

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

DWAYNE COX,

Plaintiff,

ORDER
00-C-161-C

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

This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Dwayne Cox 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 complaint. In an order entered on July 24, 2000, I granted the motion of defendants Jon E. Litscher and Steven Schneider to dismiss plaintiff's complaint because of his failure to exhaust his administrative remedies against these defendants. Plaintiff's response to the motion of defendants Litscher and Schneider to dismiss crossed in the mail with this court's July 24 order. In his response to the motion to dismiss of defendants Litscher and Schneider, plaintiff

contends that between November 30, 1999 and January 12, 2000, when he was transferred to the Supermaximum Correctional Institution in Boscobel, Wisconsin, he did not have access to the necessary materials, such as a pen and piece of paper, to file an administrative grievance. Even if plaintiff was unable to file an administrative complaint while at the Corrections Corporation of America - Whiteville Correctional Facility in Tennessee, plaintiff has failed to explain why he did not file a complaint against defendants Litscher and Schneider, both Wisconsin Department of Corrections employees, once he was transferred to Wisconsin. Because plaintiff's response does not contain proof of administrative exhaustion on his complaints against defendants Litscher and Schneider, it is of no consequence that the July 24 order and plaintiff's response crossed in the mail.

In the July 24 order, I stayed a decision whether to allow plaintiff to proceed on his claims against defendants Charles Blanchett, Percy Pitzer, John Doe #1, John Doe #2 and John Doe #3 until August 7, 2000, in order to allow him additional time either to submit proof that he had exhausted his administrative remedies against these defendants before filing his proposed complaint or an explanation for his failure to do so. Now that he has provided an explanation, I will address defendants' motions. Defendants Pitzer and Blanchett have moved to dismiss the complaint against them pursuant to Fed. R. Civ. P. 12(b)(2) or 12(b)(3) on the grounds that Wisconsin is not a proper venue for the action and this court lacks personal

jurisdiction over them. I agree that venue is improper in this court and will transfer the case to the District Court for the Western District of Tennessee. Defendants also contend that the John Doe defendants should be dismissed because plaintiff has failed to identify or serve them. I will deny defendants' motion to dismiss the John Doe defendants because the deadline for identifying and serving such defendants has not passed.

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

The facts as alleged by plaintiff are included in the May 26, 2000 order allowing plaintiff to proceed with his complaint and will not be repeated here.

I. MOTION TO DISMISS

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.” In this case, 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. 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 the motion of defendants Pitzer and Blanchett to dismiss will be denied.

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 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 Doe defendants and accomplish service on them. See Fed. R. Civ. P. 4(m).

It should be noted that plaintiff submitted the following documents in an effort to demonstrate proof of administrative exhaustion: (1) an inmate complaint filed with the Wisconsin Department of Corrections on February 9, 2000, in which he complained of procedural due process violations; (2) an inmate complaint filed with the Wisconsin Department of Corrections on February 9, 2000 in which he complained of Eighth Amendment violations (with no indication that the department received the complaint); and (3) his affidavit stating that he filed a complaint and an appeal in which he complained about excessive force with defendant Pitzer but that he has received no response. Plaintiff has failed to submit a copy of the inmate grievance or appeal that he filed with defendant Pitzer. It will

be up to the District Court for the Western District of Tennessee to decide whether plaintiff's proof of exhaustion is sufficient to satisfy the Prison Litigation Reform Act mandate 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." See 42 U.S.C. § 1997e(a).

II. SECOND REQUEST FOR LEAVE TO FILE AN AMENDED COMPLAINT

For the second time, plaintiff has requested leave to file an amended complaint to indicate that defendants Litscher and Schneider are sued in their individual capacities and substitute Corrections Corporation of America for Charles Blanchett. 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 will be denied because the changes in his amended complaint fail to state claims upon which relief may be granted. Plaintiff's request to sue defendants Litscher and Schneider in their individual capacities is moot because I granted their motion to dismiss the complaint for plaintiff's failure to exhaust his administrative remedies in the July 24 order.

Plaintiff's request to substitute the Corrections Corporations of America as a defendant fails as well. 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 v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). 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 substitute the Corrections Corporation of America in place of defendant Blanchett. Plaintiff's proposed amended complaint fails to state any new claims upon which relief may be granted.

III. 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 to dismiss plaintiff's complaint for improper venue and lack of personal jurisdiction is DENIED;

2. Defendants' motion to dismiss the John Doe defendants is DENIED;

3. Plaintiff Dwayne Cox's motion for leave to file an amended complaint is DENIED;

4. Plaintiff's motion for appointment of counsel is DENIED without prejudice;

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

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

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge