

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

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JAMES E. BROWN,

Petitioner,

v.

JOSEPH SCIBANA, Warden at Oxford  
F.C.I.; THEODORE EDGEComb, Counselor at Oxford  
F.C.I.; JILL WENDLANDT, Case Manager at  
Oxford F.C.I.; MS. EURICA, Correctional Officer at Oxford F.C.I.;  
MICHAEL MOORE, Lieutenant at Oxford F.C.I.,

Respondents.  
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ORDER

03-C-586-C

This is a proposed civil action for mandamus and declaratory and injunctive relief, brought pursuant to 28 U.S.C. § 1361, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. Petitioner, who is presently confined at the Federal Prison Camp in Oxford, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages.

Because petitioner has not met his burden of showing either that a writ of mandamus against respondents or injunctive relief would be appropriate, I will deny his request for leave to proceed in forma pauperis.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner is a prisoner at the Federal Prison Camp in Oxford, Wisconsin. Respondent Joseph Scibana is the warden of the Federal Prison Camp. Respondent Theodore Edgecomb is employed as a counselor at the camp. Respondent Jill Wendlandt serves as a case manager. Respondent Eurica is a correctional officer. Respondent Michael Moore is a lieutenant.

On or about September 26, 2003, respondent Edgecomb grabbed petitioner's clothing and slammed him forcefully against the wall while conducting a "pat search." Petitioner asked Edgecomb why he was being aggressive, to which Edgecomb responded by hitting petitioner in the lower arm area, knocking his arms in the air against the wall.

Respondents Eurica and Wendlandt witnessed Edgecomb's assault against petitioner. The Bureau of Prisons Program Statement forbids federal officers from allowing physical or mental harm to inmates and requires staff to report such harm to the Internal Affairs Office and the warden. Respondents Edgecomb, Eurica and Wendlandt violated their duty as outlined in the Bureau of Prisons Program Statement. Petitioner spoke to respondent Eurica about the assault. Respondent Eurica told petitioner that she would have written an incident report if it was she but that she does not participate in whistle-blowing.

Approximately two hours after the assault, petitioner spoke to respondent Scibana about the incident. Scibana suggested that petitioner speak to respondent Moore, which he did. Respondent Moore gave petitioner two choices: 1) file a Bureau of Prisons Administrative Remedy and be placed in a Segregated Housing Unit; or 2) sign a statement saying that petitioner is reporting a false incident. Because petitioner suffers from Hepatitis C, being placed in segregated housing for an undetermined amount of time would jeopardize his health. Therefore, petitioner chose the second option offered him.

## DISCUSSION

I understand petitioner to be asking the court for two forms of relief: 1) a writ of mandamus under 28 U.S.C. § 1361 and 2) injunctive relief under Bivens for respondents' alleged violations of his First, Fifth and Eighth Amendment rights. Specifically, petitioner asks the court to compel respondents, under 28 U.S.C. § 1361, to submit affidavits about the assault by Edgecomb and to adhere to the rules in the program and policy statements. Petitioner argues that respondents violated his First, Fifth and Eighth Amendment rights when 1) respondent Edgecomb physically assaulted him as respondents Eurica and Wendlandt stood by and watched; 2) respondents Scibana, Edgecomb, Eurica and Wendlant refused to follow the Bureau of Prison's program statement forbidding prison staff from allowing harm to inmates; and 3) respondent Moore coerced him into signing a false incident statement.

### A. Writ of Mandamus

In seeking mandamus relief, petitioner's primary objective appears to be to compel respondents Edgecomb, Eurica and Wendlandt to admit in affidavits that petitioner was physically assaulted and to compel these same respondents to adhere to prison rules and policies in the future. Petitioner makes his request under 28 U.S.C. § 1361, which provides

district courts with jurisdiction to issue a “mandamus to compel a federal officer or agency to perform a duty owed to the plaintiff.” It appears likely that petitioner wants affidavits from respondents so that he can defend against any statement that he lied about staff as a result of his signing a statement admitting that he did so, although he does not reveal whether that is the case.

In order for a court to invoke a writ of mandamus, a federal official must forgo a duty required of him by *law*. Banks v. Secretary of the Indiana Family and Social Services Administration, 997 F.2d 231, 244 (7th Cir. 1993) (the “extraordinary remedy of mandamus ‘is traditionally available to compel a ministerial duty owed by the agency and then only when the statute defining that duty is ‘clear and free from doubt’”). Petitioner refers to policy statements and a Bureau of Prisons Program Statement that allegedly forbids any federal officer from allowing physical or mental harm to inmates and requires staff to report such harm to the Internal Affairs Office and the warden. However, the Bureau of Prisons program statements and internal policies do not qualify as “law” for the purpose of bringing a mandamus action.

The Court of Appeals for the Seventh Circuit has held that “[t]he BOP’s program statements are internal agency interpretations of its statutory regulations.” Parsons v. Pitzer, 149 F.3d 734 (7th Cir. 1998); see also Koray v. Sizer, 21 F.3d 558, 562 (3d Cir. 1994), *rev’d on other grounds sub nom. Reno v. Koray*, 515 U.S. 50 (1995) (“The Bureau’s interpretation

is recorded in its ‘Program Statements,’ which are merely internal agency guidelines and may be altered by the Bureau at will.”). Bureau of Prisons program statements do not create a federal cause of action for a prisoner; rather, they serve as internal guidelines for the government agency. See Miller v. Henman, 804 F.2d 421, 426 (7th Cir. 1986) (“The manual was not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations, and therefore it does not create legally enforceable entitlements.”). Therefore, petitioner cannot use the mandamus statute to sue for enforcement of the program statements and policies at issue.

#### B. Injunctive Relief

In addition to mandamus relief, petitioner appears to seek declaratory and injunctive relief for alleged violations of his First, Fifth and Eighth Amendment rights. (Petitioner asks for “any other relief this Honorable Court deems just and appropriate.”) Courts may award injunctive relief without a specific request to do so. However, even a liberal construction of petitioner’s complaint does not reveal enough facts to support a First or Fifth Amendment claim or show how injunctive relief would protect petitioner’s rights under those amendments. Petitioner has not offered enough facts to put respondents on notice to file an answer regarding his First or Fifth Amendment claims. See, e.g., Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (so long as complaint gives defendant sufficient notice of

claim to file answer, it cannot be dismissed on ground that it is conclusory or fails to allege facts).

As to his Eighth Amendment claim, other than the one physical assault by respondent Edgecomb, petitioner fails to allege any facts to indicate that he could benefit from injunctive relief. He does not state that he is in danger of ongoing physical assaults by respondents. Because petitioner could not benefit from any injunctive relief that I could order, petitioner is not involved in a case or controversy, as required under Article III of the Constitution. Petitioner may have been able to pursue an Eighth Amendment claim against respondents had he requested monetary relief for respondent Edgecomb's physical assault. However, petitioner should note that the exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). "The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999).

I do not need to consider whether administrative remedies were indeed available to petitioner when respondent Moore gave him the two choices to address the alleged physical assault by Edgecomb. Whether or not petitioner could have exhausted his administrative remedies on each of his claims, he has failed to allege facts that warrant mandamus or injunctive relief. Therefore, I will deny his request for leave to proceed in forma pauperis.

#### ORDER

IT IS ORDERED that

1. Petitioner James E. Brown's motion to compel respondents Joseph Scibana, Theodore Edgecomb, Jill Wendlandt, Ms. Eurica, and Michael Moore to submit affidavits and comply with prison rules under 28 U.S.C. § 1361 is DENIED;
2. Petitioner's request for leave to proceed in forma pauperis on his First, Fifth and Eighth Amendment claims is DENIED and this case is DISMISSED;
3. The unpaid balance of petitioner's filing fee is \$139.41; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 12th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge