

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

-----  
ANDREW R. JACKSON,

Petitioner,

v.

OPINION AND ORDER

01-C-648-C

OFF. GNIOT, TOM GOZINSKE,  
TOM BORGEN, JOHN RAY and  
CINDY O'DONNELL,

Respondents.  
-----

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Andrew R. Jackson, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, contends that respondents violated his Eighth Amendment rights when respondent Gniot used excessive force by hitting his injured hand. 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 respondent 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 petitioner has failed to allege facts indicating excessive force was used, petitioner will be denied leave to proceed on his Eighth Amendment claim of excessive force for failure to state a claim upon which relief can be granted.

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

#### ALLEGATIONS OF FACT

Petitioner is an inmate at Kettle Moraine Correctional Institution. At the time of the incident at issue, petitioner was an inmate at the Fox Lake Correctional Institution. Respondent Off. Gniot is a correctional officer at the Fox Lake Correctional Institution. Respondent Tom Gozinske is an inmate complaint examiner. Tom Borgen is warden of Fox

Lake Correctional Institution. John Ray is a corrections complaint examiner. Cindy O'Donnell is the secretary's designee.

On February 5, 2000, petitioner injured his left hand while trying to secure a mop wringer to a bucket at the Fox Lake Correctional Institution. Petitioner showed his injury to respondent Gniot, who hit petitioner's hand causing further injury. Petitioner was seen by medical staff at Fox Lake Correctional Institution for his injuries.

On February 7, 2000, petitioner filed an inmate complaint (FLCI-2000-5039) alleging that respondent Gniot had smacked petitioner's hand. According to the inmate complaint examiner's report, an "investigation showed that [petitioner] invited Officer Gnoit to inspect his hand immediately after he had injured it and she pushed it away."

Respondent Gozinske recommended dismissal of petitioner's complaint. On February 18, 2000, petitioner's complaint was dismissed by respondent Borgen. On March 1, 2000, petitioner appealed the dismissal. Respondent Ray recommended affirmation of petitioner's dismissal. On March 24, 2000, respondent O'Donnell affirmed the dismissal.

### OPINION

I understand petitioner to allege that respondent Gniot violated his Eighth Amendment rights by using excessive force when she struck his left hand. The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary

infliction of pain.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Because prison officials must sometimes use force to maintain order, the central inquiry for a court faced with an excessive force claim is whether the force “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. See Whitley v. Albers, 475 U.S. 312, 321 (1986).

According to the inmate complaint investigation, respondent Gniot pushed petitioner’s hand away after he invited her to inspect an injury he had just received. Petitioner concedes that he was showing respondent Gniot his injured hand, but alleges that she smacked it rather than pushed it away. From the allegations in the complaint, it is impossible to determine the extent, if any, of the injury inflicted and, as a result, it is also impossible to draw any inferences of excessive force. In other words, the complaint does not allege any facts indicating excessive force was used. Petitioner simply alleges in a vague and conclusory manner that respondent Gniot’s “hit” his hand causing “further injury.” Petitioner does not allege the specific nature of his injury, other than “she smack me on my injured [sic] hand which was already sore and with pain.” Although petitioner alleges he

was seen by the medical staff at Fox Lake Correctional Institution, he fails to provide any report or allegations of his medical evaluation.

Because petitioner has failed to allege facts sufficient to indicate excessive force was used, his request for leave to proceed in forma pauperis on his Eighth Amendment claim of excessive force will be denied for failure to state a claim upon which relief can be granted.

### ORDER

IT IS ORDERED that

1. Petitioner Andrew R. Jackson request for leave to proceed in forma pauperis against respondents Off. Gniot, Tom Gozinske, Tom Borgen, John Ray and Cindy O'Donnell on his Eighth Amendment claim of using excessive force is DENIED for failure to state a claim upon which relief can be granted;

2. The unpaid balance of petitioner's filing fee is \$140.81; 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 4th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge