

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

RALPH LUTHER BLEVINS, JR. and
GREGORY NEWTON,

Petitioners,

v.

JOHN DOE (Warden at F.C.I. Oxford in 1997)
and HIS AGENT (Woodhouse Reception Supervisor),

Respondents.

ORDER

00-C-530-C

This is a proposed civil action for injunctive and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Petitioners Ralph Luther Blevins, Jr. and Gregory Newton, who are presently confined at the Federal Correctional Institution in Leavenworth, Kansas, seek 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 petitioners' proposed complaint, I conclude that petitioners are unable to prepay the full fees and costs of instituting this lawsuit. Petitioners Blevins and Newton have submitted the initial partial payments required

under § 1915(b)(1). (Larry Rice, Martes Brooks and Antonio Mordican have failed to submit initial partial payments by the date set forth in the order of November 9, 2000, and will not be considered as parties in this case.)

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, 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. Although this court will not dismiss petitioners' case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioners have 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).

Petitioner Blevins will be denied leave to proceed in forma pauperis because he has failed to allege any facts to support an equal protection claim in this case that are different from the case that was decided in 1984. Petitioner Newton will be granted leave to proceed in forma

pauperis because he has alleged facts sufficient to support a claim that prison officials violated the equal protection clause of the United States Constitution by assigning him to a cell on the basis of his race.

In their complaint, petitioners make the following allegations of fact.

ALLEGATIONS OF FACT

A. Petitioner Blevins

In December 1978, petitioner Blevins arrived at the Federal Correctional Institution in Oxford, Wisconsin. Petitioner Blevins and other black inmates were placed in two-men rooms in the Woodhouse reception unit that were segregated by race. In another case filed in 1983, petitioner Blevins sued William Brew, the prison official responsible for inmate placement in the reception unit. On February 2, 1984, this court held that segregating inmates by race in cell assignments in the reception unit was a violation of the equal protection clause of the United States Constitution. See Blevins v. Brew, No. 83-C-85-C.

B. Petitioner Newton

Despite this court's ruling in Blevins v. Brew, prison officials at F.C.I.-Oxford have continued to assign inmates to rooms in the reception unit on the basis of their race, especially

black inmates who are placed in rooms with black inmates only. Prison officials have used this assignment system in the general population as well.

Petitioners are black. When petitioner Gregory Newton arrived at F.C.I.-Oxford in December 1997, he was placed in a cell in the reception unit with another black inmate because of his race.

OPINION

A. Petitioner Blevins

Petitioner Blevins alleges that he succeeded in another case on his claim that prison officials violated the United States Constitution by making initial cell assignments on the basis of race. It is unclear why he is again a petitioner in this case. Petitioner Blevins may not seek to recover a second time for the constitutional violation that occurred in December 1978 and was resolved in a lawsuit in 1984. Petitioner Blevins will be denied leave to proceed in forma pauperis for his failure to state a claim upon which relief may be granted. 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 failure to state a claim upon which relief may be granted is one of the enumerated grounds, a strike will be recorded against petitioner under § 1915(g).

B. Petitioner Newton

Petitioner Newton alleges that upon his arrival at F.C.I. Oxford, he was assigned to a cell with another black inmate on the basis of his race. “[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for ‘the necessities of prison security and discipline.’” Cruz v. Beto, 405 U.S. 319, 321 (1972) (citing Lee v. Washington, 390 U.S. 333 (1968)). See also Harris v. Greer, 750 F.2d 617, 618 (7th Cir. 1984) (“A policy of deliberate racial segregation of prisoners would raise serious questions under the equal protection clause of the Fourteenth Amendment.”) The prison security and discipline exception is a narrow one: “[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.” Lee, 390 U.S. at 334. Liberally construing petitioner’s allegations as I must at this stage, I will allow petitioner Newton to proceed on his equal protection claim.

C. Defendants

Petitioner Blevins has named as defendants John Doe, who was the warden at F.C.I.-Oxford in 1997, and the warden’s agent, who was the Woodhouse reception supervisor.

Although petitioner failed to name those who were responsible for the alleged constitutional violation, this is not a bar to proceeding in the case. I will allow him to proceed against the current warden at F.C.I.-Oxford, Warden Stiff, so that petitioner 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 a 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 the person or persons directly responsible absent formal discovery). Petitioner may proceed against Stiff for the sole purpose of discovering the names of the warden at F.C.I.-Oxford and the Woodhouse reception supervisor in 1997.

ORDER

IT IS ORDERED that

1. Petitioner Gregory Newton's request for leave to proceed in forma pauperis on his equal protection claim is GRANTED;

2. Petitioner Ralph Luther Blevin's request for leave to proceed in forma pauperis is DENIED. A strike will be recorded against petitioner Blevins in accordance with 28 U.S.C. § 1915(g).

3. Service of this complaint will be made promptly after petitioner Newton submits to the clerk of court one (1) completed marshals service forms and two (2) completed summonses, one for the respondent and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service, summons forms before December 15, 2000, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute;

4. In addition, petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney; and

5. The unpaid balance of petitioners' filing fee is \$91.67; petitioners Newton and Blevins are obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2). Their obligation is joint and several, that is, any payments made by either

petitioner will be credited to the amount they both owe and both are responsible for paying the balance.

Entered this 30th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge