

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

JAMES LIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

05-C-146-C

This is a proposed civil action for monetary relief, brought under the Federal Tort Claims Act, 28 U.S. C. §§ 2671 - 2680. Petitioner, who is presently confined at the Federal Correctional Institution 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. 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

On June 29, 2004, petitioner James Light was transferred to the Federal Correctional Institution in Oxford, Wisconsin from a federal facility in Florence, Colorado. Plaintiff's property was inadvertently shipped to Ottisville, New York. A federal officer in Ottisville opened the box, removed two new pairs of tennis shoes, two pairs of sweat pants and two sweatshirts and replaced these items with one pair of old tennis shoes and one pair of used shower shoes. The federal officer removed petitioner's property list from the box and sent it to plaintiff at the Oxford facility. When the box arrived, petitioner took his property but

left the two pairs of shoes that did not belong to him.

DISCUSSION

Petitioner claims that someone in Ottisville, New York took some of his personal property in the course of his transfer to the Federal Correctional Institution in Oxford, Wisconsin. 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). New York recognizes a claim of conversion for “any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of superior possessory right of another in the property.” Galtieri v. Kramer, 648 N.Y.S.2d 144, 145 (N.Y. App. Div.

2 Dept. 1996); (quoting Meese v. Miller, 436 N.Y.S.2d 496, 500 (N.Y. App. Div. 1981)).

Although petitioner's allegations indicate that he might be able recover under the Federal Tort Claims Act, he must have presented his grievance to the appropriate federal agency and that agency denied the claim before he brought this suit. 28 U.S.C. § 2675(a). Satisfaction of section 2675(a)'s exhaustion requirement is a jurisdictional prerequisite to a suit in federal court. Sullivan v. United States, 21 F.3d 198, 206 (7th Cir. 1994) (citing Deloria v. Veterans Admin., 927 F.2d 1009, 1011 (7th Cir.1991)). In order to satisfy the exhaustion requirement, a federal prisoner must adhere to the following procedure. First, the prisoner must submit his claim to the Bureau of Prisons for informal resolution on a BP-9 form. 28 C.F.R. § 542.13. Ordinarily, this submission is to be made within 20 days of the underlying incident but an inmate may obtain an extension by demonstrating a valid reason for delay. 28 C.F.R. § 542.14 (a-b). If unable to obtain relief, an inmate has twenty days from the date the warden signs the response to submit an appeal to the appropriate Regional Director using a BP-10 form. 28 C.F.R. § 542.15(a). An inmate dissatisfied with the Regional Director's response has 30 days to submit a BP-11 form, appealing to the General Counsel. Id. The General Counsel's denial constitutes a final administrative denial, which allows the prisoner the right to bring suit in federal district court. Without this, a prisoner may not proceed.

Petitioner states that he filed a complaint and appealed its denial to the Bureau of

Prison's regional office in Kansas City. However, it appears that he forgot to attach documentation of exhaustion. I will give him an additional two weeks to submit proof of exhaustion under the Federal Tort Claims Act. The easiest way for petitioner to do this is to send the court a copy of the Bureau of Prison's General Counsel's denial of his appeal. If petitioner fails to submit exhaustion documentation within this time, I will dismiss his claim without prejudice to his refiling it after he has pursued the outlined remedies.

ORDER

IT IS ORDERED that a decision whether to grant petitioner James Light leave to proceed in forma pauperis on his claim under the Federal Tort Claims Act is STAYED and that petitioner will have until May 5, 2005 in which to submit proof that he has exhausted his administrative remedies on this claim.

Entered this 28th day of April, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge