IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SYLVESTER JACKSON,

OPINION and ORDER

Plaintiff,

16-cv-542-bbc[1]

v.

RANDALL HEPP, JUDY SMITH,
DEBRA BOYD, RICK RAEMISCH,
GARY HAMBLIN, M. OLSEN,
P. SCHULZ, TAMMY MAASSEN,
CAPT. COOK, CAPT. FOSTER,
CAPT. JENSEN, LT. LACOST,
SGT. GARCIA, SGT. GEROGE,
DGT. GILLET, C/O LEE, T. MARCO,
C/O OLSON, C/O PETKOVSEK,
C/O BIDDLE, DEBRA TIDQUIST,
KENNETH ADLER, GEORGIA KOSTOHRYZ,
MS. DOUGHERTY, MR. FLIEGER,

Defendants.

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This case brought by pro se plaintiff and prisoner Sylvester Jackson was administratively closed on November 22, 2016, after the court determined that the case needed to be severed in accordance with Fed. R. Civ. P. 20 and 21, but plaintiff failed to instruct the court whether he wished to dismiss some of the unrelated claims or open new lawsuits. Dkt. #12. Judge Crabb stated that plaintiff could ask the court to reopen the case

[1] Because Judge Crabb is on medical leave, I am issuing this order to prevent an undue delay in the progress of the case.

for good cause. Id. Now plaintiff has filed a document in which he asks the court to reopen the case and reconsider both the decision denying plaintiff indigent status under 28 U.S.C. § 1915 and the decision that the case needs to be severed. For the reasons explained below, I am granting the motion to reopen but I am denying the motions for reconsideration. In addition, I am giving plaintiff one more chance to tell the court how he wishes to proceed with all of this claims.

OPINION

A. Procedural History

On August 1, 2016, plaintiff filed a complaint that included more than three dozen claims against more than two dozen defendants, raising a wide range of issues such as inadequate medical care, unfair discipline, harassment, denial of legal materials, race discrimination, failure to protect plaintiff from an assault by another prisoner and excessive force. Dkt. #1. After Magistrate Judge Peter Oppeneer concluded that plaintiff was not entitled to proceed in forma pauperis, dkt. #6, plaintiff paid the filing fee and the court screened the complaint in accordance with 28 U.S.C. § 1915(e)(2) and § 1915A.

In the September 27, 2016 screening order, dkt. #7, Judge Crabb concluded that plaintiff had improperly joined many of his claims because plaintiff had tried to combine unrelated claims against different defendants. She provided the following reasoning:

> Under Fed. R. Civ. P. 20, Fed. R. Civ. P. 21 and a court's inherent authority, a lawsuit may be severed when it includes unrelated claims against different defendants. Lee v. Cook County, Illinois, 635 F.3d 969, 971 (7th Cir. 2011); In re High Fructose Corn Syrup Antitrust Litigation, 361 F.3d 439, 441 (7th

> Cir. 2004); Aiello v. Kingston, 947 F.2d 834, 835 (7th Cir. 1991). As the Court of the Appeals for the Seventh Circuit has stated, "[a] litigant cannot throw all of his grievances, against dozens of different parties, into one stewpot." Wheeler v. Wexford Health Sources, Inc., 689 F.3d 680, 683 (7th Cir. 2012). Lawsuits with so many unrelated claims are both unfair to defendants (who must participate in many proceedings that have little to do with them) and difficult to manage for the court and the plaintiff (who may find it impossible to litigate so many claims at the same time, with or without a lawyer). Owens v. Hinsley, 635 F.3d 950, 952 (7th Cir. 2011) ("[U]nrelated claims against different defendants belong in separate lawsuits . . . to prevent the sort of morass produced by multi-claim, multi-defendants suits.") (internal quotations omitted). Thus, when a plaintiff tries to cram too much into one case, the court may require the plaintiff "to file separate complaints, each confined to one group of injuries and defendants." Wheeler, 689 F.3d at 683.

Dkt. #7 at 2.

Judge Crabb concluded that the claims in plaintiff's complaint belonged in 12 different lawsuits related to the following subject matters: (1) plaintiff's interactions with defendant Garcia and the discipline plaintiff received for complaining about Garcia; (2) interference with plaintiff's lawsuit against the warden and subsequent retaliation; (3) delays in receiving medical appointments; (4) plaintiff's conditions of confinement while he was housed in segregation in August 2011; (5) discipline that plaintiff received arising out of an "altercation" with defendant George; (6) a threat by defendant Petkovsek; (7) refusals by health care staff to provide medical treatment to plaintiff in 2012; (8) interference with plaintiff's ability to communicate with his lawyer; (9) incidents arising out of another prisoner's assault of plaintiff; (10) race discrimination in the context of housing and job assignments; (11) an allegedly false conduct report that plaintiff received in 2012; and (12) verbal and physical harassment by defendant Biddle. (A more thorough description of the way Judge Crabb grouped the lawsuits is in the September 27 order.)

Judge Crabb gave plaintiff until October 12, 2016, to do the following: (1) identify for the court which one of the twelve sets of claims he wanted to pursue under the case number assigned to this case; and (2) inform the court which other sets of claims he wanted to pursue under separate case numbers, if any, and which claims he would dismiss voluntarily, if any.

On October 13, 2016, the court received a response from plaintiff in which he identified which set of claims he wanted to pursue under this case number. Dkt. #8. However, he did not say what he wanted to do with his remaining claims—dismiss them or pursue them in separate cases. Instead, plaintiff said that he would file "within a few days" a motion for reconsideration on the decision to sever his case. Id. Because plaintiff did not inform the court how he wanted to dispose of all of his claims and he stated that a motion for reconsideration of the severance decision was imminent, the court deferred a screening of the merits of plaintiff's claims.

On October 31, 2016, plaintiff stated that he needed two more weeks to prepare his motion for reconsideration because of an "unknown medical condition" in his hands that made it painful for him to write. Dkt. #9. In response, the Judge Crabb gave plaintiff a November 15, 2016 deadline to either (1) file a motion for reconsideration of the September 27, 2016 order; or (2) inform the court that he is not filing a motion for reconsideration of the September 27, 2016 order and then identify which sets of claims identified in that order he wished to pursue in separate cases and which sets of claims he wished to dismiss without prejudice to his refiling them at a later date. Plaintiff was to accompany any additional

requests for time with medical evidence showing that he was unable to write. Judge Crabb informed plaintiff that, if he did not respond by the deadline, she would direct the clerk of court to close the case administratively. Dkt. #10.

On November 16, 2016, plaintiff filed another motion for an extension of time because of an unknown medical condition in his hands. Dkt. #11. However, he did not provide any medical documentation or explanation of his condition. In addition, plaintiff provided no information about the progress he had made on his motion or how much longer he believed it would take him to draft it. Finally, plaintiff did not explain why he was unable to type his motion as he had done with his complaint.

In an order dated November 22, 2016, Judge Crabb stated that the case could not move forward until plaintiff decided what to do with all of his claims. Dkt. #12. Because plaintiff had not given any indication that he would make that decision any time soon, she denied his request for an extension of time and administratively closed the case. She stated that plaintiff was free to ask the court to reopen the case when he is ready if he had good cause for doing so.

On December 1, 2016, the court received plaintiff's current motion.

B. Motion to Reopen

In requesting to reopen the case, plaintiff does not show why he has good cause. Instead, he cites a health services request in which he alleges that his hands "are locking up and [the] joints in [his] fingers hurt[]." Dkt. #13-1. In addition, he cites a 62-page

complaint in a case filed in the Eastern District of Wisconsin in which he alleges that he is not receiving adequate medical care. Neither of these documents shows that plaintiff was unable for more than two months to comply with the court's order to specify which claims he wanted to pursue in separate lawsuits. In fact, plaintiff's complaint and subsequent filings in the other case undermines any allegation that a medical condition prevented plaintiff from complying with this court's order; plaintiff submitted those filings in September, October and November 2016, the same time that plaintiff should have been responding to the court's orders in this case. However, because only a few days passed between the decision to close the case and the filing of plaintiff's new motion, I will grant plaintiff's motion to reopen the case.

C. Indigency Status

Plaintiff objects to the court's determination that he does not qualify to proceed in forma pauperis under 28 U.S.C. § 1915. Plaintiff believes that he should qualify because his trust fund account contained less than three dollars at the time he filed his motion to proceed in forma pauperis.

Plaintiff's observation is correct, but he overlooks the nearly $6000 he had in his release account and his release savings account. Under 28 U.S.C. § 1915(b)(1), a prisoner litigant must prepay 20% of the greater of the average monthly balance or the average monthly deposits made to his "prison account" in the six-month period immediately preceding the filing of the complaint. In making this determination, the court considers the

prisoner's release accounts as well as his trust fund account. Carter v. Bennett, 399 F. Supp. 2d 936, 936 (W.D. Wis. 2005); Spence v. McCaughtry, 46 F. Supp. 2d 861, 863 (E.D. Wis. 1999). This is because the language of § 1915 does not make a distinction between the two types of prisoner accounts.

In this case, 20% of the average monthly balance of all of plaintiff's accounts is $1220.81, and 20% of the average monthly deposits made to his account is $3.37. Because the greater of the two amounts is 20% of the average monthly balance, or $1220.81, plaintiff did not qualify as indigent and was responsible for paying the full $400.00 filing fee. Accordingly, I am denying plaintiff's motion for reconsideration of this issue.

D. Severance

Plaintiff argues that he is entitled to bring all of his claims in one lawsuit because all the defendants' alleged actions were "the result of [plaintiff's] filing complaints against staff and for filing a 42 U.S.C. [§]1983 complaint against the warden." Dkt. #13 at 3. Plaintiff does not cite any portion of his complaint in which he sets forth allegations that all of his claims are based on a theory that defendants retaliated against him for filing complaints against prison officials and I uncovered no such allegations in my own review of the complaint. Rather, plaintiff alleges a variety of motivations for the different conduct alleged, including both retaliation and racial discrimination. In addition, with respect to some claims, plaintiff does not allege a particular motivation. For example, he alleges that some defendants acted with deliberate indifference to his health and safety. In any event, even if

plaintiff were alleging that all of defendants' conduct was motivated by retaliatory animus, it would not entitle plaintiff to bring the dozens of claims he has asserted in a single case.

First, even under his newly stated theory, plaintiff seems to admit that different defendants were motivated by different complaints that he filed against different officials. Plaintiff cannot join claims against different defendants simply because the claims are based on a similar legal theory. The claims must arise "out of the same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(1)(A). In other words, there must be some factual overlap among the claims. E.g., Liebzeit v. Raemisch, No. 10-cv-170-slc, 2010 WL 2486366, at *2 (W.D. Wis. June 16, 2010) (severing claims arising under free exercise clause because there was no factual overlap among claims); Nelson v. Aim Advisors, Inc., No. 01-CV-0282-MJR, 2002 WL 442189, at *3 (S.D. Ill. Mar. 8, 2002) ("The fact that Plaintiffs have made claims against each Defendant under identical federal statutory provisions does not mean that there are common issues of law and fact sufficient to satisfy Rule 20(a)."); Minasian v. Standard Chartered Bank, PLC, No. 93 C 6131, 1994 WL 395178, at *3 (N.D. Ill. July 27, 1994) ("The similarity of the legal theories under which the parties would proceed is also insufficient to support joinder."). The court in the Eastern District of Wisconsin recently reached the same conclusion as to various claims that plaintiff filed regarding allegedly inadequate medical care. Jackson v. Balsewicz, No. 16-cv-1253-WCG (E.D. Wis. Dec. 15, 2016), dkt. #23 at 2-3 ("[I]t is clear that most of the claims should not be joined in a single action. . . . [F]or example, the asthma-based claim against Nurse Eppegg has nothing to do with the claim against Nurse Jennifer, who is

alleged to have mistreated an ulcer on Jackson's foot.").

Second, even if plaintiff means to allege that each that all of the alleged actions in this lawsuit were part of a vast conspiracy among more than two dozen defendants to retaliate against him for filing a single complaint that he filed, I could not credit such a conclusory allegation, even at the pleading stage. "[C]onspiracy allegations [are] often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her [is] not enough." Cooney v. Rossiter, 583 F.3d 967, 970–71 (7th Cir. 2009). See also Rivera v. Schultz, No. 12-cv-240-bbc, 2012 WL 2680822, at *1 (W.D. Wis. July 5, 2012) (applying Cooney to deny joinder under Rule 20), aff'd, 556 F. App'x 500 (7th Cir. 2014); Holliman v. Paquin, No. 10-cv-443-slc, 2010 WL 3732124, at *1 (W.D. Wis. Sept. 16, 2010) (same).

Plaintiff advances an alternative argument that joinder should be allowed because defendant Randall Hepp, the warden of the prison, is included in all of the claims. Presumably, plaintiff is relying on Fed. R. Civ. P. 18, which allows joinder of even unrelated claims if they are asserted against the same defendant. Again, however, plaintiff does not cite portions of his complaint showing that Hepp was involved in each of the alleged incidents and my own review of the complaint does not support the assertion. Further, most of plaintiff's claims against Hepp are simply that he refused to take corrective action after another defendant violated plaintiff's rights. E.g.. Cpt. ¶¶ 40-42, 47, 55, and 67.

Even if I assume that such limited involvement would be sufficient to permit joinder under Rules 18 and 20, I would still exercise my discretion and sever the claims. Rules 18

and 20 do not give a plaintiff a "right" to bring in one case as many claims as he can against the same defendant, particularly when there are so many other defendants and there is little overlap among the claims. Rather, "[i]f other issues predominate over the common question, the district judge is entitled to sever the suit." Lee, 635 F.3d at 971 (citing Fed. R. Civ. P. 20(b), 21). Because the differences between the different sets of claims greatly outweigh their similarities, I am not persuaded that they should be litigated together.

Unfortunately, plaintiff still does not say in his motion whether he wants to dismiss the unrelated claims or pursue them in a separate lawsuit. I will give plaintiff one more opportunity to do so. If he does not comply this time, the court will dismiss without prejudice all of his claims except those included in what Judge Crabb called "Lawsuit #1," Sept. 27, 2016 order, dkt. #7, at 3, because those are the claims that plaintiff stated he wishes to pursue under case no. 16-cv-542-bbc. Dkt. #8. If the other claims are dismissed, the statute of limitations will continue to run as to those claims. Once it is determined how plaintiff wishes to proceed with all of his claims, the court will screen the merits of plaintiff's claims in accordance with 28 U.S.C. § 1915(e)(2) and § 1915A.

ORDER

IT IS ORDERED that

1. Plaintiff Sylvester Jackson's motion to reopen, dkt. #13, is GRANTED.
2. Plaintiff's motion for reconsideration, dkt. #13, is DENIED.
3. Plaintiff may have until January 23, 2017, to inform the court which claims he

wishes to pursue in separate lawsuits and which claims which he claims he wishes to dismiss without prejudice. If plaintiff does not respond by January 23, the court will dismiss all claims other than those included in "Lawsuit #1."

Entered January 6, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge