

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

TONY PAYANO,

Plaintiff,

OPINION and ORDER

v.

11-cv-437-slc

GREG GRAMS,

Defendant.

Plaintiff Tony Payano alleges that defendant Greg Grams subjected him to unconstitutional conditions of confinement as a pre-trial detainee after the reversal of his state criminal conviction. Payano asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and moves for appointment of counsel. From the financial affidavit Payano has given the court, it concludes that he is unable to prepay the full fee for filing this lawsuit. Payano has made the initial partial payment of \$109.20 required of him under § 1915(b)(1).

The next step is determining whether Payano's proposed action is (1) frivolous or malicious, (2) fails to state a claim on which relief may be granted or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because Payano meets this step as well, he will be allowed to proceed and the state required to respond.

ALLEGATIONS OF FACT

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). In his complaint, Payano alleges, and the court assumes for purposes of this screening order, the following facts:¹

- Plaintiff Tony Payano currently is incarcerated at the Columbia Correctional Institution, (CCI), in Portage, Wisconsin.

¹ The facts are drawn from the petition and a review of the state circuit and appellate court's electronic docket sheets, available at <http://wscca.wicourts.gov>.

- Defendant Greg Grams is the warden at CCI.
- Payano was confined at CCI pursuant to Milwaukee County convictions. On April 15, 2008, these convictions were reversed by the Wisconsin Court of Appeals.
- The case was remanded to the trial court for a new trial and the trial court set bail in the amount of \$50,000. Payano did not pay the bail, so he remained detained pending further proceedings.
- Although Payano now was a pretrial detainee, Grams continued to confine Payano in the DS-1 segregation unit at CCI where Payano had to sleep, eat and write on the floor. His privileges were extremely restricted and he suffered routine use of force.
- On July 21, 2009, the Wisconsin Supreme Court reversed the decision of the Court of Appeals and reinstated Payano's convictions. (Case No. 2007-AP-1042).

OPINION

Payano challenges the conditions of his confinement at CCI from April 15, 2008 until July 21, 2009, the period during which he was a pretrial detainee as opposed to a convicted prisoner. The Fourteenth Amendment due process clause prohibits the punishment of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This protection is “more inclusive in its protection than the Eighth Amendment which would allow punishment as long as it is not cruel and unusual.” *Lock v. Jenkins*, 641 F.2d 488, 491 n.7 (7th Cir. 1981). Nevertheless, absent a showing of an expressed intent to punish, conditions or restrictions reasonably related to legitimate non-punitive governmental objectives do not support a claim that a pretrial detainee is being punished in violation of the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. at 535.

Payano's allegations that he had to sleep, eat and write on the floor, and that he suffered routine use of force, are sufficient to support a reasonable inference that defendant Grams subjected Payano to punishment in violation of the Fourteenth Amendment from April 15,

2008, until July 21, 2009. He will be allowed to proceed on this claim. To prevail on his claim, however, Payano will have to show that defendant Grams subjected him to conditions or restrictions not reasonably related to legitimate non-punitive governmental objectives.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Tony Payano's request to proceed on his Fourteenth Amendment due process claim against Greg Grams is GRANTED.
- (2) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.
- (3) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- (4) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.
- (5) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

Entered this 4th day of October, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge