

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

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JOHN D. TIGGS, JR.,

Petitioner,

v.

HON. ALLAN B. TORHORST, Judge,
Racine County Circuit Court; WILLIAM
McREYNOLDS, Sheriff, Racine County
Jail; and T. GRAVES,

Respondents.

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ORDER

00-C-420-C

This is a proposed civil action for injunctive, monetary and declaratory relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at Supermax Correctional Institution in Boscobel, 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. Petitioner is destitute. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), petitioner is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

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. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

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

ALLEGATIONS OF FACT

I. PARTIES

Petitioner John D. Tiggs, Jr. is incarcerated at Supermax Correctional Institution. However, at all relevant times, petitioner was assigned temporarily to the Racine County jail where he was awaiting a criminal trial proceeding.

Respondent Judge Allan B. Torhorst is a judge in the Circuit Court for Racine County. Respondent William McReynolds is sheriff of Racine County. Respondent T. Graves is a deputy at Racine County jail.

II. PRIOR LAWSUITS

The allegations of negligence raised in this complaint were first brought in another action filed in this court, Tiggs v. McReynolds, 99-C-94-C. In that case, I declined to address any state law claims.

In May 1999, petitioner filed the same negligence claim in the Circuit Court for Racine County, alleging he was injured by a leaking roof in the intake area at the Racine County jail. Respondent Judge Torhorst denied petitioner leave to proceed in forma pauperis on the ground that petitioner's indigency was "self-created." Petitioner has been in prison segregation since approximately August 1996. This is a non-pay status and petitioner rarely receives money from outside sources.

On or about June 25, July 13 and August 12, 1999, petitioner asked respondent Judge Torhorst to reconsider his decision. Respondent told petitioner to "cease contacting the court pertaining to the matter and that further correspondence thereto will not be revisited by the court." On or about August 15, 1999, petitioner borrowed \$120 for the partial filing fee and had the money delivered to the Circuit Court for Racine County.

Respondent rejected the \$120 as insufficient to cover the \$180 filing fee. Respondent said that petitioner's pleadings were submitted on the wrong forms. After the money was sent back to the prison, petitioner was disciplined for enterprising, fraud and soliciting monies from

an unauthorized source. The \$120 was confiscated.

Petitioner filed a supervisory writ with the Wisconsin Court of Appeals. On three occasions, the Wisconsin Court of Appeals refused to change the Racine County Circuit Court's decision. Initially, the court of appeals stated that its ruling was based upon petitioner's failure to provide proof of administrative exhaustion. After petitioner provided such proof, the court of appeals stated that it had dismissed the appeal because of petitioner's failure to show why the trial court had not accepted the pleadings. When petitioner served the court of appeals with the written decisions from respondent Judge Torhorst, the court of appeals responded by stating, "no one should get more than one kick at the cat."

On May 23, 2000, the Wisconsin Supreme Court declined to review the case.

III. NATURE OF STATE LAW NEGLIGENCE CLAIM

On the evening of October 17, 1998, petitioner was assigned temporarily to the Racine County jail intake area cell 8. When it began raining, the cell started to leak with water and other liquids that quickly filled the cell. Petitioner complained repeatedly to respondent deputy Graves, who was reluctant to move the prisoners to another cell. After approximately two and a half hours, petitioner was moved to another cell, cell 10. At that time, respondent Graves instructed the trustee to place containers in cell 8 to catch the water that was leaking through

the ceiling and the walls.

The cell to which petitioner was reassigned also leaked. Apparently, this amused respondent Graves, who laughed and chuckled at petitioner's complaints and requests for one of the three containers placed in cell 8. Instead of buckets, petitioner was given rolls of toilet tissue and instructed to mop up the water.

Petitioner and his cellmate in cell 10 took turns mopping up the water, which had leaked onto both bunks and the floor. Because there were leaks over both bunks, petitioner and his cellmate were forced to one end of a single bunk. At or about 11:10 p.m. to 11:30 p.m., petitioner got up to mop the water and his right foot slipped on the wet floor while he was bending over. Petitioner "windmilled" to gain his balance and collided with a cement wall at the foot of the bunk. He received a wound to the left top of his head that required five stitches.

On or about October 23, 1998, petitioner tried to file a prison grievance on the incident and found that Racine County jail did not have a grievance procedure. Petitioner wrote to the jail captain and respondent Sheriff McReynolds. Petitioner was visited by the jail lieutenant, who admitted that the jail had leaked for some time because the jail had inadequate funds; he patronized petitioner by asking him about repairing a roof. Respondent McReynolds knew or had contemporary knowledge that approximately five cells in the jail's intake area leaked and

had been leaking for some time, yet he had failed to make repairs.

DISCUSSION

Petitioner's claim against respondent Judge Torhorst is barred by the doctrine of absolute immunity because respondent was acting within the scope of his judicial function. See Newman v. Indiana, 129 F.3d 937, 941 (7th Cir. 1997) (judges enjoy absolute immunity for acts within their lawful jurisdiction). Petitioner's request for leave to proceed in forma pauperis on this claim will be dismissed as legally frivolous.

Because petitioner fails to state a claim upon which relief may be granted over which the court has original jurisdiction, I will decline to exercise supplemental jurisdiction over any state law tort claims. In his earlier complaint filed in this court against respondents McReynolds and Graves, petitioner alleged the same facts about his slipping on the wet floor at Racine County jail on October 17, 1998 as he has alleged here. In that case, I denied petitioner leave to proceed in forma pauperis on his claim under the Eighth Amendment arising out of the incident and declined to exercise supplemental jurisdiction over any state law tort claims. See Tiggs v. McReynolds, No. 99-C-94-C, order at 5, 7 (W.D. Wis. Mar. 24, 1999). Because petitioner has already brought this same claim previously in this court and knows that this court will not exercise supplemental jurisdiction over it unless it is joined with a viable federal claim, this

lawsuit is legally frivolous. Therefore, I will issue a strike against petitioner pursuant to 28 U.S.C. § 1915(g).

ORDER

IT IS ORDERED that

1. Petitioner John D. Tiggs, Jr.'s request for leave to proceed in forma pauperis is DENIED and this action is DISMISSED on the ground that it is legally frivolous;
2. The unpaid balance of petitioner's filing fee is \$150; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and
3. A strike will be recorded against petitioner pursuant to § 1915(g).

Entered this 30th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge