

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

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RONALD ROBINSON,

Petitioner,

v.

WARDEN J. T. O'BRIEN, COUNSELOR
M. KLAUITTER, COUNSELOR K. ZOOK,
CASE MANAGER M. CISKE, UNIT MANAGER
S. ROBINSON, L. T. R. E. WILLIAMS,
D.H.O. OFFICER W. W. SKIDERSKI,

Respondents.

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ORDER

00-C-379-C

This is a proposed civil action for declaratory, injunctive and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680. Petitioner, who is presently confined at the Federal Correctional Institution in Memphis, Tennessee, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of

instituting this lawsuit. 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. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

In addition to submitting a proposed complaint, petitioner has filed a number of other papers raising various issues unrelated to those raised in the complaint. I will not address these issues in the context of this lawsuit. If petitioner wishes, he may raise them in a lawsuit separate from this one.

I summarize below the allegations of fact petitioner makes in his complaint.

ALLEGATIONS OF FACT

In September 1998, petitioner Ronald Robinson was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. At all relevant times, respondents were employed at the same institution: Respondent J. T. O'Brien as warden; respondents M. Klawitter and K. Zook as counselors; respondent M. Ciske as a case manager; respondent S. Robinson as a unit manager, respondent Williams as "L. T."; and respondent W. W. Skiderski as a discipline hearing officer.

On June 1, 1998, petitioner informed respondent O'Brien that he was going to file a lawsuit against the Peoria Police Department and Peoria County Jail.

Petitioner made many requests to be placed with different cell mates. A first cell mate caused petitioner stress and mental anguish. He was then placed with another cell mate who planned to harm petitioner. Petitioner told respondent Klawitter that petitioner's cell mate sleeps with his coat on, stays inside the room when petitioner showers, keeps the window open at all times and uses the table all day and night so that petitioner is never able to use it to write a letter. After Klawitter spoke to petitioner's cell mate, the cell mate began to sing to petitioner, "you can run but not hide, I'll find you." Because petitioner wrote five or six grievances against respondent Klawitter, petitioner lost his commissary privileges and sweat suit and was transferred from a prison where he was close to his family. Respondents Zook, Ciske and Robinson were told that petitioner did not get along with his cell mate but did not immediately

move him from the cell. Respondents Robinson and Ciske told petitioner that if he and his cell mate did not get along, that was between the two of them. Petitioner Zook responded to petitioner's request to move by stating that his request had been added to the list and would be considered in turn with other inmate requests.

On September 17, 1998, respondent Klawitter searched petitioner's cell and discovered a weapon in the cell. Petitioner was placed in the Special Housing Unit. Petitioner did not receive all of his personal property after he was moved.

On September 22, 1998, respondent Skiderski sentenced petitioner to sixty days in segregation, a loss of 41 days' good time credits and transfer to a prison in another region of the country. On November 20, 1998, petitioner arrived at the United States Penitentiary at Leavenworth without his personal property. Petitioner was at Leavenworth for approximately six months and never received his personal property. While petitioner was at Leavenworth, his disciplinary report for weapons possession was expunged and petitioner was transferred to another prison without being asked whether he wanted to be closer to his family. Because petitioner wrote grievances about staff members, they set him up.

DISCUSSION

From petitioner's complaint, I have identified the following claims: (1) respondent

Klawitter retaliated against petitioner for filing grievances against him and for filing lawsuits against city police in Peoria, Illinois; (2) respondents O'Brien, Klawitter, Zook, Ciske and Robinson were deliberately indifferent to petitioner's safety when they failed to separate him from his cell mate; (3) petitioner's property was negligently or intentionally destroyed or lost.

A. Retaliation

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. See id. To state a claim in the absence of direct evidence of retaliation, the prisoner must allege a chronology of events that supports drawing an inference that the official acted in retaliation, see Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994); the allegations must show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275. Petitioner alleges that respondents retaliated against him because he told them he was going to file lawsuits against the police department in Peoria, Illinois. Filing lawsuits against respondents might support an inference that the respondents subsequent adverse actions against petitioner were retaliatory, depending on the time elapsed

between the two events; filing lawsuits against Illinois city police officials does not lead to such an inference.

Petitioner makes the additional allegation that respondent Klawitter transferred him to another institution and took away his sweatshirt and commissary privileges in retaliation for the grievances petitioner filed against him. Petitioner may have alleged a cognizable claim of retaliation against respondent Klawitter. However, he will not be allowed to proceed on it because he has failed to submit proof that he exhausted his administrative remedies on that claim.

The Administrative Remedy Procedure consists of the inmate's completing the appropriate BP-9, BP-10, and BP-11 forms, and submitting them to the warden, the regional director of the Bureau of Prisons, and the Bureau of Prison's General Counsel, according to the timetable set out in 28 C.F.R. §§542.14 and 542.15. Petitioner has submitted several letters titled "Grievance" that he wrote to respondent warden O'Brien, but he has not submitted any administrative complaints or appeals filed on the appropriate BP-9, BP-10 or BP-11 forms that relate to his retaliation claims. Furthermore, even if his letters to respondent O'Brien were sufficient to trigger the formal administrative complaint process, petitioner has failed to provide this court with the prison's responses, other than one dismissal of a regional appeal for petitioner's failure to follow appropriate procedures. See Ex. R. Such a dismissal does not

constitute administrative exhaustion.

The deadline for submission of a formal administrative remedy request on the BP- 9 form is “20 calendar days following the date on which the basis for the Request occurred.” See 28 C.F.R. § 542.14(a). An extension of this deadline may be allowed where the inmate demonstrates a valid reason for delay. See 28 C.F.R. § 542.14(b). “Valid reasons for delay include the following: an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate’s request for copies of dispositions requested . . . was delayed.” Id. Because it is possible that petitioner will be able to obtain an extension in order to file administrative remedy requests, I will deny him leave to proceed on his retaliation claim without prejudice until such time as petitioner can demonstrate that he has exhausted available administrative remedies.

B. Failure to Protect from Harm

I understand petitioner to contend that he suffered emotional, mental and psychological anguish when he was forced to live with dangerous cell mates. “[T]he mere practice of double

celling is not per se unconstitutional.” French v. Owens, 777 F.2d 1250, 1252 (7th Cir. 1985) (citing Rhodes v. Chapman, 452 U.S. 337 (1981)). Petitioner has not alleged facts suggesting that his double celling resulted in a “serious deprivation of basic human needs.” Cf. id. Although petitioner asked repeatedly to be moved away from his cell mate, he does not allege that he was physically injured by the cell mate. 42 U.S.C. § 1997e(e) precludes a prisoner from bringing suit for “mental or emotional injury suffered while in custody without a prior showing of physical injury.” Petitioner fails to state a claim upon which relief may be granted.

C. Federal Tort Claims Act

Petitioner alleges that some of his personal property was never returned to him after he was moved into the Special Housing Unit in September 1998 and later transferred to prisons in Leavenworth and Memphis. The Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680, provides in part that the United States “shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. Cognizable claims under the act include those that are: (1) against the United States, (2) for money damages, (3) for injury or loss of property, (4) caused by the negligent or wrongful act or omission of any employee of the Government (5) while acting within the scope of his office or employment, (6) under circumstances in which the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. See 28 U.S.C. § 1346(b)(1); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994) (claim against United States is cognizable under act if it alleges six elements outlined above).

Petitioner has submitted a copy of a Final Denial of Claim from the Regional Counsel, dated December 27, 1999. I conclude that petitioner has exhausted his available administrative remedies with respect to his claim under the Federal Tort Claims Act. He will be granted leave to proceed in forma pauperis on that claim. I note, however, that the United States is the only proper party to defend against a claim brought under the Federal Tort Claims Act. See 28 U.S.C. § 2674. Therefore, the United States will be substituted as party for the individual respondents named by petitioner.

D. Appointment of Counsel

Petitioner has requested that counsel be appointed to assist him. Petitioner will be granted leave to proceed only on his claim under the Federal Tort Claims Act, which is a relatively straightforward claim. In his complaint, petitioner has demonstrated that he is able to communicate with the court at a sufficient level to be able to represent himself on his tort claim. Therefore, petitioner's motion for the appointment of counsel will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Ronald Robinson's motion for leave to proceed in forma pauperis is GRANTED in part and DENIED in part;

2. Petitioner states a claim upon which relief may be granted with respect to his claim under the Federal Tort Claims Act against the United States of America, which will be substituted in the caption as the only defendant in the case;

3. Petitioner's claim of retaliation is DISMISSED without prejudice for petitioner's failure to submit proof that he exhausted his available administrative remedies;

4. Petitioner's claim that he was illegally housed with a dangerous cell mate is DISMISSED for his failure to state a claim upon which relief may be granted;

5. The complaint is DISMISSED against respondents O'Brien, Klawitter, Zook, Ciske, Robinson, Williams and Skiderski;

6. Petitioner's motion for the appointment of counsel is DENIED;

7. The unpaid balance of petitioner's filing fee is \$135.36; petitioner is obligated to pay this amount as described in 28 U.S.C. § 1915(b)(2);

8. Pursuant to Fed. R. Civ. P. 4(i), service of this complaint will be made promptly after petitioner submits to the clerk of court two (2) completed marshals service forms; and three (3)

completed summonses, one for the United States Attorney for the Western District of Wisconsin, one for the Attorney General in Washington, D.C. and one for the court. Enclosed with a copy of this order is a set of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before October 3, 2000, his petition will be subject to dismissal for failure to prosecute.

In addition, petitioner should be aware of the requirement that he send the United States Attorney in this district a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the specific lawyer or lawyers in the United States Attorney's office who will be representing respondent, he should serve the lawyer directly. Petitioner should retain a copy of all documents for his own files. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent's attorney.

Entered this 19th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge