

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

CHRISTOPHER McSWAIN,

Petitioner,

ORDER

v.

02-C-91-C

GARY McCAUGHTRY, JON E.
LITSCHER, SUSAN WALLINTIN and
STATE OF WISCONSIN,

Respondents.

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Christopher McSwain, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, contends that respondents violated his Fourteenth Amendment due process rights by not responding to his inmate complaints within five business days and by dismissing his inmate complaints without sending him a copy of the dismissal. He 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'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. 28 U.S.C. § 1915(e).

Petitioner will be denied leave to proceed on his due process claim because the claim is legally frivolous. He will be denied leave to proceed on his state law claims because I decline to exercise supplemental jurisdiction over them. In addition, petitioner's motions for an injunction and appointment of counsel will be denied as moot.

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

ALLEGATIONS OF FACT

Petitioner Christopher McSwain is an inmate at Waupun Correctional Institution. Respondent Gary McCaughtry is the warden at Waupun. Respondent Jon E. Litscher is Secretary of the Wisconsin Department of Corrections. Respondent Susan Wallintin is the business manager at Waupun. Petitioner has also named the State of Wisconsin as a

respondent.

Petitioner has problems with the Wisconsin prison system and its policies and procedures governing the grievance process. According to the Wisconsin Administrative Code, staff is supposed to answer all grievances within five working days. Staff does not answer petitioner's grievances.

Petitioner filed a grievance about the business office taking all of his money from him without leaving him anything to live on. Under prison policies, the business office is to take only 50% for restitution, not 100%. Petitioner believes that when he writes grievances, the staff never answer or they dismiss the complaint without sending him a copy of the report. The Department of Corrections should make sure that Waupun staff follow the policies and procedures on the grievance process and that they follow the rules before dismissing complaints.

Petitioner has low blood sugar and has a medical bill of \$865.48. Staff at Waupun is taking money from petitioner's prison account to pay for the medical bill. Petitioner does not have this much money, but staff takes all of his money from his account, leaving him with no money to live on.

Petitioner is suffering mental anguish from respondents' actions. He is going through a lot of mental problems for which he is taking a lot of medication.

DISCUSSION

A. Fourteenth Amendment Due Process

Petitioner alleges that respondents do not answer his inmate complaints within five business days and that they dismiss his complaints without sending him a copy of the dismissal. In essence, petitioner contends that respondents are violating his right to due process under the Fourteenth Amendment by not following proper procedures in the inmate complaint review system.

The adoption of mere procedural guidelines does not give rise to a protected liberty interest. Culbert v. Young, 834 F.2d 624, 628 (7th Cir. 1987); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991). In Studway, the plaintiff contended that the defendant's failure to conduct a disciplinary hearing within 21 days of the conduct charged violated his due process rights. In granting the defendant's motion to dismiss the complaint, I concluded that the failure to hold a disciplinary hearing within the 21-day time period established in Wis. Admin. Code § DOC 303.76(3) did not place a substantive limit on the decision maker's determination of what conduct may be subject to prison discipline but was merely a procedural regulation that did not give rise to a constitutional claim. Id. at 135.

Petitioner's claim fails for the reasons set out in Studway. Petitioner alleges that respondents do not respond to his complaints within the proper timeframe and that they dismissed his inmate complaints without sending him copies of the dismissals. The

requirements to respond timely to inmate complaints and to send copies of dismissals are procedural rules that do not give rise to a protected liberty interest. Petitioner may have a state law claim for violation of the regulation but he does not have a federal constitutional claim. Petitioner will be denied leave to proceed on his Fourteenth Amendment due process claim against respondents McCaughtry, Litscher, Wallintin and the State of Wisconsin because the claim is legally frivolous.

B. State Law Claims

I understand petitioner to allege that respondents are violating various state laws and regulations by taking more than 50% of his prison account funds for restitution and by taking his funds to pay for his medical bills. Because petitioner will not be granted leave to proceed on his constitutional law claims, I decline to exercise jurisdiction over his various state law claims. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) ("a district court ha[s] the discretion to retain or to refuse jurisdiction over state law claims").

C. Motion for Injunction

Petitioner has filed a "motion for injunction," which I construe as a motion for a preliminary injunction. Petitioner seeks an injunction against respondents McCaughtry and the State of Wisconsin, enjoining them from taking any funds from petitioner's prison

account until further notice. Because the motion involves petitioner's state law claims over which I am declining to exercise supplemental jurisdiction, petitioner's motion for a preliminary injunction will be denied as moot.

D. Motion for Appointment of Counsel

Petitioner has also filed a motion for appointment of counsel. Because I am denying petitioner leave to proceed on all of his claims, I will deny his motion for appointment of counsel as moot.

ORDER

IT IS ORDERED that

1. Petitioner Christopher McSwain's request for leave to proceed in forma pauperis on his claim for due process against respondents McCaughtry, Litscher, Wallintin and the State of Wisconsin is DENIED because the claim is legally frivolous.
2. I decline to exercise supplemental jurisdiction over petitioner's state law claims.
3. Petitioner's motion for an injunction is DENIED as moot.
4. Petitioner's motion for appointment of counsel is DENIED as moot.
5. 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 the state law claims do not fall under one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g).

6. The unpaid balance of petitioner's filing fee is \$146.43; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

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

Entered this 25th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge