

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

MARCUS TODD DRAKE, et al.,

Plaintiffs,

v.

CASE NO. 18-3174-SAC

(FNU) UNDERWOOD, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Marcus Drake is a state prisoner housed at El Dorado Correctional Facility (WCF) in El Dorado, Kansas. Mr. Drake and eight (8) other plaintiffs filed this § 1983 action against eleven (11) defendants alleging interference with their right to free exercise of religion.

Filing Fee

After filing the complaint, the Court on July 23, 2018, issued notices of deficiency to all nine (9) plaintiffs. *See* ECF Nos. 4 through 12. The notices stated either that they had not submitted the financial information required to accompany a motion for leave to proceed in forma pauperis, or that they had not paid the filing fee or submitted a motion to proceed in forma pauperis. All notices ordered the plaintiffs to respond by August 22, 2018. As of the date of this Order, only two plaintiffs have responded to the notice of deficiency: Mr. Drake submitted the required financial information as directed, and Mr. Iori submitted an ifp motion but has not filed the required financial information.

Under Rule 41(b) of the Federal Rules of Civil Procedure, a district court may dismiss an action “if the plaintiff fails to prosecute or to comply with these rules or a court order.” Fed. R. Civ. P. 41(b). Because one plaintiff has complied with the Court’s order, this matter is not

dismissed. However, the following plaintiffs who have failed to comply are dismissed without prejudice for lack of prosecution: Ryan Lee, Cliff Swarthout, John Mistler, Corey Barfoot, Gary Iori, David Smith, Jacob Ott, and Steven Schultz. Mr. Iori's motion for leave to proceed in forma pauperis (ECF No. 16) is denied without prejudice.

Mr. Drake's motions for leave to proceed in forma pauperis (ECF No. 2 and 14) are granted. The Court assesses an initial partial filing fee of \$25.50, calculated under 28 U.S.C. § 1915(b)(1). Mr. Drake is granted fourteen (14) days from receipt of this order to submit the fee. Any objection to this order must be filed on or before the date payment is due. The failure to pay the fee as directed may result in the dismissal of this matter without further notice. Plaintiff Drake remains obligated to pay the remainder of the \$350.00 filing fee. The agency having custody of Plaintiff shall forward payments from Plaintiff's account in installments calculated under 28 U.S.C. § 1915(b)(2).

Motions to File Amended Complaint (ECF Nos. 13 and 18)

Mr. Drake has filed two motions to amend the complaint (ECF No. 13 and 18). Both motions describe numerous changes Plaintiff intends to make to the complaint, but Plaintiff did not attach an amended complaint to either motion. Although Plaintiff may amend his complaint *one* time without leave of Court (*see* Fed. R. Civ. P. 15(a)(1)), he must actually file an amended complaint.

The amended complaint must be on the Court-approved form and must include all allegations and claims that Plaintiff intends to pursue in this action, including those to be retained from the original complaint. This is because an amended complaint completely supersedes the original complaint and renders the original complaint of no legal effect. *Franklin v. Kansas Dep't*

of Corr., 160 F. App'x 730, 733–34 (10th Cir. 2005), *citing Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991); *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir. 1990).

Because Plaintiff does not need leave of Court to file an amended complaint at this time and because he attempts to make changes to the complaint through the motions to amend, his motions are denied.

Motion for Orders (ECF No. 3)

In this filing, Plaintiff Drake asks the Court to order the defendants to stop harassing, targeting, and intimidating members of the Asatru Religion call-out at WCF.

A movant seeking a preliminary injunction to remedy an alleged constitutional violation must establish “four factors: (1) a likelihood of success on the merits [of his described claim]; (2) a likelihood that [he] will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in [his] favor; and (4) that the injunction is in the public interest.” *White v. Kansas Dep't of Corr.*, 617 F. App'x 901, 904 (10th Cir. 2015) (*quoting RoDa Drilling Co.*, 552 F.3d at 1208). At this point, the Court cannot find that success on the merits is likely and or that Plaintiff will suffer irreparable harm in the absence of injunctive relief. As a result, Plaintiff's motion is denied without prejudice.

Motion for Preliminary Injunction (ECF No. 15)

In his motion filed August 15, 2018, plaintiff Drake asks the Court to order Winfield Correctional Facility and the Kansas Department of Corrections to provide inmate trust fund statements to all of the plaintiffs in this case. The motion includes signed declarations from Steven Schultz, Cliff Swarhout, Corey Barfoot, Ryan Lee, and Jacob Ott stating they filed the correct forms but have not received their account statements and asking the Court to extend the deadline for responding to the deficiency notices.

Because the Court has not taken action on the deficiency notices until now, the Court effectively extended the deadline by two months. As explained above, eight of the nine plaintiffs have still not responded or updated the Court on the status of their responses. The Court denies the motion without prejudice.

IT IS THEREFORE ORDERED BY THE COURT that plaintiffs Ryan Lee, Cliff Swarthout, John Mistler, Corey Barfoot, Gary Iori, David Smith, Jacob Ott, and Steven Schultz are dismissed from this matter without prejudice for lack of prosecution;

IT IS FURTHER ORDERED that plaintiff Drake's motions for leave to proceed in forma pauperis (ECF Nos. 2 and 14) are **granted**.

IT IS FURTHER ORDERED that plaintiff Iori's motion for leave to proceed in forma pauperis (ECF No. 16) is **denied** without prejudice.

IT IS FURTHER ORDERED that plaintiff Drake is granted **fourteen (14) days** from receipt of this order to submit the \$25.50 initial partial filing fee. The failure to pay the fee as directed may result in the dismissal of this matter without further notice.

IT IS FURTHER ORDERED that the agency having custody of plaintiff Drake shall forward payments from Plaintiff's account in installments calculated under 28 U.S.C. § 1915(b)(2).

IT IS FURTHER ORDERED that plaintiff Drake's motions to amend the complaint (ECF Nos. 13 and 18) are **denied**.

IT IS FURTHER ORDERED that plaintiff Drake's Motion for Orders (ECF No. 3) is **denied**.

IT IS FURTHER ORDERED that plaintiff Drake's Motion for Preliminary Injunction (ECF No. 15) is **denied**.

IT IS SO ORDERED.

Dated on this 25th day of October, 2018, in Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U. S. Senior District Judge