UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RONALD SCHROEDER,
Plaintiff,

v. **Case No. 20-CV-1066**

CITY OF MUSKEGO,
Defendant.

ORDER

Ronald Schroeder filed this Section 1983 action against the City of Muskego, asserting that the City's sex offender residency ordinance violates his constitutional rights. ECF No. 1. Thirteen months later, he moved for leave to amend his complaint. ECF No. The City opposes the motion. ECF No. 15.

I. BACKGROUND

In 2008, a jury convicted Ronald Schroeder of two counts of second-degree sexual assault of an unconscious person in violation of Wis. Stat. § 940.225(2)(d). ECF No. 1, ¶ 8. He was released from prison on March 31, 2020. *Id.*, ¶ 9.

Schroeder wants to reside in Muskego, Wisconsin. *Id.*, ¶ 10. At the time he filed the complaint, Schroeder had been invited to reside with a friend in Muskego whose home was within 1,250 feet from a public lake access point. *Id.*, ¶¶ 10–11. However, the City has enacted a sex offender residency ordinance. *See* ECF No. 1-3; MUSKEGO, WIS., CODE § 294-3. The residency ordinance applies to "offenders," which includes individuals who have been convicted of a "sexually violent offense," such as second-degree sexual assault. *See* MUSKEGO, WIS., CODE § 294-2. The City has made it "unlawful for any offender to establish a permanent residence or temporary residence on property that is

within 1,250 feet of" certain types of facilities, including public lake access points, swimming pools, and schools. MUSKEGO, WIS., CODE § 294-3(A). Moreover, the City prohibits any offender from residing within its limits "unless such person was domiciled in the City of Muskego at the time of the offense resulting in the person's most recent conviction for committing the sexually violent offense." MUSKEGO, WIS., CODE § 294-3(D). The penalty for violating the residency ordinance is a fine of "not less than $500 nor more than $5,000." MUSKEGO, WIS., CODE § 294-3(D). Because of the ordinance, Schroeder is not permitted to reside anywhere in Muskego, let alone his friend's home. ECF No. 1, ¶¶ 7, 12.

Schroeder commenced this action on July 14, 2020, alleging that the City's residency ordinance violates his due process and equal protection rights under the Fourteenth Amendment. *Id.*, ¶¶ 13–19. The City of Muskego waived service on August 4, 2020, and answered on September 11, 2020. ECF Nos. 6–7. I entered and subsequently amended a scheduling order that set the discovery deadline as September 15, 2021, and the dispositive motion deadline as November 15, 2021. ECF No. 11; Text Only Order of July 13, 2021.

On August 18, 2021, Schroeder moved for leave to file an amended complaint. ECF No. 13. The amended complaint adds allegations about Schroeder's current living situation. He presently resides in Milwaukee. *Id.*, ¶ 10. Karin Kotar, his friend whose home was located within 1,250 of a lake access point, has subsequently sold the property. *Id.* Schroeder now has an invitation from another friend, Sharon Squires, to reside at her home in Muskego. *Id.*, ¶ 11. Schroeder also hopes to rent his own residence in the city. *Id.*, ¶ 12. In addition to raising due process and equal protection claims, the amended

complaint alleges that the City's residency ordinance is an unconstitutional ex post facto law. *Id.*, ¶¶ 21–22.

II. DISCUSSION

Federal Rule of Civil Procedure 15(a) directs district courts to freely give leave to amend when justice so requires. FED. R. CIV. P. 15(a). A district court may deny leave to amend upon a finding of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). However, such denials are disfavored. *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010).

A. Prejudice

The City focuses its opposition to Schroeder's motion on the newly added ex post facto claim. It contends that "it now must completely re-strategize as it was not intending to refute such a claim from the beginning." ECF No. 15 at 5. It also contends that it will need to "engage in unnecessary additional discovery that could have been undertaken had Plaintiff brought the claim initially." *Id.* at 6.

Both Schroeder's effort to amend his complaint and the City's opposition to that effort implicate an axiom of our federal pleading standards. "[P]laintiffs are not required to plead legal theories in their complaints." *Lovelace v. Gibson*, 21 F.4th 481, 488 (7th Cir. 2021). "Complaints plead *grievances*" with factual allegations. *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). "What rule of law, if any, those [allegations] violated, [is] a subject to be explored in other papers, such as motions, memoranda, and briefs." *Id.* at 974–75.

Even "when a plaintiff does plead legal theories, [they] can later alter those theories." *Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 859 (7th Cir. 2017). Relatedly, "the fact that the complaint omits a legal theory cannot block a plaintiff from invoking that theory." *Koger*, 950 F.3d at 974. As long as a legal theory relies on the allegations in the operative complaint, the plaintiff need not amend the complaint to raise it. *See id.* at 975.

The complaint and the amended complaint both plead the same grievance. The factual changes in the amended complaint are nominal. At core, Schroeder would like to live in Muskego, but the City's residency ordinance prevents him from doing so. Schroeder was not required to amend his complaint to later raise his ex post facto claim.

That conclusion cuts both ways. I am not sure why Schroeder felt the need to amend his complaint to add a legal theory this late in litigation. At the same time, the City's complaints of prejudice "by no fault of its own," ECF No. 15 at 6, are not entirely accurate. The complaint placed the City on notice of the factual basis for Schroeder's claims. The City could have explored Schroeder's legal theories in discovery.

It is true, as the City points out, that "[t]here must be a point at which a plaintiff makes a commitment to the theory of its case." *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304 (7th Cir. 1993). But I do not believe this case is at that point. When Schroeder moved for leave to amend, there was one month left of discovery and two months until the dispositive motion deadline. That is ample time for the City to research and assess the ex post facto claim. Moreover, even if discovery on the ex post facto claim will "result in great expense" to the City, ECF No. 15 at 6, I am not convinced that the expense would be the result of Schroeder's delay. *See George v. Kraft Foods Glob., Inc.*,

641 F.3d 786, 791 (7th Cir. 2011). The minimal factual additions likewise do not substantially prejudice the City. The amended complaint does mention Sharon Squires for the first time. However, Schroeder notes that the City has already deposed Squires because he disclosed her as a witness. EC No. 16 at 5. Finally, if the parties need more time for discovery, they may seek an amendment to the scheduling order.

Although Schroeder was not required to amend his complaint to raise an ex post facto claim grounded in the allegations of his original complaint, the amended complaint will better focus the parties as they approach summary judgment. Granting leave now also forestalls any dispute that could have arisen if Schroeder first raised his ex post facto claim in response to the City's motion for summary judgment. The City has not demonstrated that any prejudice would outweigh these benefits.

B. Futility

The City also contends that granting leave to amend would be futile. "The opportunity to amend a complaint is futile if the complaint, as amended, would fail to state a claim upon which relief could be granted." *See Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997) (internal quotations omitted). This calls for the same analysis as if the City moved for dismissal under Rule 12(b)(6). *Id.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). I must "accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the elements of the claim are not

entitled to this presumption of truth." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

The Constitution's ex post facto clauses, U.S. CONST., Art. I, § 10, cl. 1 and U.S. CONST., Art. I, § 9, cl. 3, prohibit retroactive punishment. *United States v. Leach*, 639 F.3d 769, 772 (7th Cir. 2011). To fall within the ex post facto prohibition, a law must be "*both* retroactive *and* penal." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018) (emphasis original).

i. Retroactivity

The Seventh Circuit has developed its retroactivity analysis in the context of sex offender registration and residency laws over two cases. In *Leach*, the Seventh Circuit considered whether the Sex Offender Registration and Notification Act (SORNA) constituted an ex post facto law. *Leach*, 639 F.3d at 772. Leach was convicted of a sexual offense in 1990, 16 years before SORNA's enactment. *Id.* at 771. In 2009, the federal government charged Leach under the statute for failing to register after moving to a new state. *Id.* The Seventh Circuit acknowledged that "SORNA impose[d] significant burdens on sex offenders who, like Leach, may have committed their crimes and completed their prison terms long before the statute went into effect." Id. at 773. However, the law was not retroactive because it "target[ed] only the conduct undertaken by convicted sex offenders after its enactment." *Id.* Thus understood, the law "merely create[d] new, prospective legal obligations based on the person's prior history." *Id.*

In *Vasquez*, the Seventh Circuit reaffirmed the principles of *Leach* in upholding Illinois' sex offender residency restrictions against an ex post facto challenge. *See Vasquez*, 895 F.3d at 520. Like the registration requirements of SORNA, Illinois'

residency restrictions undoubtedly applied to individuals "who were convicted of child sex offenses before the amendment was adopted." *Id.* But again, as in *Leach*, the law was not retroactive because its "requirements and any criminal penalty appl[ied] only to conduct occurring *after* its enactment—i.e., knowingly maintaining a residence within 500 feet of" specified areas. *Id.* (emphasis original).

Weeks after deciding *Vasquez*, the Seventh Circuit applied the case to affirm summary judgment against a plaintiff challenging a City of Green Bay law prohibiting sex offenders from residing within 2,000 feet of specified areas. *See Werner v. City of Green Bay*, 743 F. App'x 10, 12 (7th Cir. 2018) (unpublished). Most recently, the Seventh Circuit acknowledged that its retroactivity caselaw is in tension with other circuits. *Hope v. Comm'r of Ind. Dep't of Corr.*, 9 F.4th 513, 530 (7th Cir. 2021). However, it declined to revisit *Leach* and *Vasquez,* which, as a result, remain good law in this circuit. *See id.*

Schroeder does not address *Leach* or *Vasquez*. Instead, he argues that the City's residency ordinance is retroactive because it was "not enacted until May 2019, more than a decade after Plaintiff's conviction." ECF No. 16 at 7. That is clearly not enough in the Seventh Circuit. *See Leach*, 639 F.3d at 773; *Vasquez*, 895 F.3d at 520. *But see Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016). Schroeder would be hard-pressed to distinguish the City's 1,250-foot residency restriction, MUSKEGO, WIS., CODE § 294-3(A), from the residency restrictions in *Vasquez*. Section 294-3(A) and its penalties only apply to post-enactment conduct of a convicted sex offender—that is, living within 1,250 feet of a specified area. Therefore, the amended complaint does not sufficiently allege that Section 294-3(A) is retroactive. Schroeder has thus failed to state a plausible claim that Section 294-3(A) is an unconstitutional ex post facto law.

It is less clear how to characterize the City's ban on sex offenders residing in Muskego "unless such person was domiciled in the City of Muskego at the time of the offense resulting in the person's most recent conviction for committing the sexually violent offense." MUSKEGO, WIS., CODE § 294-3(D). On the one hand, Section 294-3(D) only applies to the future conduct of covered sex offenders. Only those covered sex offenders who reside in Muskego post-enactment are subject to the ordinance's penalties. On the other hand, whether a person is subject to Section 294-3(D) depends on the person's prior conduct—or, in the words of the Seventh Circuit, "the person's prior history." *Leach*, 639 F.3d at 773. The only prior history contemplated by SORNA was the person's pre-enactment conviction. *Id.* Section 294-3(D) expands the concept of prior history to include (1) the person's conviction and (2) the person's residence.

This is where the tension between the Seventh Circuit's retroactivity analysis and other circuits' approach is laid bare. The Tenth Circuit would merely ask whether Schroeder is subject to an ordinance for conduct that took place before its enactment. *See Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016). The answer to that question is clearly, yes. Schroeder is subject to the ordinance because of his pre-enactment conviction and his pre-enactment residence.

The key question in the Seventh Circuit is whether the law "targets only the conduct undertaken by convicted sex offenders after its enactment." *Leach*, 639 F.3d at 773. This approach decouples a person's status as a sex offender from their offending conduct. It ignores the fact that these sex offender registration and residency laws are triggered, in part, by a person's criminal conduct. No one is subject to these laws unless they committed a sexual offense. Judge Scudder recognized this in his concurrence in *Hope*,

where he wrote: "What *Leach* and *Vasquez* failed to account for is that the registration obligations did not apply at the time the sex offenders committed the offenses triggering registration—meaning that the sex offender registration laws imposed obligations beyond those prescribed at the time of the offense." *Hope*, 9 F.4th at 535 (Scudder, J., concurring).

Leach and *Vasquez* nonetheless remain good law. Even so, the City cannot escape a finding that, as alleged, Section 294-3(D) applies retroactively to Schroeder. To come within Section 294-3(D)'s residency ban, a convicted sex offender must (1) live in Muskego post-enactment and (2) have lived outside of Muskego at the time of their offense. Schroeder committed his offense before the City enacted the ordinance, and it is reasonable to infer that he did so when he lived outside of Muskego. As alleged in the complaint, then, Section 294-3(D) "appli[ies] to events occurring before its enactment," *Weaver*, 450 U.S. at 29—that is, Schroeder's living outside of Muskego when he committed his offense. Therefore, the amended complaint sufficiently alleges that Section 294-3(D) is retroactive as applied to Schroeder.

ii. Punitive

The Supreme Court's case law concerning the punitive prong of the ex post facto analysis sets forth a two-step "intent-effects test." *Hope*, 9 F.4th at 530. First, a district court must ask "whether the legislature intended to enact a punitive, rather than a civil, law." *Id.* If the legislature intended to enact a punitive law, the inquiry ends. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Otherwise, the district court must ask whether the law is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Hope*, 9 F.4th at 530 (quoting *Smith*, 538 U.S. at 92). To assess the law's effects,

the district court must consider "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id.*

Schroeder concedes that the City intended to enact a civil law when it passed its sex offender residency ordinance. He therefore argues that the amended complaint sufficiently alleges that Section 294-3(D) is so punitive in effect as to negate the City's intentions.

Schroeder sufficiently alleges that Section 294-3(D) is akin to the punishment of banishment. Traditionally, banishment meant that a person "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." *Smith*, 538 U.S. at 98. As alleged in the complaint, Section 294-3(D) permanently bans Schroeder from residing in Muskego, an outcome that sufficiently resembles banishment to support a finding that the law is punitive.

Schroeder also sufficiently alleges that Section 294-3(D) imposes an affirmative disability or restraint on him. "The boundaries of this factor are undefined," and "[o]utside the 'paradigmatic' example of physical restraint, it is not evident what statutory requirements amount to a restraint or disability." *Hope*, 9 F.4th at 532. However poorly defined those boundaries may be, I find that this is an instance where they have been crossed. As alleged in the complaint, Section 294-3(D) does not merely limit Schroeder's housing options in Muskego, it permanently prohibits him from living in the city.

Finally, Schroeder sufficiently alleges that Section 294-3(D) is excessive in relation to its purpose. "The touchpoint for the excessiveness factor is 'whether the regulatory means chosen are reasonable in light of the nonpunitive objective,' not whether 'the legislature has made the best choice possible to address the problem it seeks to remedy.'" *Id.* at 534 (quoting *Smith*, 538 U.S. at 105). As alleged in the complaint, Section 294-3(D) has the nonpunitive purpose of protecting children by "creating zones around places where children regularly gather in which sex offenders are prohibited from establishing residence." ECF No. ¶ 17. Schroeder points to two inconsistencies between Section 294-3(D)'s stated purpose and its means of achieving that purpose. First, he notes that Section 294-3(D) does not distinguish between persons convicted of sexual offenses involving minors and persons convicted of sexual offense not involving minors. Second, he notes that instead of "creating zones around places where children regularly gather in which sex offenders are prohibited from establishing residence," Section 294-3(D) bans certain sex offenders from residing anywhere in Muskego. At this stage, these disconnects are enough to sufficiently allege that Section 294-3(D) exceeds its nonpunitive purpose.

In light of the foregoing, the amended complaint sufficiently alleges that Section 294-3(D) is so punitive as to negate the City's intention to deem it civil. Therefore, the amended complaint sufficiently alleges that Section 294-3(D) is both retroactive as applied to Schroeder and penal. Schroder has stated a plausible claim that Section 294-3(D) is an unconstitutional ex post facto law; it would not be futile to give him leave to amend.

III. CONCLUSION

In sum, I find that (1) justice requires giving Schroeder leave to amend his complaint, (2) the amended complaint fails to state a plausible claims that Section 294-3(A) is an unconstitutional ex post facto law, and (3) the amended complaint states a plausible ex post facto claim with respect to Section 294-3(D). I remind the parties that whether Schroder prevails on his plausible ex post facto claim is a question left for future resolution.

IT IS THEREFORE ORDERED that Schroeder's motion for leave to file an amended complaint is **GRANTED**.

IT IS FURTHER ORDERED that Schroeder's claim that Section 294-3(A) is an unconstitutional ex post facto law is **DISMISSED WITH PREJUDICE**.

Dated at Milwaukee, Wisconsin, on this 18th day of February, 2022.

s/Lynn Adelman
LYNN ADELMAN
United State District Judge