

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

CHARLES KEYS,

Petitioner,

v.

LEE SEMLER, JUDY FAUST and
KENNETH MORGAN,

Respondents.

ORDER

01-C-361-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Racine Correctional Institution in Sturtevant, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See 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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove 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). 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).

I understand petitioner to allege that respondents violated his rights under the Eighth Amendment and under state tort law when petitioner was injured by faulty equipment in a food service truck. He will be denied leave to proceed in forma pauperis on his Eighth Amendment claim because he has failed to state a claim upon which relief may be granted. I will decline to exercise supplemental jurisdiction over his state law claim.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

All respondents are employed at Racine Correctional Institution. Respondent Lee Semler is a correctional officer, respondent Judy Faust is a food service administrator and respondent Kenneth Morgan is Warden.

On May 31, 2001, petitioner was working in the Racine Correctional Institution yard on the service truck that takes food to all the units. A belt broke on the truck. The belt secured the Cambro, containing thousands of pounds of food and other items. When the belt broke, the Cambro broke loose and pinned petitioner to the wall of the truck, slamming his back and hips to the wall. Petitioner was not treated immediately, but eventually received treatment. Respondent Semler was driving the truck when the belt broke and no one knew petitioner was pinned in when the accident first occurred. The truck is faulty by nature and 90% of everything on it breaks down. The truck is a danger to staff and inmates.

A prison administrator told petitioner that this is a non-grievable issue because the prison did not make the belts that broke, because petitioner's injury was the result of faulty equipment and because petitioner is still getting treatment for his back and hip. Petitioner believes his injuries will have a long-term effect and that he will need continuing medical treatment when he is released from prison.

DISCUSSION

Petitioner contends that the Wisconsin Department of Corrections and Racine

Correctional Institution were negligent in failing to maintain quality working equipment on the truck and by placing inmates in the back portion of the truck. Negligence is a state law tort claim. Because this court has subject matter jurisdiction over this case only if petitioner has stated a claim under the federal Constitution or federal law, see 28 U.S.C. § 1331, I understand him to allege also that respondents violated his rights under the Eighth Amendment.

A. Eighth Amendment

The Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.” Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106. Deliberate indifference requires that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Sherrod v. Lingle, 223 F.3d 605, 611 (7th Cir. 2000) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). Petitioner’s allegations suggest that he did not receive medical care immediately after the accident because no one was aware of the accident when it first occurred. Petitioner’s allegation that no one knew about his accident immediately

after it happened defeats any contention that respondents were deliberately indifferent to his medical need.

Petitioner contends that respondents' maintenance of the truck and placement of inmates in the back of the truck "does and will continue to jeopardize the lives and welfare of all inmates, including that of the plaintiff." Cpt. at 3. However, negligence does not rise to the level of deliberate indifference that is required to state a claim for relief under the Eighth Amendment. Petitioner has not alleged facts suggesting that respondents' conduct was more than merely negligent. He will be denied leave to proceed in forma pauperis on his claim under the Eighth Amendment because he has failed to state a claim upon which relief may be granted.

B. Negligence

Because petitioner has failed to state a claim for relief under federal law, I will decline to exercise supplemental jurisdiction over his negligence claim pursuant to 28 U.S.C. § 1367. However, this ruling does not preclude petitioner from bringing those claims in state court.

The 1996 Prison Litigation Reform Act requires that "strikes" be recorded against inmates for every "action" that is filed which is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). I have found that petitioner fails to state a federal law claim upon which relief may be granted. However, because petitioner

presents an additional state law claim in this action, a strike will not be recorded against him because it cannot be said that his action is without merit.

ORDER

IT IS ORDERED that

1. Petitioner Charles Key's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is \$142.85; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will not be recorded against petitioner pursuant to § 1915(g); and

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

Entered this 30th day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge