

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

LUIS VASQUEZ,

Plaintiff,

v.

ORDER

06-cv-00743-bbc

STEVEN SCHUELER, Security Supervisor, Capt.;
CURT JANSSEN, Security Supervisor, Capt.;
CAPT. GEMPELER, Security Supervisor;
OFFICER WAYNE BAUER, Lieutenant;
GARY ANKARLO, Ph.D., PSUS;
SGT. JORDAN PREIST; SGT. JEFF MEYER;
SGT. ROBERT GUTJAHR; SGT. EMIL TONY;
SGT. BEN HILBERT; OFFICER PLYER KMIECIK;
OFFICER JOHN NICKEL; MARY ANN GORSKE;
TIMOTHY PRICE; JOSHUA FLETCHER; SCOTT
ROSS; JASON ROSENTHAL; CO KEYS; CO PONTOW;
BRETT MIERZEWJESKI and JEFF ROLINS,

Defendants.

In orders dated March 14, April 2, and August 6, 2007, I granted plaintiff leave to proceed on the following claims:

(1) Defendants Mike Biersack, Michael Passig and Jaime Fuecht used excessive force against plaintiff on August 17, 2005;

(2) Defendants Jamie Fuecht, Steven Schueler, Ben Hilbert, Mary Ann Gorske, Timothy Price and Jordan Preist denied plaintiff medical care after the August 17 use of force;

(3) Defendants John Nickel and Joshua Fletcher conducted an unconstitutional manual body cavity search of plaintiff on August 21, 2006, and defendants Plyer Kmiecik Curt Janssen, Robert Gutjahr and Emil Tony failed to intervene to stop the search;

(4) Defendants Scott Ross, Jason Rosenthal, CO Keys, CO Pontow, Brett Mierzewjeski, Wayne Bauer, Jeff Rolins, Deborah Gempeler and Jeff Meyer were involved in an unconstitutional manual body cavity search and use of taser gun against plaintiff on November 3, 2006;

(5) Defendant Ankarlo refused to provide plaintiff with mental health treatment after the incident on November 3; and

(6) Defendant Jody Lapine was deliberately indifferent to plaintiff's health by denying him psychotropic medication for approximately one week in June 2006.

Defendants have answered the complaint and a preliminary pretrial conference was held on June 7, 2007 before Magistrate Judge Stephen Crocker. At that time, the magistrate judge set a schedule for moving this case to resolution. Now, however, I must stay the proceedings, because a recent ruling of the Court of Appeals for the Seventh Circuit requires me to sever plaintiff's claims into four separate lawsuits, and plaintiff will have to choose

which of the four lawsuits he wishes to prosecute under the case number assigned to this action.

In George v. Smith, --- F.3d ---, No. 07-1325 (7th Cir. Nov. 9, 2007) (copy attached), the court of appeals ruled that a prisoner may not “dodge” the fee payment or three strikes provisions in the Prison Litigation Reform Act by filing unrelated claims against different defendants in one lawsuit. Rather, district courts must sever unrelated claims against different defendants or sets of defendants and require that the claims be brought in separate lawsuits. The court reminded district courts that Fed. R. Civ. P. 18 and 20 apply as much to prisoner cases as they do to any other case.

Fed. R. Civ. P. 20(a) provides that a plaintiff may sue more than one defendant when his injuries arise out of “the same transaction, occurrence, or series of transactions or occurrences” and when there is “any question of law or fact common to all defendants.” Rules 18 and 20 operate independently. 7 Charles Alan Wright et al., Federal Practice & Procedure, § 1655 (3d ed. 1972). Thus, multiple defendants may not be joined in a single action unless the plaintiff asserts at least one claim to relief against each of them that arises out of the same transaction or occurrence or series of transactions or occurrences *and* presents questions of law or fact common to all. Id.; 3A Moore’s Federal Practice ¶ 20.06, at 2036-2045 (2d ed. 1978). If the requirements for joinder of parties have been satisfied under Rule 20, only then may Rule 18 be used to allow the plaintiff to join as many other

claims as the plaintiff has against the multiple defendants or any combination of them, even though the additional claims do not involve common questions of law or fact and arise from unrelated transactions. Intercon Research Assn., Ltd. v. Dresser Ind., Inc., 696 F.2d 53, 57 (7th Cir. 1983) (quoting 7 Charles Alan Wright et al., Federal Practice & Procedure).

In applying Rules 18 and 20 to this case, I conclude that plaintiff's complaint must be divided into four separate lawsuits. In what I will call Lawsuit #1, plaintiff may sue defendants Mike Biersack, Michael Passig and Jaime Fuecht for allegedly using excessive force against him on August 17, 2005. In that same lawsuit, he may sue defendants Jamie Fuecht, Steven Schueler, Ben Hilbert, Mary Ann Gorske, Timothy Price and Jordan Preist denied him medical care for injuries he sustained in the August 17 incident. This is because there is a common question of fact relating to both of these claims. Plaintiff will have to prove first that he was injured in the August 17 incident and then he can attempt to prove that other defendants ignored his need for medical attention following the incident.

However, plaintiff's other claims are unrelated to the claims in Lawsuit #1. In what I will call Lawsuit #2, plaintiff may sue defendants Scott Ross, Jason Rosenthal, CO Keys, CO Pontow, Brett Mierzewjeski, Wayne Bauer, Jeff Rolins, Deborah Gempeler and Jeff Meyer on his claim that these defendants conducted an unconstitutional manual body cavity search and used a taser gun against him on November 3, 2006. In this same lawsuit, plaintiff may sue defendant Ankarlo on his claim that after the November 3 incident,

Ankarlo refused to provide plaintiff with mental health treatment.

In Lawsuit #3, plaintiff may sue defendants John Nickel and Joshua Fletcher for allegedly fondling plaintiff's genitals while conducting a manual body cavity search of him on August 21, 2006, and defendants Plyer Kmiecik Curt Janssen, Robert Gutjahr and Emil Tony for allegedly failing to intervene to stop the search.

Finally, in Lawsuit #4, plaintiff may sue defendant Jody Lapine for being deliberately indifferent to his health by denying him psychotropic medication for approximately one week in June 2006.

In light of George, I may apply the initial partial payment plaintiff paid in this case, and the subsequent payments he made to only one of the four lawsuits I have identified above. Plaintiff will have to choose which lawsuit that is. That lawsuit will be the only lawsuit assigned to this case number.

As for the other lawsuits, plaintiff has a more difficult choice. He may choose to pursue each lawsuit separately. However, for each additional lawsuit he wants to prosecute, he will be required to pay an additional filing fee, beginning with an initial partial payment in the amount of \$4.60 (the partial fee payment that was calculated from plaintiff's trust fund account statement at the time he filed this action) and the remainder of the filing fee in installments as required by 28 U.S.C. § 1915(b)(2). Alternatively, he may choose to dismiss any or all of his remaining lawsuits voluntarily. If he chooses this latter route,

plaintiff will not owe additional filing fees. Any lawsuit dismissed voluntarily would be dismissed without prejudice, so plaintiff would be able to bring it in another lawsuit, at another time.

I understand that it is not normally the case that a lawsuit may be withdrawn without prejudice when a case has progressed as far as this one has. However, in light of the unanticipated and far-reaching effect of the George decision on existing prisoner litigation, I intend to permit prisoner litigants in cases pending in this court at the time the George opinion was issued to dismiss without prejudice the separate lawsuits within their original complaint that have been identified as requiring severance.

One further matter requires comment. In George, the court of appeals ruled that if a prisoner brings a lawsuit raising multiple claims and if any one or more of those claims is dismissed at the time of screening because it is frivolous, malicious or fails to state a claim upon which relief may be granted, a strike under 28 U.S.C. § 1915(g) is to be recorded against the plaintiff. At the time this court screened plaintiff's complaint in this case, it dismissed as legally meritless his claims against various prison officials who were alleged to have opened his legal mail on four different occasions outside his presence, denied him access to the courts by failing to fix computers he wanted to use for legal research, provided him insufficient law library time while preparing his complaint in this case, and confiscated his legal manual. Therefore, a strike will be recorded against plaintiff for filing a complaint

containing claims subject to the three-strikes provision of the Prison Litigation Reform Act.

ORDER

IT IS ORDERED that

1. Plaintiff may have until December 13, 2007, in which to advise the court and defendants on which one of the separately numbered lawsuits identified in the body of this opinion he wishes to proceed. As to this one lawsuit, plaintiff's existing case number and fee obligation will be applied.

2. Plaintiff may have until December 13, 2007, in which to advise the court which of the remaining separately numbered lawsuits he will prosecute, if any, and which he will withdraw voluntarily.

3. For any lawsuit (other than the one plaintiff chooses to keep assigned to this case number) that plaintiff dismisses voluntarily, he will not owe a filing fee.

4. For any lawsuit (other than the one plaintiff chooses to keep assigned to this case number) that plaintiff advises the court he intends to prosecute, plaintiff will owe a separate \$350 filing fee, starting with an initial partial payment of \$4.60, which he must pay by December 20, 2007. The payment(s) may be submitted by a check or money order made payable to the clerk of court. The remainder of the filing fee(s), will be collected in installments in accordance with 28 U.S.C. § 1915(b)(2).

5. If, by December 13, plaintiff fails to respond to this order, I will enter an order dismissing the lawsuit as it presently exists with prejudice for plaintiff's failure to prosecute.

6. A strike is recorded against plaintiff for having filed a lawsuit containing legally meritless claims.

7. All other proceedings in this action are STAYED pending plaintiff's response to this order.

Entered this 29th day of November, 2007.

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