

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

LARRY GEORGE,

Plaintiff,

v.

JUDY SMITH, RUTH TRITT,
MARTY SCHROEDER, LAURA
VILSKI, TIM PIERCE, NURSE
CARIVOU,

Defendants.

ORDER

05-C-403-C

This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Larry George is a prisoner detained at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. In an order dated August 2, 2005, I screened plaintiff's complaint, granted him leave to proceed on a plethora of constitutional claims and dismissed other claims and defendants. Because plaintiff did not identify the prison official or officials responsible for some of the alleged violations of his constitutional rights, I granted him leave to proceed on these claims against defendant Judy Smith, the warden at Oshkosh, for the sole purpose of discovering the identities of the responsible officials. Those claims were as follows:

1. Plaintiff's First Amendment rights were violated when an unknown prison official denied him three art books and an atlas on July 8, 2002;
2. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the August 2003 issue of Spin magazine;
3. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the December 2004 issue of Blender magazine;
4. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the January 2005 issue of Spin magazine;
5. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the February 2005 issue of Spin magazine;
6. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the March 2005 issue of FHM magazine;
7. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the March 2005 issue of Blender magazine;
8. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the May 2005 issue of Blender magazine;
9. Plaintiff's First Amendment rights were violated when an unknown prison official denied him the May 2005 issue of Spin magazine; and
10. Plaintiff's Eighth Amendment rights were violated when an unknown prison

official refused to allow him to see an eye doctor for several months.

In the preliminary pretrial conference order dated March 6, 2006, Magistrate Judge Crocker advised the parties how to identify the unknown defendants. He ordered the state of Wisconsin to file and serve a letter identifying all of the unknown officials and gave plaintiff under April 3, 2006 in which to file an amended complaint. Judge Crocker instructed plaintiff to replace all of the references to unknown defendants in his complaint with the names provided by the state and not to make any other changes to his complaint without first asking for and receiving permission from the court.

After the state identified the unknown defendants, plaintiff filed two proposed amended complaints on April 5, 2006. One of the proposed amended complaints complies substantially with the magistrate judge's preliminary pretrial conference order. The other does not and will be stricken. The amended complaint that will be accepted for filing is the complaint that is dated June 26, 2005, and is identical to plaintiff's original complaint except where plaintiff has specified the names of defendants in place of the previously unknown parties. (Plaintiff also appears to have crossed out paragraphs pertaining to claims on which I denied him leave to proceed. These changes are inconsequential.) From this amended complaint, I understand plaintiff to allege that the following defendants denied him the following publications:

PUBLICATION	RESPONSIBLE OFFICIAL(S)
3 art books and atlas on July 8, 2002	Mary Hopfensperger
August 2003 issue of Spin magazine	Marty Schroeder and Laura Vilski
December 2004 issue of Blender magazine	Ruth Tritt and Rebecca Blodgett
January 2005 issue of Spin magazine	Ruth Tritt and Rebecca Blodgett
February 2005 issue of Spin magazine	Laura Vilski
March 2005 issue of FHM magazine	Ruth Tritt and Rebecca Blodgett
March 2005 issue of Blender magazine	no official identified
May 2005 issue of Blender magazine	Ruth Tritt
May 2005 issue of Spin magazine	Laura Vilski and Rebecca Blodgett

In addition, plaintiff alleges that defendants Tom Edwards and Dr. Chan violated his Eighth Amendment rights by refusing to allow him to see an eye doctor. Plaintiff will be allowed to proceed on these claims against the identified defendants, with one exception. Because no official has been identified as having denied plaintiff the March 2005 issue of Blender magazine, plaintiff will be denied leave to proceed on this claim. Because the proper defendants have been identified, defendant Smith is no longer a defendant with respect to these claims.

In addition, plaintiff has added new defendants Edwards and Hopfensperger to claims on which he was allowed to proceed in the screening order. Specifically, plaintiff has added defendant Hopfensperger to his claim that his First Amendment rights were violated when

he was denied three art books on March 22, 2005. In the screening order, I allowed plaintiff to proceed on this claim against defendant Pierce. Also, plaintiff has added defendant Edwards to his claim that his Eighth Amendment rights were violated when he was denied his Nasacort for two extended periods of several days. In the screening order, I allowed plaintiff to proceed on this claim against defendant Carivou. Although plaintiff did not have permission from the court to add defendants Edwards and Hopfensperger to these claims, I will allow the additions. Plaintiff may proceed against defendants Pierce and Hopfensperger on his First Amendment claim concerning the denial of three art books on March 22, 2005 and he may proceed against defendants Carivou and Edwards on his Eighth Amendment claim concerning denial of Nasacort.

Plaintiff's second proposed amended complaint is dated March 29, 2006. This document varies in significant respects from plaintiff's original complaint and the amended complaint he filed on April 5 that includes the previously unknown defendants. It contains extensive changes to the allegations in his original complaint and raises claims on which he has been denied leave to proceed. This document will be stricken from the record because plaintiff did not have permission from the court to file an amended complaint other than one that conformed to the requirements set out in Judge Crocker's preliminary pretrial conference order.

In keeping with the magistrate judge's preliminary pretrial conference order, all of the

defendants have answered plaintiff's properly filed proposed amended complaint. (Although the caption of defendants' answer does not include the names of the new defendants, it is clear that the pleading is compliant with the magistrate judge's directive that the new defendants file an answer to plaintiff's amended complaint no later than April 17, 2006.) Nevertheless, the new defendants must be served with the amended complaint pursuant to Fed. R. Civ. P. 4. Plaintiff was allowed to proceed in forma pauperis in this action for the purpose of having his complaint served. Order dated December 21, 2005 (Dkt. #10). Therefore, I will arrange for copies of plaintiff's amended complaint to be sent to the Attorney General's office for service on defendants Rebecca Blodgett, Tom Edwards, Mary Hopfensperger and Dr. Chan.

ORDER

IT IS ORDERED that

1. Plaintiff's amended complaint dated June 26, 2005, which is identical to plaintiff's original complaint except where plaintiff has specified the names of defendants in place of the previously unknown parties, is ACCEPTED as the operative pleading in this case; the names of Rebecca Blodgett, Tom Edwards, Mary Hopfensperger and Dr. Chan will be added to the caption of all future filings and orders;
2. Plaintiff's "proposed amended complaint" dated March 29, 2006, is STRICKEN

as unauthorized;

3. Defendant Judy Smith is DISMISSED with respect to the claims against the previously unknown defendants; she remains as a defendant, however, on plaintiff's claim that exposure to second hand smoke at the Oshkosh Correctional Institution violates plaintiff's rights under the Eighth Amendment;

4. Plaintiff is DENIED leave to proceed on his claim that his First Amendment rights were violated when he was denied the March 2005 issue of Blender magazine because he has not named a defendant who was personally involved in denying him the magazine;

5. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants Blodgett, Edwards, Hopfensperger and Dr. Chan. Because these defendants already have filed an answer to the amended complaint, no additional responsive pleading is required.

Entered this 11th day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge