IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DRAKE A. SHEAD,

ORDER

Petitioner,

03-C-0447-C

v.

WARDEN STIFF, Oxford F.C.I.;
Camp Ad. LINNETTE RITTER; and
Camp Case Mgr. CHERRI COMSTOCK,

Respondents.

- -

This is a proposed civil action for monetary relief brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and 28 U.S.C. § 1331. Petitioner, a former prisoner at the Federal Prison Camp in Oxford, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

Because petitioner filed his complaint after he was released from prison, he is not subject to the 1996 Prison Litigation Reform Act. This means that if he is found to be financially eligible to proceed in forma pauperis, he will not need to pay an initial partial payment of the $150 fee for filing his complaint. In addition, he is not subject to the exhaustion requirements set out in 42 U.S.C. § 1997e.

From the affidavit of indigency petitioner has submitted to the court with his complaint, I find that he is eligible financially to proceed in forma pauperis. Nevertheless, before petitioner may proceed further with this action, I must examine his complaint and dismiss any claim that is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages against a defendant who is immune from such relief. 28 U.S.C. § 1915(e). In conducting this review, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Drake A. Shead, a black male, surrendered himself to the Oxford Federal Prison Camp in October 2000, after having been sentenced to 27 months in prison for wire fraud.

On September 5, 2001, respondent Cherri Comstock called petitioner into her office and informed him that a detainer from the State of Texas had been lodged against him. Immediately thereafter, Comstock informed petitioner that he would be transferred to a higher security prison. At that same time, another inmate, Gary Scott, who also had a detainer lodged against him from the State of Arizona, was allowed to stay at the camp facility and was given normal inmate privileges. In March, Nat Nutapaya, an inmate who

had an Immigration and Naturalization Service detainer lodged against him, was allowed to stay at the camp. Respondents Comstock, Ritter and Stiff believed that petitioner was a security risk, but that inmates Nutapaya and Scott were not. Nutapaya and Scott are white.

Petitioner was placed in a special housing unit as an "administrative detainee /nondiscipline" pending his transfer. Under 28 C.F.R. § 541.22, administrative detainees are granted certain privileges. Staff at Oxford did not adhere to those regulations and did not grant petitioner the privileges to which he was entitled.

DISCUSSION

I understand petitioner to allege that when respondents transferred him to a higher security prison, they did so in violation of 1) his right to be free from race discrimination under the equal protection clause of the United States Constitution; and 2) his rights under 28 C.F.R. § 541.22. I will address each of these claims in turn.

A. Fifth Amendment: Equal Protection

Although lawful imprisonment deprives convicted prisoners of many rights, inmates retain limited constitutional protection, including the right to equal protection of the laws. Williams v. Lane, 851 F.2d 867, 871 (7th Cir. 1988) (citing Lee v. Washington, 390 U.S. 333 (1968)). Absent a compelling state interest, racial discrimination in administering a

prison violates the equal protection clause of the Fourteenth Amendment. Black v. Lane, 824 F.2d 561, 562 (7th Cir. 1987) (black inmate stated cause of action by alleging racial discrimination in assignment of prison jobs); see also Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981).

Because petitioner is challenging the actions of federal officials rather than state actors, the equal protection analysis must proceed under the Fifth and not the Fourteenth Amendment. The Fifth Amendment does not contain an equal protection clause, but the Supreme Court has held that the amendment's due process clause prevents the federal government from "engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). See also Nicholas v. Tucker, 114 F.3d 17, 19 (2d Cir. 1997) ("the standards for analyzing equal protection claims under either amendment are identical").

The equal protection clause of the Fifth or Fourteenth Amendment prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a prison policy or system, but conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986).

Petitioner's allegation of race discrimination comes close to being conclusory. There are a multitude of factors that come into play in deciding the security level institution to which a prisoner belongs. In addition, petitioner's own allegations suggest that he was not similarly situated to inmate Nat Nutapaya. An INS detainer is not similar to a detainer lodged by a state to hold a person who has been charged with a criminal offense or who is required to be detained to serve a sentence in another state. Petitioner does not allege facts from which an inference can be drawn that he is similarly situated to inmate Gary Scott. Nothing in petitioner's allegations suggests that the detainer lodged against him should not have raised respondents' concerns about security as petitioner alleges respondents believed they did. Indeed, petitioner does not allege anything about the nature of either detainer. Given the vast number of differences among the bases for detainers generally, petitioner will have an uphill battle to prove that a discriminatory motive and not a legitimate security concern was the basis for his transfer.

However, there is "no requirement in federal suits of pleading the facts or the elements of a claim." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002); see also Shah v. Inter- Continental Hotel Chicago Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002) ("The plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply."); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) ("All that need be specified is the bare minimum facts necessary to put the

defendant on notice of the claim so that he can file an answer."). Therefore, I will allow petitioner leave to proceed on his claim that defendants discriminated against him by transferring him to a higher security institution because of his race after a detainer was lodged against him.

B. Failure to Follow 28 C.F.R. § 541.22

Petitioner alleges that as a result of respondent Comstock's order that he be transferred, he was placed into a special housing unit as an administrative detainee. According to petitioner, his status as an administrative detainee entitled him to certain rights and privileges under 28 C.F.R. § 541.22. Petitioner alleges that the "entire staff ignored [those] rights." Petitioner will not be allowed to proceed on this claim.

First, petitioner does not name any respondent who allegedly deprived him of his rights under § 541.22. In order to proceed on an actionable claim, petitioner would have to sue the person or persons responsible for violating his rights.

Second, even if petitioner had named the persons responsible for violating his rights, his allegations are too vague to put the respondents on notice of the claim against them so that they may file an answer. Cf. Higgs v. Carver, 286 F.3d at 439 (indicating that plaintiff's charge that he was placed in lockdown segregation for 11 days after bringing lawsuit satisfied bare minimum facts necessary to put defendant on notice of claim so that he could file

answer). 28 C.F.R. § 541.22 has multiple subsections that discuss several different procedural requirements, such as requiring the warden to prepare an administrative detention order detailing the reasons for placing an inmate in administrative detention (§ 541.22(b)), requiring the segregation review official to review the status of administrative detainees (§ 541.22(c)). The regulation lists discretionary and mandatory privileges that are available to administrative detainees (§ 541.22(d)). Petitioner has not identified which rights and privileges under § 541.22 he was denied. The claim is too vague to allow the respondents an opportunity to answer.

Third, even if petitioner had alleged sufficient facts to put the appropriate respondents on notice of his claim against them, he cannot recover money damages for violations of 28 C.F.R. § 541.22. Just because petitioner alleges a violation of a federal law does not mean that he has a right to sue under that law. The law in question must create a cause of action. See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 807 (1986) ("[T]he vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.").

Petitioner may sue respondents for the alleged violation of 28 C.F.R. §§ 541.22 under the Administrative Procedure Act. See 5 U.S.C. § 702. Under § 702 of the act, Congress has specifically waived the sovereign immunity of the United States as regards claims against the United States based on an agency's violation of regulations. This waiver applies, however,

only to claims seeking injunctive or declaratory relief.

In this case, petitioner asks for $10,000,000 in money damages and additional relief in the form of an order directing respondents to "explain why they discriminate and don't follow their rules and regulations." To the extent that petitioner's request for an "explanation" can be construed as a request that the court declare his rights to have been violated, the claim is moot. In order to satisfy Article III's "case or controversy" requirement, petitioner must allege facts sufficient to show either that the injuries he complains of are continuing or that he is under the immediate threat that the injuries complained of will be repeated. See Sierakowski v. Ryan, 223 F.3d 440, 444 (7th Cir. 2000) ("[I]n order to invoke Article III jurisdiction a plaintiff in search of prospective equitable relief must show a significant likelihood and immediacy of sustaining some direct injury."). As the Supreme Court explained in City of Los Angeles v. Lyons, 461 U.S. 95 (1983), "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Id. at 102. This rule applies to claims for declaratory as well as injunctive relief. See Robinson v. City of Chicago, 868 F.2d 959, 966 n.5 (7th Cir. 1989)("The declaratory relief statute is not an independent basis of jurisdiction and requires an 'actual controversy'.").

Petitioner is out of prison. He alleges a one-time incident involving respondents' alleged failure to grant him rights under federal regulations. There is no immediate threat

that he is likely to suffer an injury arising out of the same circumstances again. Therefore, his claim for declaratory or injunctive relief is moot.

That leaves petitioner's prayer for relief in the form of money damages. It is beyond contention that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941); see also United States v. Shaw, 309 U.S. 495, 500-01(1940) ("without specific statutory consent, no suit may be brought against the United States"). Although petitioner has not officially named the United States as a defendant in the action, "the bar of sovereign immunity cannot be avoided simply by naming officers and employees of the United States as defendants." Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 115 (6th Cir.1988) (citing Hutchinson v. United States, 677 F.2d 1322 (9th Cir.1982)); see Brandon v. Holt, 469 U.S. 464, 471-72 (1985). Because Congress has not waived sovereign immunity for claims for money damages under § 702, petitioner's claim for money damages against respondents for violating 28 C.F.R. § 541.22 must be dismissed.

ORDER

IT IS ORDERED that

1. Petitioner Drake A Shead's is GRANTED leave to proceed in forma pauperis against respondents Stiff, Ritter and Comstock on his claim that these respondents violated

his equal protection rights under the Fifth Amendment by ordering his transfer from Oxford Federal Correctional Institution to a higher security prison on account of his race;

2. Petitioner is DENIED leave to proceed on his claim that respondents failed to follow 28 U.S.C. § 541.22. This claim is DISMISSED with prejudice because it lacks legal merit.

Entered this 24th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge