

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

CHRISTOPHER McSWAIN,

Petitioner,

v.

STATE OF WISCONSIN, JON E.
LITSCHER and GARY R. McCAUGHTRY,

Respondents.

ORDER

02-C-525-C

This is a proposed civil action for injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 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 paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 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. Although this court will not dismiss petitioner's case on its own motion 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).

In his complaint and two letters from petitioner that I have included as part of the complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner was in danger at Waupun Correctional Institution. An inmate at Waupun told petitioner that he was going to beat him. A Waupun inmate who is a gang member stole petitioner's name and threatened to beat him with a lock wrapped in a sock if he didn't follow orders. When petitioner told respondent McCaughtry and prison security staff about these incidents they just laughed because they want petitioner to be killed. If petitioner is

forced to save his own life there will be a “blood bath” in the prison because he will kill every person in the prison who has harmed him. Petitioner asked respondent McCaughtry to transfer him to the Wisconsin Resource Center but McCaughtry refuses to do so. White inmates are more readily transferred out of Waupun to safer prisons than are black inmates.

At some point after he filed his complaint, petitioner was transferred from Waupun Correctional Institution to Dodge Correctional Institution. Even so, petitioner is afraid he will be transferred back to Waupun. Someone tried to poison petitioner at Waupun. Petitioner wants to be transferred to the Wisconsin Resource Center where he will be safe. Petitioner cannot live at Waupun, Dodge or Columbia Correctional Institutions.

OPINION

Before considering the merits of petitioner’s complaint, I note the following for petitioner’s information. The civil rights statute under which petitioner is suing respondents, 42 U.S.C. § 1983, applies to “persons” who violate petitioner’s rights under the Constitution or federal law. The “State of Wisconsin” is not a “person” within the meaning of the statute. See Power v. Summers, 226 F.3d 815, 818 (7th Cir. 2000). Therefore, I will dismiss the State of Wisconsin as a respondent.

I will dismiss respondent Litscher as well, because petitioner has not alleged any facts in his complaint to suggest how Litscher was involved personally in denying him his rights.

That leaves respondent McCaughtry. I understand petitioner to allege that McCaughtry was intentionally indifferent to his safety in violation of the Eighth Amendment because he ignored other inmates' threats on petitioner's life. I also understand petitioner to be alleging that McCaughtry violated his rights under the Fourteenth Amendment's equal protection clause by being more willing to transfer out of Waupun white inmates whose lives were threatened than black inmates whose lives were threatened. The only relief petitioner wants is a court order transferring him to the Wisconsin Resource Center.

A. Eighth Amendment

In a case alleging that a prison official's failure to protect an inmate from physical harm violates the Eighth Amendment, the petitioner must allege facts suggesting that the official knew there was a substantial risk that the prisoner would be assaulted and that he failed to take reasonable protective measures. See Farmer v. Brennan, 511 U.S. 825, 847 (1994). A prisoner normally proves that a prisoner official had actual knowledge of the likelihood that he is in serious physical danger by showing that he complained to the official about "a *specific* threat to his safety." Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) (quoting McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991)) (emphasis added).

In this case, petitioner's allegations do not support a claim that respondent McCaughtry refused to protect him from a substantial risk of serious harm. Petitioner filed

his complaint in this court on September 17, 2002, alleging that he was threatened by a fellow inmate at Waupun Correctional Institution and that respondent McCaughtry refused to insure his safety by transferring him out of Waupun. However, in a letter received by the court on September 25, 2002, petitioner informed the court that he had been transferred to Dodge Correctional Institution. This allegation disproves any allegation petitioner might have had that respondent McCaughtry was deliberately ignoring threats to his safety at the Waupun Correctional Institution. Although, in a later letter dated October 8, 2002, petitioner expresses fear that he will someday be transferred back to Waupun and that he is unsafe anywhere but the Wisconsin Resource Center, he does not allege any facts to suggest that his transfer from Waupun is only temporary. His speculation that he might someday be returned to Waupun is insufficient to support a live case or controversy against respondent McCaughtry.

Because petitioner does not have a constitutional right to be transferred to a particular institution or to not be transferred at all, and because it appears from petitioner's own materials that respondent McCaughtry has not been deliberately indifferent to his safety needs, I will deny petitioner's request for leave to proceed on his Eighth Amendment claim because the claim is moot.

B. Fourteenth Amendment

Petitioner's Fourteenth Amendment equal protection claim fails as well. The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Petitioner alleges that "half of the whites here in this system have got sent to a place that's safe for them while the blacks have to fight there way out of [Waupun Correctional Institution]." Petitioner has not specifically alleged that he is black, but I assume that he is on the basis of his allegations. However, I cannot infer from petitioner's vague allegations that he has been treated differently than a similarly situated white inmate. Indeed, petitioner's allegations establish that he *has* been transferred out of the prison where he was threatened. Accordingly, petitioner's equal protection claim will be dismissed as legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis in this case is DENIED.
2. This action is DISMISSED on the grounds that petitioner's Fourteenth Amendment claim is legally frivolous and his Eighth Amendment claim is moot.
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 one of petitioner's claims on the ground that it is moot, a strike will not be recorded against petitioner under § 1915(g).

4. The unpaid balance of petitioner's filing fee is \$132.40. This amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

5. The clerk of court is directed to enter judgment for respondents and close this case.

Entered this 26th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge