

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

FREDERICK ROGERS,

Petitioner,

v.

C.O. SCHEFFER and
MATTHEW FRANK,

Respondents.

ORDER

04-C-979-C

This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, 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. 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. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Frederick Rogers is an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. At the time of the incident giving rise to this lawsuit, he was incarcerated at the Racine Correctional Institution in Racine, Wisconsin. Respondent Scheffer is a corrections officer at the Racine facility and respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections.

On April 28, 2003, petitioner's right hand was placed in a tether for some "improper"

reason. That afternoon he asked respondent Scheffer for his 4:00 p.m. medication. Respondent Scheffer told petitioner to “shut the fuck up” and proceeded to dispense medications for all other inmates on the unit before returning to petitioner forty-five minutes later. When respondent Scheffer returned, petitioner indicated that he was unable to use his breathing testing device because of the tether on his right hand. At that point, respondent Scheffer yelled, “Stop playing fucking games” and pulled petitioner’s right hand through the trap on his cell door, breaking one of his fingers and injuring his wrist and forearm.

DISCUSSION

A. Respondent Frank

In order for a supervisory official to be found liable under § 1983, there must be a “causal connection, or an affirmative link, between the misconduct complained of and the official sued.” Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); see also Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Petitioner has not alleged any facts suggesting that respondent Frank was personally involved in the incidents underlying petitioner’s claim. Although respondent Frank is Secretary of the Wisconsin Department of Corrections, the doctrine of respondeat superior, under which a superior may be liable for a subordinate’s tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312,

325 (1981). Accordingly, respondent Frank will be dismissed.

B. Excessive Force

Petitioner alleges that respondent Scheffer used excessive force in violation of the Eighth Amendment's prohibition on cruel and unusual punishment by pulling petitioner's tethered hand through the trap on his cell door breaking his finger and injuring his wrist and forearm. 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 must consider 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. Whitley v. Albers, 475 U.S. 312, 321 (1986). None of petitioner's allegations suggest any reason for pulling his hand through his cell door trap. Furthermore, petitioner alleges that his hand was pulled so violently that his finger was broken. At this early stage of the proceedings, petitioner's allegations are sufficient to make out an excessive force claim. Accordingly, I will grant him leave to proceed.

C. Rule 11

Although I am granting petitioner leave to proceed, a word of caution appears warranted. In his complaint, petitioner alleges that respondent broke his fingers; however, in the administrative exhaustion documents attached to his complaint, an inmate complaint examiner noted after investigating petitioner's claim of wrongdoing that petitioner's hands and wrists had been examined and none of the bones in the affected area was broken. If this is true and petitioner deliberately lied in his complaint in this court, then he may be subject to sanctions. It is true that pro se litigants are generally held to lesser standards in litigating their claims. Nevertheless, they are not insulated from the prohibitions of Federal Rule of Civil Procedure 11. Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990). Rule 11 prohibits parties from making representations to the court unless they have a reasonable belief that their allegations have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(3)(b). In addition, the rule prohibits the filing of complaints for the purpose of harassment. Fed. R. Civ. P. 11(b)(1). A party found to have violated the rule's provisions may face penalties, including possible dismissal of their suit.

ORDER

IT IS ORDERED that

1. Petitioner Frederick Roger's request for leave to proceed in forma pauperis is GRANTED on his Eighth Amendment claim that respondent Scheffer used excessive force when he pulled petitioner's hand through a trap on his cell door on April 28, 2003, breaking one of his fingers and injuring his wrist and forearm.

2. Respondent Matthew Frank is DISMISSED for lack of personal involvement.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. The unpaid balance of petitioner's filing fee is \$148.02; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

6. Pursuant to an informal service agreement between the Attorney General and this court, a copy of petitioner's complaint and this order are being sent today to the Attorney

General for service on the defendant.

7. Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. Those papers will not be considered to be a part of petitioner's complaint. However, they are being held in the file of this case in the event respondent wishes to examine them.

Entered this 15th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge