

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

LARRY WILLIAM FAUST,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF
CORRECTIONS,

Defendant.

ORDER

03-C-531-C

Plaintiff Larry William Faust is a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. He has submitted a proposed complaint under 42 U.S.C. § 1983 against defendant Wisconsin Department of Corrections and has paid the \$150 filing fee. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. Under the act, plaintiff cannot proceed with this action unless the court grants him permission to proceed after screening his complaint pursuant to 28 U.S.C. § 1915A.

In his complaint, plaintiff alleges that on April 13, 1998, he was sentenced to eight years' incarceration. Despite the recommendation in July 1998 that he be placed at Oshkosh Correctional Institution and entered into a Sex Offender Treatment Program, plaintiff was

instead transferred to Tennessee, where he stayed until August 19, 1999. Because plaintiff was unable to begin his treatment program until he was returned to Wisconsin, he will be held past his mandatory release date in order to complete the program.

DISCUSSION

Plaintiff alleges that by forcing him to remain incarcerated past his mandatory release date in order to complete the Sex Offender Treatment Program, defendant Department of Corrections is violating his constitutional right to procedural and substantive due process under the Fourteenth Amendment and his rights under the Eighth Amendment. He requests release from confinement.

As noted above, plaintiff filed his complaint under 42 U.S.C. § 1983. However, a petition for a writ of habeas corpus under 28 U.S.C. § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). The Court of Appeals for the Seventh Circuit has held that "when a plaintiff files a § 1983 action that cannot be resolved without inquiring into the validity of confinement, the court should dismiss the suit without prejudice" rather than convert it into a petition for habeas corpus under § 2254. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. at 477). Accordingly, plaintiff

cannot seek his release in this action. If he wishes to pursue his claim, he will have to do so in a petition for a writ of habeas corpus after he has exhausted all the state court remedies available to him. 28 U.S.C. § 2254.

ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because the claim in the complaint is not cognizable in a civil action pursuant to 42 U.S.C. § 1983.
2. The clerk of court is directed to enter judgment for defendant and close this case.
3. A strike will not be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g), because dismissal of an action for failure to use the proper avenue for relief is not a ground listed in § 1915(g) for recording a strike.

Entered this 26th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge