IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM R. GATES,

Plaintiff,

v.

JON E. LITSCHER, STEVEN SCHNEITER, CHARLES BLANCHETT, PERCY PITZER, OFFICER JOHN DOE #1, OFFICER JOHN DOE #2, OFFICER JOHN DOE #3 and OFFICER JANE DOE,

Defendants.

OPINION AND ORDER

00-C-159-C

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This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner is presently confined at the Supermaximum Correctional Institution in Boscobel, Wisconsin but was confined at the Corrections Corporation of America Whiteville Correctional Facility in Tennessee at all times relevant to the proposed complaint. In an order entered May 23, 2000, I granted plaintiff leave to proceed in forma pauperis on his Eighth Amendment claims against defendants.

Presently before the court are the motion of defendants Jon E. Litscher and Steven

Schneiter to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), the motion of defendants Percy Pitzer and Charles Blanchett to dismiss the complaint pursuant to Fed. Rs. Civ. P. 12(b)(2) and 12(b)(3) and plaintiff's motions to amend the complaint and for the appointment of counsel. Defendants Litscher and Schneiter are employees of the Wisconsin Department of Corrections and the remaining defendants are or were, at all relevant times, employees of the Corrections Corporation of America. In the May 23 order, I held that because plaintiff had no remedy available to him through the administrative process to complain of his alleged Eighth Amendment violations that occurred at the Corrections Corporation of America - Whiteville Correctional Facility in Tennessee, I would consider his claims without requiring him to provide proof of administrative exhaustion. In their motion to dismiss, defendants Litscher and Schneiter contend that plaintiff's complaint should be dismissed because he failed to exhaust his administrative remedies before filing suit against them. Upon reconsideration, I agree that with respect to the Wisconsin defendants, plaintiff failed to exhaust the requisite administrative remedies before he filed this lawsuit and as a result, defendants' motion must be granted.

Defendants Pitzer and Blanchett have moved to dismiss the complaint against them on the grounds that Wisconsin is not a proper venue for the action and this court lacks personal jurisdiction over them. These defendants also argue that plaintiff has failed to state a claim

upon which relief may be granted against the John and Jane Doe defendants. I agree that venue is improper in this court and will transfer the case to the District Court for the Western District of Tennessee.

Also before the court are plaintiff's request for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 and his motion for appointment of counsel. Plaintiff's motion for leave to file an amended complaint will be denied because his amended complaint fails to state any new claims upon which relief may be granted. His motion for appointment of counsel will be denied without prejudice pending transfer to the Tennessee court.

The facts as alleged by plaintiff are included in my May 9 order staying a decision on whether plaintiff would be granted leave to proceed in order to allow him to provide proof of administrative exhaustion. Those allegations will not be repeated here.

I. MOTION TO DISMISS OF DEFENDANTS LITSCHER AND SCHNEITER

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to

prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has adopted an expansive reading of the applicability of § 1997e(a), stating "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. Further emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that "[t]here is no futility exception to § 1997e(a)," Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e's

exhaustion requirement. See Perez, 182 F.3d at 537-38; see Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

In dicta in Perez, 182 F.3d at 538, Judge Easterbrook set forth a hypothetical situation that might fall into a narrow exception to § 1997e's exhaustion requirement

> in which the harm is done and no further administrative action could supply *any* 'remedy.' Suppose a prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

But see Nyhuis, 204 F.3d at 69 ("A subsequent panel for the Seventh Circuit Court of Appeals cast doubt on the extent of this exception, calling it dicta and not applying it to the case at bar.") (citing Massey, 196 F.3d at 734). Although Judge Easterbrook's hypothetical makes good sense, it is hard to square it with the strict approach the court of appeals has taken to prisoner suit exhaustion requirements. Why would a healed broken leg be any different from a beating by a guard who is no longer employed, an allegedly illegal transfer to another prison from which the prisoner has now been returned or any other event unlikely to be repeated?

A strong argument can be made that plaintiff's claim is similar to the hypothetical prisoner because he has not alleged ongoing Eighth Amendment violations; in fact, all of his allegations stem from the November 1999 riot. Nevertheless, all of the reasons for requiring

administrative exhaustion are present in plaintiff's case. Bringing his claims to the attention of prison authorities would have enabled them to investigate his allegations of Eighth Amendment violations, thus giving them the first opportunity to scrutinize any constitutional violations. At the least, filing a claim might have helped to narrow the dispute or to develop the factual record. And finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38; see also Nyhuis, 204 F.3d at 74.

Plaintiff has presented proof that he filed an administrative grievance with the Wisconsin Department of Corrections, complaining of a procedural due process violation; he was denied leave to proceed in forma pauperis on this claim in the May 9 order. Plaintiff has failed to submit proof that he exhausted his administrative remedies on his Eighth Amendment claims against any of the defendants. Although plaintiff filed an administrative complaint in Wisconsin after his transfer to the Supermaximum Correctional Institution in Boscobel, Wisconsin, he has not shown that he exhausted his claims against defendants Litscher and Schneiter, both Wisconsin Department of Corrections employees. The Seventh Circuit has held that "courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then § 1997e(a) requires inmates to exhaust those

procedures before bringing a prison conditions claim." Perez, 196 F.3d at 734. Plaintiff had an available internal grievance procedure in Wisconsin that he failed to use to file a complaint against defendants Litscher and Schneiter alleging their failure to protect him from harm. See Wis. Admin. Code DOC §§ 310.01 - 310.19. Even if there was no effective remedy available to plaintiff on his Eighth Amendment claims through the Wisconsin administrative grievance system, § 1997e(a) requires "that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733. I am now persuaded that I must dismiss plaintiff's complaint against defendants Litscher and Schneiter because of plaintiff's failure to exhaust his administrative remedies pursuant to § 1997e(a).

II. MOTION TO DISMISS OF DEFENDANTS PITZER AND BLANCHETT

Under 28 U.S.C. § 1391(b), a civil rights action "may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." Venue is improper under § 1391(b)(1) because, with the dismissal of defendants Litscher and Schneiter, no defendant

resides in Wisconsin. None of the events giving rise to the claim occurred in Wisconsin. Because no exception to § 1391(b) applies, the Western District of Wisconsin is an improper venue for this case.

28 U.S.C. § 1406(a) authorizes a federal court in which venue is improper to transfer a case to another court where venue is proper if the transfer would further the interests of justice. In this case, plaintiff has requested the transfer of venue. The court may transfer venue pursuant to § 1406(a) regardless whether it has personal jurisdiction over the defendants. See Goldlawr v. Heiman, 369 U.S. 463, 466 (1961). Particularly when a plaintiff is proceeding pro se, transfer to a district court in which venue is proper is in the interest of justice. Therefore, this case will be transferred to the Eastern Division of the District Court for the Western District of Tennessee and defendants Pitzer and Blanchett's motion to dismiss will be denied. (However, for the different reason noted below, defendant Blanchett will be dismissed from this case.)

Where, as here, a high official such as defendant Pitzer is named as a respondent, plaintiff can proceed against that official so that plaintiff can conduct formal discovery to uncover the names of the persons directly responsible for violating his constitutional rights. See Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (pro se complaint should not suffer dismissal of defendant high official for lack of personal involvement when claim involves

conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly responsible absent formal discovery). In order to proceed with his claim against the John and Jane Doe defendants, plaintiff will have to serve them with the complaint because he must provide legal notice of the claim against them. See Fed. R. Civ. P. 5(a). As plaintiff has noted, he has 120 days from May 23, 2000, the date on which I granted him leave to proceed in forma pauperis on his complaint, in which to learn the four names of the John and Jane Doe defendants and accomplish service on them. See Fed. R. Civ. P. 4(m).

III. REQUEST FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff requests leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 to indicate that defendants Litscher and Schneider are sued in their individual capacities, substitute Corrections Corporation of America for Charles Blanchett as a defendant and provide additional factual support for his due process claim against Donald Jackson, Carolyn McGraw and William Craft, CCA employees who were dismissed in the May 9 order. Because defendants have not yet filed an answer to plaintiff's complaint, Fed. R. Civ. P. 15(a) indicates that plaintiff may amend his complaint as a matter of course. However, the Prison Litigation Reform Act requires that the court deny leave to proceed on claims in plaintiff's proposed

amended complaint that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2).

Plaintiff's motion to amend will be granted to the extent that he wishes to remove Charles Blanchett as a defendant. In all other respects, plaintiff's request will be denied because the changes in his amended complaint fail to state claims upon which relief may be granted. In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. See Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Because plaintiff has not alleged facts suggesting that the board of directors of Corrections Corporation of America had personal involvement in the alleged constitutional violations, he will not be allowed to amend the complaint to add Corrections Corporation of America as a defendant.

As discussed above, plaintiff has failed to exhaust his administrative remedies on his claims against respondents Litscher and Schneiter. Therefore, his request to sue them in their individual capacities is moot. Although plaintiff attempts to supplement his due process claim, nothing in the complaint states a viable due process claim because his allegations do not establish that he was deprived of a protectible liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures *and* interference

with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Plaintiff's allegations that he was given sixty days' disciplinary segregation and was reclassified to a higher security level and transferred to the Supermaximum prison do not constitute protectible liberty interests. See Sandin v. Conner, 515 U.S. 472, 483-484 (1995) (stating that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.").

Plaintiff's proposed amended complaint fails to state any new claims upon which relief may be granted. His motion to amend the complaint will be denied.

IV. APPOINTMENT OF COUNSEL

Plaintiff has requested that counsel be appointed to assist him. Because I am transferring this case to the District Court for the Western District of Tennessee, it would not be appropriate for me to appoint counsel at this time. Plaintiff's motion for the appointment of counsel will be denied without prejudice.

ORDER

IT IS ORDERED that

1. The motion of defendants Jon E. Litscher and Steven Schneiter to dismiss plaintiff's complaint against them is GRANTED;

2. Defendant Charles Blanchett is dismissed from this case;

3. The motion of defendants Percy Pitzer and Charles Blanchett to dismiss the complaint for improper venue and lack of personal jurisdiction is DENIED;

4. The motion of plaintiff William R. Gates for leave to file an amended complaint is DENIED;

5. Plaintiff's motion for appointment of counsel is DENIED;

6. This case is transferred to the Eastern Division of the United States District Court for the Western District of Tennessee; and

7. The clerk of court is directed to transmit the file to the Eastern Division Western District of Tennessee.

Entered this 27th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge