

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

JEFFREY STEVEN AKRIGHT,

Plaintiff,

v.

SHERIFF DAVID GRAVES,
ADMINISTRATOR MICHAEL T. SCHMITZ,
CORRECTIONAL OFFICER JUNK and
CORRECTIONAL OFFICER JOHNSTON,

Defendants.

ORDER

05-C-15-C

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff, who is presently confined at the Walworth County Jail Correctional Institution in Elkhorn, Wisconsin, alleges that defendants violated his rights under the Eighth Amendment by allowing his food to be prepared in an unsanitary manner. Plaintiff has paid the \$150 filing fee. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. The act requires the court to deny leave to proceed if plaintiff'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 plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On November 20, 2004, plaintiff saw an inmate named Knutson, who was working in the kitchen, scratch his "back side" while wearing his kitchen gloves. Knutson also pulled his pants up with his gloves on and then went to the food cart to fill the juice cups without changing his gloves. Plaintiff, who was in administrative segregation at the time, pushed the intercom button to tell defendants Johnston and Junk, guards working at posts 4 and 5, about what he had seen. After listening to plaintiff, neither guard did anything to address the matter. Shortly thereafter, defendant Junk and Knutson brought the lunch trays into administrative segregation. Knutson handled the food trays, drinking cups and spoons. Plaintiff told defendant Junk about Knutson's unsanitary behavior and she replied, "Tell someone who cares." Plaintiff asked defendant Junk for something and she told him that

he could “go hungry for all she cares.” Plaintiff asked for a grievance form but defendant Junk refused to provide one; he received a form from defendant Johnston. Knutson continues to work in the food service program without any reprimand or discipline.

DISCUSSION

I understand plaintiff to allege that his food was prepared in an unsanitary manner in violation of the Eighth Amendment. Plaintiff contends that Knutson scratched his “back side” and pulled his pants up while handling food later served to inmates. In addition, he contends that defendants Junk and Johnston did not pay attention to Knutson’s actions and ignored plaintiff’s complaints about him. Under the Eighth Amendment, prisoners are entitled to “nutritionally adequate food that is prepared and served under conditions that do not present an immediate danger to the health and well being of the inmates who consume it.” French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (quoting Ramos v. Lamm, 639 F.2d 559, 570-71 (10th Cir. 1980)). More broadly, the amendment’s protection against cruel and unusual punishment does not extend to the minor, isolated discomforts and inconveniences of prison life because they are “part of the penalty that criminal offenders pay for their offenses against society.” Lunsford v. Bennett, 17 F.3d 1574, 1581 (7th Cir. 1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Only those deprivations and punishments that constitute “wanton infliction of pain,” “deliberate

indifference to serious medical needs” or “shocking prison conditions” violate the amendment. Wells v. Franzen, 777 F.2d 1258, 1264 (7th Cir. 1985) (citing cases).

Liberally construed, plaintiff’s allegations fall into the isolated discomfort category. He recounts an isolated incident in which a food service worker exhibited little regard for hygiene while preparing meals for inmates. To be sure, Knutson’s actions do not make prison food more appetizing; however, it is by no means clear that they placed plaintiff’s health in jeopardy. For his part, plaintiff does not allege that he did not eat his meal after seeing Knutson’s actions or that he became physically ill after eating his meal. His speculation that Knutson could have had human waste on his pants or his “back side” adds nothing to his allegations. Therefore, defendant Junk’s response to plaintiff’s concerns cannot be construed as deliberate indifference to a serious risk of harm. In short, as I read plaintiff’s complaint, he can prove no set of facts consistent with his allegations that would entitle him to relief. Therefore, he will be denied leave to proceed on his claim.

ORDER

IT IS ORDERED that plaintiff Jeffrey Steven Akright's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED with prejudice for plaintiff's failure to state a claim upon which relief may be granted. The clerk of court is directed to close the file.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge