

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAY F. VERMILLION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:15-cv-00605-RLY-TAB
	)	
MARK E. LEVENHAGEN,	)	
SALLY NOWATZKE,	)	
BRETT MIZE,	)	
GARY BRENNAN,	)	
	)	
Defendants.	)	

Entry Denying Motion for Leave to File Fourth Amended Complaint

Now before the court is Plaintiff's motion for leave to file a Fourth Amended Complaint. Dkt [273]. The proposed Amended Complaint seeks to do two things: 1) add claims against Douglas Barnes; and 2) amend or clarify the scope of the due process claims. Defendants' motion for leave to file a surreply, dkt [291], is **granted**. The motion to amend is now fully briefed.

The motion to amend is necessarily brought under Rule 15(a)(2) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 15(a)(2). "It instructs courts to 'freely give leave when justice so requires,' and thus district courts should not deny leave absent a 'good reason'—such as futility, undue delay, prejudice, or bad faith." *Kreg Therapeutics, Inc. v. VitalGo, Inc.*, 919 F.3d 405, 417 (7th Cir. 2019).

The motion to amend is denied because it is untimely and unduly prejudicial to Defendants. The deadline to file the Third Amended Complaint in this action was May 15, 2015. *See* dkt. 92. On June 1, 2016, the parties were instructed that further amendments to the complaint were not anticipated. Dkt. 146. Plaintiff argues, however, that the amendments are timely because counsel

was recently appointed to assist the otherwise indigent, pro se, prisoner plaintiff. This court agrees that court-recruited counsel has acted with diligence and that it is difficult to litigate pro se. However, the appointment of counsel does not negate the fact that this action was originally filed on July 12, 2011, and that the Defendants have actively litigated the claims raised in the Third Amended complaint. Defendants' motion for summary judgment was granted in part and denied in part on May 22, 2018. Following summary judgment there are only two claims remaining for resolution in this nearly 8-year-old case:

Whether Mark Levenhagen, Sally Nowatzke, Brett Mize and Gary Brennan violated Vermillion's Eighth Amendment rights through his placement in the Westville Control Unit for 1,513 days.

Whether Mark Levenhagen and Brett Mize transferred Vermillion from the ISP to department-wide administrative segregation at the Westville Control Unit in violation of Vermillion's due process rights.

Dkt. 214 at 27.

I. Proposed Addition of Defendant Barnes

Plaintiff seeks to add claims against Douglas Barnes. These claims would necessarily be brought against him in his individual capacity. This action was transferred to this Court following the Seventh Circuit's Mandate entered on April 6, 2016. That Mandate specifically vacated the Northern District of Indiana's Judgment insofar as it dismisses any claim against defendants Levenhagen, Morton, Brennan, Mize, Nowatzke, Plank, Buss, Whelan, and Carrasco. Mr. Barnes was not named in the Mandate and to attempt to bring him into this case more than three years after the Mandate would be prejudicial and cause undue delay.

II. Proposed Addition of Due Process Claims

The Motion to Amend the Complaint to include a claim against Defendants Brennan and Nowatzke for their ongoing failure to afford Plaintiff the periodic reviews of his placement in

department-wide administrative segregation is denied. The addition of due process claims against Brennan and Nowatzke shall not be permitted because it is unduly prejudicial to these Defendants. The court's screening order reflects that the court did not understand the Third Amended Complaint, dkts [96] and [97], to include an independent claim based on the failure to provide periodic reviews of Plaintiff's placement against Defendants Nowatzke and Brennan. Nor were these claims developed prior to the resolution of summary judgment. That said, this ruling should not be read to suggest that the purported denial of periodic reviews by Brennan and Nowatzke is irrelevant to the Eighth Amendment claim proceeding against them. Evidence of the denial of meaningful reviews could support the claim that these Defendants were deliberately indifferent to Plaintiff's conditions or confinement.

The Court understands the due process claim proceeding in this case against Defendants Levenhagen and Mize to encompass the claim that Plaintiff was denied meaningful, periodic review of his prolonged isolation. Accordingly, no amendment as to these two Defendants is necessary.

III. Conclusion

The motion to amend, dkt [273], is **denied**. This ruling reflects the court's need to continue to narrow the issues first raised in the Northern District of Indiana on July 12, 2011, and streamlined in the Seventh Circuit's Mandate. Given the substantial passage of time, Plaintiff must live with the litigation decisions he made years ago prior to the recruitment of counsel. The due process claims proceeding in this case against Defendants Levenhagen and Mize are understood to encompass the claim that Plaintiff was denied meaningful, periodic review of his prolonged isolation following his transfer to department-wide administrative segregation.

IT IS SO ORDERED.

Date: 4/26/2019



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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