

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

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ALEJANDRO RIVERA,

Plaintiff,

v.

GERALD A. BERGE,  
Warden of Wisconsin Secure Program Facility,

Defendant.

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ORDER

04-C-252-C

Plaintiff Alejandro Rivera is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. In his complaint, plaintiff alleges that defendant Gerald Berge failed to provide him with adequate process before transferring him to the Secure Program Facility, in violation of state law and the due process clause of the United States Constitution.

Plaintiff filed his complaint originally in the Circuit Court for Dane County, Wisconsin, but defendant removed the case to this court pursuant to 28 U.S.C. §§ 1441 and 1446. Although defendant has paid the filing fee, because plaintiff is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. Under 42 U.S.C. § 1915e, a prisoner's complaint must be dismissed if, even under a liberal construction, it 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.

Plaintiff's due process claims will be dismissed as legally frivolous. In Rivera v. Berge, 01-C-423-C (W.D. Wis. 2001), plaintiff challenged the lack of process he received both before and after he was transferred to the Secure Program Facility. (When plaintiff filed the earlier case, the Secure Program Facility was known as the Supermax Correctional Institution.) I dismissed plaintiff's due process claims as legally frivolous because I concluded that "[p]risoners do not have a liberty interest in not being transferred from one institution to another" or "in remaining out of segregation status so long as that period of confinement does not exceed the remaining term of their incarceration." Id. at 9-10 (citing Meachum v. Fano, 427 U.S. 215 (1976), and Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997)). Plaintiff did not appeal this decision.

Under the doctrine of claim preclusion, a party may not bring a claim to court if he has already litigated the same claim against the same party. Central States, Southeast and Southwest Areas Pension Fund, 296 F.3d 624, 628 (7th Cir. 2002). Plaintiff's 2001 case involved the same due process claim against defendant Berge, a claim that I dismissed on the merits. Although claim preclusion is an affirmative defense, the court of appeals has held that a court may raise an affirmative defense on its own if it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir.

2002). Because a motion to dismiss on claim preclusion grounds is inevitable, it is "sensible to stop the [claim] immediately, saving time and money for everyone concerned." Id. at 761.

I reach a different conclusion with respect to plaintiff's claims that defendant acted contrary to Wisconsin law. Plaintiff did not raise any state law claims in his 2001 case. Generally, claim preclusion applies not just to claims that were *actually* litigated but also to those claims that *could have* been litigated if the unlitigated claims arose out of the same facts. Wilhelm v. County of Milwaukee, 325 F.3d 843, 846-47 (7th Cir 2003). Although plaintiff's state law claims arise out of the same facts as his due process claims, claim preclusion does not apply because he could not have received the relief he seeks in federal court for violations of state law. In this case, plaintiff is seeking an injunction ordering defendant to transfer to him to another prison. In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), the Supreme Court held that state sovereign immunity prohibits federal courts from ordering state officials to conform their conduct to state law. Thus, state court is the only forum that plaintiff may receive injunctive relief for violations of the Wisconsin Administrative Code, the Wisconsin Statutes or the Wisconsin Constitution. Accordingly, plaintiff's state law claims will be remanded to the Circuit Court

for Dane County.

ORDER

IT IS ORDERED that

1. Plaintiff Alejandro Rivera's claim that defendant Gerald Berge transferred plaintiff to the Wisconsin Secure Program Facility without due process of law in violation of the United States Constitution is DISMISSED as legally frivolous because I dismissed the same claim on its merits in Rivera v. Berge, 01-C-423-C.

2. Plaintiff's claim that defendant Gerald Berge transferred plaintiff to the Wisconsin Secure Program Facility in violation of Wisconsin law is REMANDED to the Circuit Court for Dane County, Wisconsin. Although the circuit court has not yet provided this court with full record of this case, the clerk of court is directed to return it to the circuit court as soon as it arrives in this court.

Entered this 4th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge