Freeman v. Berge

United States District Court for the Western District of Wisconsin
September 13, 2004, Decided
03-C-0021-C

Reporter: 2004 U.S. Dist. LEXIS 18425

BERRELL FREEMAN, Plaintiff, v. GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity, GARY BOUGHTON, Security Director, in his individual capacity; JOHN SHARPE, Unit Manager (former), in his individual capacity; and GRAD HOMPE, Unit Manager, in his individual capacity, Defendants.

Subsequent History: Motions ruled upon by Freeman v. Berge, 2004 U.S. Dist. LEXIS 24222 (W.D. Wis., Nov. 23, 2004)

Prior History: Freeman v. Berge, 2004 U.S. Dist. LEXIS 15532 (W.D. Wis., July 28, 2004)

Disposition: Motion to dismiss was allowed.

Counsel: [*1] Freeman, Barrell, PLAINTIFF, Pro se.

For Gerald Berge, DEFENDANT: Joely Urdan, Assistant Attorney General, Madison, WI USA.

Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

Opinion

MEMORANDUM

Having reviewed the parties' letters on the question whether defendants are entitled to move to dismiss the only remaining claim in this action on the ground of qualified immunity, I conclude that the motion should be allowed. All of the defendants raised qualified immunity as an affirmative defense in their answer to the second amended complaint. This was the first opportunity for defendants Boughton, Sharpe, Hompe and Huibregtse to raise affirmative defenses, as they were added as defendants in the second amended complaint. Although defendant Berge has been a defendant in this action since its inception, he raised a general qualified immunity defense in response to the numerous claims raised in the original complaint and has reasserted the defense in response to plaintiff's first and second amended complaints.

Plaintiff argues that this court already has decided that plaintiff states a claim of a constitutional deprivation with respect to his food [*2] deprivation claim and that to permit defendants to press the qualified immunity defense at this late date will constitute nothing more than a rehash of issues already decided and draw the parties' attention away from trial preparation. I agree with plaintiff that I have voiced my view on two previous occasions in this lawsuit, once expressly in the December 17, 2003 order denying the parties' cross motions for summary judgment (Dkt. # 129) and once implicitly in the July 28, 2004 order permitting plaintiff to file a second amended complaint (Dkt. # 159), that plaintiff states a viable *Eighth Amendment* claim that defendants disregarded a substantial risk to his health when they repeatedly denied him food for his failure to comply with prison rules. Nevertheless, I am convinced that defendants are entitled to be heard on their affirmative defense of qualified immunity insofar as they wish to argue that their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

In opposing defendants' motion, plaintiff bears the burden of demonstrating [*3] that defendants violated a constitutional right that was clearly established at time of the incidents giving rise to his *Eighth Amendment* claim. *Perry v. Sheahan,* 222 F.3d 309, 315 (7th Cir. 2000). The schedule for briefing the motion already has been established in the magistrate judge's order of September 7, 2004.

Entered this 13th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB

District Judge