

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

DANIEL J. DeKALB,

Petitioner,

v.

STATE OF WISCONSIN, LYNN
NICOLAI, DANIEL J. BENIK,
MR. RICHARDSON, MS. SKAIFE,
and MS. PUETZ,

Respondents.

ORDER

05-C-556-C

This is a proposed civil action for declaratory relief under 42 U.S.C. § 1983. Petitioner Daniel DeKalb, an inmate at the Chippewa Falls Correctional Treatment Facility, in Chippewa Falls, Wisconsin, contends that respondents violated his “civil rights” by “failing to rectify [the] falsification” of petitioner’s prison program review summary.

Petitioner requests leave to proceed in forma pauperis, as authorized by 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 made the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, when the litigant is a prisoner, the court must dismiss the complaint if the claims contained in it, even when read broadly, are legally frivolous, malicious, fail to state a claim upon which relief may be granted, or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because I conclude that this court does not have subject matter jurisdiction over petitioner's claims, I am denying him leave to proceed in this action. His claims, which appear to be founded on state law, will be dismissed without prejudice.

In his complaint, petitioner alleges the following facts.

FACTUAL ALLEGATIONS

Petitioner is an inmate incarcerated at the Chippewa Falls Correctional Treatment Facility. Defendants all work at the facility as employees of the Department of Corrections. Defendant Lynn Nicolai is a program review specialist. Defendant Daniel Benik is Warden. Defendant Richardson is a captain. Defendants Skaife and Puetz are social workers.

On June 24, 2005, petitioner attended a program review committee hearing. Defendants Nicolai, Richardson and Puetz constituted the hearing staff committee. Sometime between July 18, 2005 and July 25, 2005, petitioner received a program review classification summary, which summarized petitioner's committee hearing and explained the

review committee's recommendations. The summary contained the following statement:

[Petitioner] arrived at [the] C[hippewa] V[alley] C[orrectional] T[reatment] F[acility] on 9/9/04 to await [alcohol and other drug] treatment. He was offered the prog[ram] on 6/30/05 and refused to participate. As this treatment is directly related to his offenses of driving while intoxicated, he is at higher risk to the public now that he has refused treatment.

Petitioner was never offered an alcohol and other drug program or any other type of program.

The program review committee recommended that petitioner's custody status be elevated and that his next review hearing be held in twelve months' time. In issuing their recommendations, the program review committee "considered" petitioner's "refusal of offense related treatment."

After petitioner received a copy of the summary, he asked defendant Nicolai to correct the error contained in it, but she refused to do so. On July 25, 2005, petitioner wrote a letter to defendant Benik, attaching a copy of the program review summary and complaining of the "falsification." Defendant Benik responded by letter on July 29, stating, "The issues you raise in your recent communication are best addressed with the Program Review Coordinator, Lynn Nicolai. I have forwarded your letter to her."

The falsification of petitioner's papers has had and will continue to have a direct effect upon his future assessments, security classification, institutional assignment and conditions of his extended supervision.

OPINION

Petitioner complains that his program review committee summary contains inaccurate information that has a negative effect upon his custody status and future conditions of supervision. Although petitioner's concerns are well founded, they are not concerns a federal judge can adjudicate.

Generally, federal courts have the power to hear two types of cases: (1) those in which a plaintiff alleges a violation of his or her constitutional rights or rights established under federal law and (2) those in which a citizen of one state alleges a violation of his or her rights established under state law by a citizen of another state and the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1331-32. Petitioner's complaint does not fall into either category.

It is possible that petitioner may be able to challenge the substantive basis of the program review committee's decision in state court. See, e.g., State ex rel. Freeman v. Berge, 2002 WI App 213, ¶ 24, 651 N.W.2d 881. Although federal courts may exercise supplemental jurisdiction over state law claims when they are brought in the same case as federal claims and "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy," petitioner has not alleged facts from which an inference may be drawn that he has suffered a violation of his constitutional rights or

rights under federal law. 28 U.S.C. § 1367. Because this court does not have subject matter jurisdiction over petitioner's claim, I will deny him leave to proceed.

ORDER

IT IS ORDERED that:

1. Petitioner Daniel DeKalb's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED for lack of subject matter jurisdiction without prejudice to refiling in state court;

2. The unpaid balance of petitioner's filing fee is \$223.63. This amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." Because I am dismissing petitioner's claim on the ground that this court lacks subject matter jurisdiction, and not for one of the reasons enumerated in §

1915(g), a strike will not be recorded against him under § 1915(g).

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

Entered this 21st day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge