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United States District Court, D. Kansas.

Thomas PORTER, et al., Plaintiffs,
v.
Governor Joan FINNEY, et al., Defendants.

No. 77-3045-R. | Nov. 4, 1991.

Attorneys and Law Firms

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Dept. of Corrections, Topeka, Kan., for defendants.

Opinion

MEMORANDUM AND ORDER

ROGERS, District Judge.

*1 This case is now before the court upon various pleadings filed by Jouett Arney and Eric Moore. Mr. Arney was a named class representative in this litigation before he was permitted to withdraw. He currently is appealing the court's denial of his motion to intervene in this case. Mr. Moore is not a named party in this case. Both Mr. Arney and Mr. Moore are acting without counsel and, in fact, are attacking, among others, counsel who have been representing the class of plaintiffs in this case. The court shall respond to these pleadings as follows.

Docket 384 and 385. These pleadings are a motion for an order to show cause and an affidavit in support thereof. Mr. Arney has filed these documents. Initially, the motion requests an order directed to Professor William Rich (one attorney currently representing the plaintiffs' class) and Lisa Nathanson (former counsel to the class) directing them to show cause why criminal charges should not be brought against them and others for alleged acts of retaliation against Mr. Arney. The motion closes by requesting that the show cause order be issued to several other persons, including certain defendants, agents for

defendants, and counsel for defendants.

We believe these pleadings should be struck from this case for the following reasons. Issues regarding retaliation for bringing this lawsuit are separate from the other issues in this case and should be litigated in separate cases. Indeed, Mr. Arney has already brought separate cases alleging retaliation. Although we acknowledge that in this case we have urged or directed that no retaliation occur, retaliation is not a matter which generally affects the class, and it should not be litigated as part of this class action. Of course, the filing of criminal charges is a question for the U.S. Attorney or appropriate state authorities to consider. This court cannot initiate criminal charges. Finally, these pleadings have not been brought by class counsel. Court expects counsel for the class to file matters involving issues relevant to this litigation.

Docket 396, 397, 398 and 399. These pleadings seek to add allegations of retaliation and unconstitutional conditions of confinement to this litigation. These pleadings may be labeled as a class action complaint, a petition for class certification, a preliminary injunction motion, and an amended complaint addressing First Amendment and retaliation issues. The pleadings focus upon conditions and activities at the Ellsworth Correctional Facility, although the class action complaint seeks to address conditions at several other correctional facilities in Kansas.

Again the court shall direct that these pleadings be struck from the record. This case does not directly involve conditions of confinement at Ellsworth Correctional Facility or at the other correctional facilities mentioned in the class action complaint—pleading # 396. This case is primarily concerned with conditions at Lansing Correctional Facility and Hutchinson Correctional Facility. The court has issued orders with the intent of preventing the shifting of unconstitutional conditions from Hutchinson or Lansing to other facilities in the Kansas prison system. The court has also stated that it intends to examine conditions at Ellsworth to determine how conditions at that facility have been affected by efforts to comply with court orders regarding Lansing and Hutchinson. But, there has been no attempt to litigate whether conditions at facilities other than Lansing Correctional Facility and Hutchinson Correctional Facility violate the Constitution and federal law.

*2 The efforts of Mr. Arney and Mr. Moore to add such claims to this case must fail. If they wish to litigate these claims, then they should file new cases instead of seeking to add claims to this case. Counsel for the plaintiffs in this case are in charge of the claims advanced. Attempts to supplement the claims or issues in this case must proceed through counsel for the class. Of course, the court must

Porter v. Finney, Not Reported in F.Supp. (1991)

approve any motion to amend the claims or to add parties in this case, even if it is filed by counsel.

Even if the constitutionality of conditions at Ellsworth was an issue in this case, the court still would not recognize these pleadings because counsel for the plaintiffs' class is in charge of litigating the claims in this case on behalf of the class. As the court has remarked in other orders, the court must rely upon class counsel, not individual members of the class, to advance plaintiffs' claims in this case. Finally, to the extent these pleadings raise the question of retaliation, as we have already stated, this question must be litigated as a separate case.

Docket # 400. This is a demand for subpoenas apparently in anticipation of a trial of the issues raised in the above-mentioned pleadings. This demand shall be denied consistent with the action taken relative to those pleadings.

Docket # 386. Mr. Arney has filed a petition for an order of payment of witness fees. Since such payment would

likely come from defendants through a taxation of costs, the court shall direct defendants to respond to Mr. Arney's petition within 15 days of the date of this order.

In summary, the court shall order that the pleadings designated with docket numbers 384, 385, 396, 397, 398 and 399 be struck from the record. Mr. Arney and Mr. Moore are advised that they should file these matters as new cases in this court if they wish to litigate the questions raised in the pleadings. Additionally, the court directs that copies of the pleadings at docket 396, 397, 398 and 399 be sent to class counsel for inspection and consideration as to whether the claims in this case should be augmented. The demand for subpoenas, docket # 400, is denied. Defendants are directed to respond to the petition for witness fees, docket # 386, within 15 days of the date of this order.

IT IS SO ORDERED.