

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

GREGORY ROMANO ACOFF,

Petitioner,

v.

ORDER

06-C-171-C

MATTHEW J. FRANK, Secretary,
Department of Corrections; CHERRI ROSE,
Registrar; LAWRENCE STAHOWIAK,
Records Supervisor; JOHN FRILLO,
Parole Agent; CHUCK WINELAND,
Supervisor, and all acting in concert therewith,

Respondents.

Petitioner Gregory Romano Acoff is a state prisoner currently in custody at the Foster Community Correctional Center in Madison, Wisconsin. When he filed this lawsuit in March 2006 he was incarcerated at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

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); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner brought this lawsuit under 42 U.S.C. § 1983. His complaint is difficult to understand, but I understand him to be alleging that after he was held in custody in 2002 for ninety days longer than he should have been, and after his supervised release was wrongfully revoked in January 2005, his mandatory release date has been miscalculated, which has resulted in his serving longer than he should have.

DISCUSSION

Petitioner alleges that respondents have violated his constitutional rights by miscalculating his mandatory release date, which has resulted in his being held beyond his rightful release date. He requests immediate release from confinement and \$500 a day for each day he is being held in illegal custody.

As noted above, petitioner filed his complaint under 42 U.S.C. § 1983. However, a petition for a writ of habeas corpus under 28 U.S.C. § 2254 “is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release.” Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). The Court of Appeals for the Seventh Circuit has held that “when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice” rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. at 477). Accordingly, petitioner cannot seek his release in this action or money for each day in wrongful custody, which amounts to a request for release. If he wishes to pursue his claim, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies available to him. 28 U.S.C. § 2254.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed is DENIED.
2. This action is DISMISSED because the claim in the complaint is not cognizable in a civil action pursuant to 42 U.S.C. § 1983.
3. A strike will not be recorded against petitioner Gregory Romano Acoff in accordance with 28 U.S.C. § 1915(g), because dismissal of an action for failure to use the proper avenue for relief is not a ground listed in § 1915(g) for recording a strike.
4. The unpaid balance of petitioner's filing fee is \$226.03; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

The clerk of court is directed to close this case.

Entered this 1st day of May, 2006.

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