

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

WILLIAM F. WEST,

Plaintiff,

v.

MATTHEW FRANK, RICHARD SCHNEITER,
GERALD BERGE and VICKI SEBASTIAN,

Defendants.

ORDER

06-C-269-C

In an order dated July 17, 2006, I allowed plaintiff William West to proceed on claims that defendants violated his rights under the First Amendment by denying him newspapers and his rights under the equal protection clause of the Fourteenth Amendment when they destroyed his but not other prisoners' newspapers without procedural protections. Defendants filed their answer to plaintiff's complaint on August 4, 2006. Now, plaintiff has filed a motion under Fed. R. Civ. P 15(a) for leave to file a second amended complaint to include "Prison Guard Aspenson," "Prison Guard Laxton," and "Prison Guard Johnson."

All of these officers were included in the allegations of plaintiff's last complaint, but they were not named as defendants in the caption.

In plaintiff's "First Amended Complaint" (the complaint that this court screened after the case was removed from state court), plaintiff alleged that Aspenson denied him copies of USA Today, that Laxton was destroying his copies of USA Today and that Johnson, when asked by plaintiff why his newspaper was being thrown away, told plaintiff, "[w]e are told to just destroy them." In his proposed second amended complaint, plaintiff keeps these allegations but adds that Aspenson and Johnson destroyed his newspapers as well.

Under Fed. R. Civ. P. 15(a), leave to amend a complaint "shall be freely granted when justice so requires." In determining whether a plaintiff satisfies this standard, courts consider a number of factors, including whether the amendment would be futile or cause unfair prejudice or whether the party waited too long to ask for amendment. Foman v. Davis, 371 U. S. 178, 182 (1962).

After plaintiff filed his motion to amend, defendants moved for additional time to respond. This motion will be denied as unnecessary. Because the case is still in its early stages, any arguments of unfair prejudice or undue delay would not be well founded. Thus, the only potentially valid argument against allowing amendment is that doing so would be futile because plaintiff's amendments would inevitably be dismissed. Because plaintiff is a prisoner, the court already has an obligation to screen his amended complaint to determine whether it is frivolous or malicious, fails to state a claim on which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915.

If I conclude that petitioner's proposed amended complaint survives screening under § 1915, I must conclude also that amendment would not be futile.

Plaintiff seeks to add three new defendants to the two claims on which I have already concluded that he may proceed. Thus, the question is not whether plaintiff states a claim generally, but whether he states a claim against the individuals he wishes to add. The more specific question is whether Laxton, Aspenson and Johnson were personally involved in the alleged violations.

In his motion, plaintiff does not state which of his claims he wishes to assert against each new defendant. However, he names all three defendants under both claims. With respect to his First Amendment claim, he alleges that Aspenson refused to deliver his newspaper. This is sufficient to show that Aspenson was personally involved, because Aspenson "participated" in the alleged violation. Boyce v. Moore, 314 F.3d 884, 888 (7th Cir. 2002). Although it is true that Aspenson was implementing a policy of higher ranking officials, this does not mean he cannot be held liable. Generally, there is no "just following orders" defense in cases brought under 42 U.S.C. § 1983. Cherry v. Berge, Nos. 02-C-544-C and 02-C-394-C (W.D. Wis. June 26, 2003) (citing Gonzales v. Cecil County, Maryland, 221 F. Supp. 2d 611, 617 (D. Md. 2002)); see also O'Rourke v. Hayes, 378 F.3d 1201, 1210, n. 5 (11th Cir. 2004) ("since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence and officers in such cases may be held

liable under § 1983 if there is a reason why any of them should question the validity of that order”) (citation and punctuation omitted).

Plaintiff does not allege that either Johnson or Laxton denied him newspapers; he alleges only that they destroyed the newspapers after they had been denied. It is the denial of the newspaper, not the way in which it was handled later, that implicated plaintiff’s First Amendment rights. Destruction of property is governed not by the First Amendment, but by the due process clause. In the July 17 order, I concluded that the destruction of plaintiff’s property did not violate the due process clause because plaintiff had an adequate remedy under state law. Accordingly, I will allow plaintiff to proceed against Aspenson on this claim, but not Johnson or Laxton.

With respect to his equal protection claim, plaintiff alleges that each of the proposed new defendants was involved in destroying his newspapers. He alleges further that each proposed defendant failed to provide him with “due process” protections before destroying his newspapers even though they provided such protections to other prisoners. As noted above, I will not allow plaintiff to proceed on a claim that his procedural due process rights were violated in connection with the taking of his property. This claim has been dismissed from the lawsuit. However, I will allow plaintiff to proceed against the proposed new defendants on a claim that their failure to give him the same procedure they give other inmates before destroying property violated his right to equal protection under the law.

As noted in the July 17 order, it is entirely unclear what procedure every other inmate allegedly gets, but at this early stage of the proceedings, that factual information is not essential to establish a claim. Plaintiff is reminded that to prevail on his equal protection claim, he will have to show that each defendant acted intentionally in handling his property destruction differently from that of other inmates, Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (plaintiff must show intentional or purposeful discrimination to establish equal protection violation), and that there was no rational basis for the differential treatment. If plaintiff did not intend to raise such a claim, he may move to withdraw it voluntarily.

Plaintiff's motion to amend his complaint is limited to his request to add Aspenson, Johnson and Laxton as defendants. However, his proposed second amended complaint also includes new allegations that certain policies concerning the level system are "arbitrarily applied." Plt.'s Am. Cpt., dkt. #13, at ¶¶ 32-43. Because plaintiff does not state in his motion that he wishes to add any new claims to his complaint, I will consider these allegations as background information for plaintiff's First Amendment and equal protection claims rather than as a separate claim.

ORDER

IT IS ORDERED that

1. Plaintiff William West's motion to amend his complaint is GRANTED. Plaintiff's second amended complaint is accepted as the operative pleading in this case.

2. Plaintiff may proceed against defendants Matthew Frank, Richard Schneider, Gerald Berge, Vicki Sebastian and officer Aspenson on his claim that he was denied newspapers in violation of the First Amendment. Plaintiff may proceed against defendants Frank, Schneider, Berge, Sebastian, Aspenson, Laxton and Johnson on his claim that they failed to give him the same procedure as other prisoners, in violation of the equal protection clause.

3. The pretrial scheduling and trial date in this case are STRICKEN. As soon as defendants have filed a responsive pleading to the second amended complaint, the case will be scheduled for a status conference.

4. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's second amended complaint and this order are being sent today to the Attorney General for service on defendants Aspenson, Laxton and Johnson.

5. The existing defendants may have until the date the new defendants' answer is due in which to file their answer to the second amended complaint.

6. Defendants' motion for an enlargement of time in which to respond to plaintiff's motion for leave to amend his complaint is DENIED as unnecessary.

Entered this 13th day of October, 2006.

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