced the amount each would have to pay to 4.028% of the average monthly balance so that the total amounted to $150, and included a table in the assessment order that reflected the math as follows:

| Name | Avg. Monthly Balance in Prison Account | x 20% | x 4.028% |
|---|---|---|---|
| | | | |
| Rashid Talib | $500 | $100 | $20.14 |
| Paul Rice | $500 | $100 | $20.14 |
| Walter Brown | $476.10 | $95.22 | $19.18 |
| Carlos A. Austin | $195.60 | $39.12 | $7.88 |
| Tingia D. Wheeler | $373.25 | $74.65 | $15.03 |
| Joeddie Smith | $187.95 | $37.59 | $7.57 |
| Baron L. Walker, Sr. | $136.40 | $27.28 | $5.49 |
| LaMont E. Moore | $350.60 | $70.12 | $14.12 |
| Eric Washington | $503.40 | $100.68 | $20.28 |

| | | | |
|---|---|---|---|
| Alphoncy Dangerfield | $500.65 | $100.13 | $20.17 |
| John D. Tiggs | $0 | $0 | $0 |
| | | | |
| TOTAL | $3723.95 | $744.79 | $150.00 |

Although this mathematical approach takes into account each petitioner's relative means to pay, it ignores Congress's specific direction in § 1915(b)(1) to assess initial partial payments at 20% of the prisoner's average monthly income or balance in his inmate account for the preceding six months.

Another problem with equally dividing filing fees becomes apparent when one or more of the group complainants has struck out under § 1915(g). The purpose of § 1915(g) is to make it difficult for prisoners who have filed repeated frivolous lawsuits to file additional frivolous suits. Savvy prisoner litigants realize that this gate keeping device can be avoided entirely simply by writing group complaints that will be financed by other prisoners.

Having grappled with the proper application of the relevant provisions in § 1915 to group complaints, I have concluded that the only way to comply with those provisions is to require each plaintiff to file his own lawsuit. Whether the Prison Litigation Reform Act repealed Fed. R. Civ. P. 20 in the context of prisoner lawsuits is a question I need not decide. A district court has inherent authority to manage its cases and it 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"). Nothing in petitioners' "Motion for Reconsideration or Reargument under Fed. R. Civ. P. 59(e)" persuades me that I abused that discretion in dismissing petitioners' group complaint without prejudice to their refiling separate lawsuits.

Because there is a difference of opinion in the circuit on the proper application of Prison Litigation Reform Act provisions to group prisoner complaints, I will enter a judgment of dismissal of this action without prejudice so that petitioners may take an appeal from the judgment if they wish. I would not certify that an appeal from the judgment is not taken in good faith. However, petitioners should be aware that if they file a joint notice of appeal, I will assess an initial partial payment of the fee for each petitioner who signs the notice of appeal. Because it is not within my authority to determine whether the court of appeals will treat the notice as four separately filed appeals for which four separate $255 filing fees should be collected or as a single appeal for which each petitioner is jointly and severally liable, I will notify petitioners' institution to begin collecting the remainder of a single fee from any petitioner who joins in the appeal. Petitioners should bear in mind, however, that if the court of appeals decides that it will treat their notice as constituting an

appeal from each petitioner who has signed the notice, then it will be necessary to notify petitioners' institution to collect a full $255 filing fee from each petitioner.

ORDER

IT IS ORDERED that petitioners' "Motion for Reconsideration or Reargument under Fed. R. Civ. P. 59(e)" is DENIED. The clerk of court is directed to enter judgment dismissing this action without prejudice. Each petitioner is free to file his own proposed complaint. Petitioners have thirty days from the date of this order in which to file a notice of appeal, if they intend to take an appeal from the judgment of dismissal.

Entered this 8th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge