IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DARRICK A. ALEXANDER,

ORDER

Petitioner,

03-C-0578-C

v.

CORRECTIONAL OFFICER PERRENARD,

Respondent.

- -

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Stanley Correctional Institution in Stanley, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He seeks relief for alleged violations of his Fourth and Eighth Amendment rights and his rights under Wis. Stat. §§ 346.62 (3) & (4). Petitioner will be denied leave to proceed on his Fourth Amendment claim, but granted leave to proceed on his Eighth Amendment claim and his state tort law claim. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

The 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if a prisoner claimant has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. 42 U.S.C. § 1915e. In performing that screening, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is an inmate who is currently incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. Respondent Perrenard is a correctional officer employed by the Wisconsin Department of Corrections. On August 11, 2003, petitioner was a

passenger in a state vehicle driven by respondent in Madison, Wisconsin. At approximately 4:10 p.m., respondent stopped the vehicle in the middle of an intersection, shifted the gear into reverse and backed into the front end of a parked car. The impact from this collision has caused petitioner severe pain in his lower and middle back, numbness in his neck and migraine headaches.

DISCUSSION

A. Fourth Amendment Claim

This Fourth Amendment is understood as a protection against unreasonable searches and seizures by the state. See, e.g., Boyd v. United States, 116 U.S. 616 (1886); Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). People have a right to be secure in their "persons, houses, papers and effects." Oliver v. United States, 466 U.S. 170, 176-77 (1983). However, the Fourth Amendment is only implicated when the state intrudes upon an interest in which a person has a "reasonable expectation of privacy." New York v. Class, 475 U.S. 106, 112 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Although prisoners do not forfeit all of their rights under the Fourth Amendment, their expectation of privacy while in custody is significantly diminished. See Hudson v. Palmer, 468 U.S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell); Lanza v. New York, 370 U.S. 139 (1962) (prisoner

had no reasonable expectation of privacy in jail visiting rooms).

"A seizure occurs when 'there is some meaningful interference with an individual's possessory interests.'" Maryland v. Macon, 472 U.S. 463, 469 (1984) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). Courts have only recognized a search or seizure to occur when the state takes some kind of bodily sample, see e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (breath and urine tests); Schmerber v. California, 384 U.S. 757 (1966) (blood samples), or breaches a reasonable expectation of seclusion or secrecy through physical observation, see e.g., Bell v. Wolfish, 441 U.S. 520 1979 (body cavity searches), or visual observation, see e.g., Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (monitoring while showering). Petitioner has not alleged any facts from which I could find that respondent's acts amounted to a search or seizure of petitioner's person. Therefore, petitioner will be denied leave to proceed on his Fourth Amendment claim because it is legally frivolous.

B. Eighth Amendment Claim

The Eighth Amendment prohibits cruel and unusual punishment for those convicted of crimes. It protects against some deprivations that are not part of a sentence but are suffered during imprisonment. Estelle v. Gamble, 429 U.S. 97 (1976). However, the traditional notion of a "punishment" implies an act that is "deliberately administered for a

penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners." Leslie v. Doyle, 125 F.3d 1132, 1137 (7th Cir. 1997) (quoting Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973)).

Petitioner's factual allegations do not suggest that respondent's actions were intended as punishment or discipline. Therefore, he has not made out a claim under the Eighth Amendment. The next question is whether his claim falls under the substantive due process protections of the Fourteenth Amendment, id. at 1136-37, which provides that a prisoner with protection against abuses of power by prison officials that are so arbitrary that they shock the conscience. County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

Although "the measure of what is conscience-shocking is no calibrated yard stick," it does provide some guidance. County of Sacramento, 523 U.S. at 847 (citing Johnson, 481 F.2d at 1033). It is not enough that a respondent's acts were negligent. Id. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"); Payne for Hicks v. Churchich, 161 F.3d 1030, 1041 (7th Cir. 1998). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento, 523 U.S. at 846. In order to meet this conscience-shocking standard, petitioner will have to adduce evidence to prove that respondent intended to injure

petitioner by deliberately backing the vehicle into another car. Id. at 849 (behavior most probable to support a substantive due process claim is that done with intent to injure).

The shocks-the-conscience standard is not static but varies according to the circumstances. Id. at 851. "In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Johnson, 481 F.2d at 1033. Reading petitioner's complaint with the generosity owed to any pro se litigant, I understand him to allege that respondent acted with a deliberate intent to injure him. Accordingly, petitioner will be granted leave to proceed on a Fourteenth Amendment substantive due process theory.

C. State Law Tort Claim

Petitioner's negligence claim arises from the same facts as the Eighth Amendment claim. Therefore, the exercise of supplemental jurisdiction over petitioner's state law claim is appropriate. 28 U.S.C. § 1367; Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999). Accordingly, petitioner will be granted leave to proceed on his negligence claim under state tort law.

D. Motion for Injunctive Relief

After he filed his complaint, petitioner submitted a document titled "Prayer for Injunctive Relief." In this document, petitioner asks to be transferred to a prison "that has on-site physical therapy and is of the same or lower security as that [in] which the petitioner is now housed." He asserted that a doctor has recommended surgery for his back and that he will need post-operative physical therapy.

Petitioner has not sued anyone other than the driver of the vehicle in which he was injured. It is highly doubtful that respondent correctional officer Perrenard has any control over decisions to transfer inmates from one institution to another. Moreover, petitioner does not allege that any other persons who may have authority to make decisions about his placement have refused to provide him the care he will need following surgery on his back.

Because petitioner has failed to show that he is entitled to an order enjoining respondent from interfering with his transfer to another institution following surgery on his back or from receiving the treatment he needs following surgery, his "motion for injunctive relief" will be denied.

ORDER

IT IS ORDERED that

1. Petitioner may proceed against respondent on his claims that respondent violated

his substantive due process rights under the Fourteenth Amendment and is liable to him under state tort law.

2. Petitioner's claim that respondent violated his Fourth Amendment rights is DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) as legally frivolous.

3. Petitioner's "Motion for Injunctive Relief" is DENIED.

4. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to respondent or to respondent's attorney.

5. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 5th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge