

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY MURRY,

Petitioner,

v.

STEVEN GIBBS and  
MARY G. FISHER,

Respondents.  
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OPINION AND ORDER

01-C-550-C

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the North Fork Correctional Institution in Sayre, Oklahoma, seeks leave to proceed pursuant to 28 U.S.C. § 1915. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's

complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Because this court lacks subject matter jurisdiction, I will deny petitioner's leave to proceed.

In his complaint, petitioner makes the following allegations of fact.

#### ALLEGATIONS OF FACT

Petitioner Anthony Murry is a Wisconsin inmate housed at the North Fork Correctional Institution in Sayre, Oklahoma. Respondent Steven Fisher is a lawyer with Hertel & Gibbs, a law firm in Eau Claire, Wisconsin. Respondent Mary Fisher works at Carrollton Senior High School in Carrollton, Texas.

Petitioner filed this cause of action alleging the same facts against the same respondents that he sued previously in this court in case number 01-C-202-C. In essence,

petitioner states (as he alleged in the previous case) that respondent Gibbs, a privately retained lawyer, provided him with inadequate legal counsel and that respondent Fisher played a role in persuading petitioner to violate his bond requirements.

### OPINION

Petitioner alleges the same facts against the same respondents in this complaint as he did in case number 01-C-202-C, which was screened by this court. Because this court lacked subject matter jurisdiction in case 01-C-202-C, an order was entered on July 6, 2001, denying petitioner's request for leave to proceed. Although petitioner argues that his claim has merit, this court still lacks either federal question or diversity jurisdiction to allow petitioner's cause of action to proceed. See 28 U.S.C. §§ 1331-32. To reiterate from the July 6 order, "petitioner does not state what federal law protects him from respondents' actions, and I am aware of none. To the extent petitioner alleges violations of state law, such as legal malpractice, he may do so in state court, which he may have already done in the case he filed in Chippewa County." Moreover, the doctrine of res judicata, or claim preclusion, bars petitioner from relitigating the issue of subject matter jurisdiction, after he was denied leave to proceed for that reason. Okoro v. Bohman, 164 F.3d 1059, 1063 (7th Cir. 1999) ("a jurisdictional dismissal is res judicata on the jurisdictional issue"); see also Ricketts v. Midwest National Bank, 874 F.2d 1177, 1182 n.4 (7th Cir. 1989). Because this court lacks

subject matter jurisdiction, I will deny petitioner's request for leave to proceed.

In addition, petitioner expresses displeasure and asserts that it is a "federal violation" to continue to deduct money from his prisoner trust fund account in order to satisfy the full \$150 filing fee for case 01-C-202-C because it had been dismissed. But according to 28 U.S.C. § 1915(b)(1) "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of the filing fee." The full filing fee is due whether a prisoner's claim is denied or granted leave to proceed; it represents the cost to initiate an action.

#### ORDER

IT IS ORDERED that

1. Petitioner Anthony Murry's request for leave to proceed is DENIED as legally frivolous;
2. The unpaid balance of petitioner's filing fee is \$136.80; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of courts is directed to close this file.

Entered this 19th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge