IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOBBY JOE JOHNSON, Jr.,

ORDER

Petitioner,

04-C-652-C

v.

GENESIS BEHAVIORAL SERVICES,
MARKUS DYESS, and JOY RAGNOW-GUZY,

Respondents.

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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 Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. 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). After reviewing the allegations in petitioner's complaint, I will deny petitioner's request to proceed in forma pauperis because the allegations fail to state a claim upon which relief can be granted.

In addressing any pro se litigant's complaint, the court must read the allegations of

the complaint generously. 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 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. 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

On February 14, 2004, respondent Dyess,[1] a site monitor employed by respondent

[1]Petitioner's complaint was brought against "Genesis Behavioral Services and John Doe." Petitioner later asked to substitute respondents Dyess and Ragnow-Guzy for "John Doe." Therefore, the court has adjusted the caption of this order accordingly.

Genesis Behavioral Services, visited petitioner at petitioner's residence at around 4:30 in the afternoon. The purpose of this visit, according to petitioner, was to allow respondent Dyess to "check on me." Petitioner allowed respondent Dyess into his residence. After looking around petitioner's residence, respondent Dyess noticed that petitioner had a mark on his neck. Respondent Dyess asked petitioner how he got the mark but petitioner refused to tell him. Respondent Dyess then searched petitioner's apartment and found female clothing. Around 4:45 pm, respondent Dyess called respondent Ragnow-Guzy, his supervisor. She arrived at petitioner's residence and found petitioner arguing with respondent Dyess and swearing at him. During the argument, respondent Dyess threatened petitioner, saying "stop swearing or he will . . . ," at which time respondent Ragnow-Guzy interrupted him and asked to know what was going on. Petitioner was then told to sit down.

Around 4:55 pm, respondent Dyess told petitioner to stand up so that respondent Dyess could search the chair in which petitioner was sitting. Petitioner refused because respondent Dyess had already searched the chair. Then respondent Dyess "became outraged" and grabbed the back of the chair and tried to throw petitioner out of the chair. Respondent Ragnow-Guzy told respondent Dyess to stop; she also told him to "take a break outside," but he refused. Several minutes later, petitioner asked whether he could use the restroom. Respondent Dyess refused permission, saying, "You may flush something down the toilet your [sic] not supposed to have." Petitioner stood up to go to the bathroom but

respondent Dyess again said no. Respondent Ragnow-Guzy patted down petitioner and stated he could use the restroom, but respondent Dyess got in petitioner's way.

Around 5:20 pm, respondent Ragnow-Guzy called the Pleasant Prairie Police Department and asked them to come arrest petitioner. When a police officer arrived, petitioner asked again to use the restroom. The officer and respondent Dyess said no. The police officer then patted down petitioner, arrested him, and took him to the police station. Petitioner was then placed on a "PO hold" pending revocation, while respondent Genesis Behavioral Services conducted an investigation regarding respondent Dyess.

DISCUSSION

Petitioner asserts a claim against respondents Dyess and Ragnow-Guzy for excessive force in violation of his Eighth Amendment protection against cruel and unusual punishment. In addition, petitioner asserts a claim against respondent Genesis Behavioral Services under the Eighth Amendment for failing to implement procedural safeguards and monitor the actions of respondents Dyess and Ragnow-Guzy on February 14, 2004.

Petitioner asserts his claims under 42 U.S.C. § 1983. To state a claim under § 1983, petitioner must present facts sufficient to show that respondents, acting under color of state law, deprived him of a specific right or interest protected by federal law or the Constitution. Bublitz v. Cottey, 327 F.3d 485, 488 (7th Cir. 2003). In other words, petitioner must show

that respondents are state actors. Gayman v. Principal Financial Services, 311 F.3d 851, 852 (7th Cir. 2002) (citing Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982)).

Petitioner alleges that respondents were acting under color of state law during the events of February 14, 2004. However, it is not clear from petitioner's complaint whether respondent Genesis Behavioral Services is a state actor. Petitioner states in his complaint that Genesis Behavioral Services is located at 7533 22nd Street, Kenosha, Wisconsin 53143. The complaint provides no further information about Genesis Behavioral Services or respondents Dyess and Ragnow-Guzy. Ordinarily I would ask petitioner to provide further information to clarify this question; however, in this case, it is likely that petitioner does not have the information needed to make the ultimate determination of state actor status. Nevertheless, from the facts petitioner has alleged, there appears to be at least an arguable basis for claiming that respondents are state actors. Cf. Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996). Thus, assuming without deciding that respondents are state actors, I will analyze petitioner's Eighth Amendment claims.

The central inquiry for a court faced with an Eighth Amendment excessive force claim is whether the defendants applied force "in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). To determine whether force was used appropriately, a court considers factual allegations revealing the safety threat perceived by the officers, the need for the application

of force, the relationship between that need and the amount of force used, the extent of the injury inflicted and the efforts made by the officers to mitigate the severity of the force. Whitley v. Albers, 475 U.S. 312, 321 (1986).

Petitioner's allegations do not state excessive force claims under the Eighth Amendment. The reason is simple: petitioner has made no allegation that respondents applied any force to his person. Petitioner's complaint does not allege that any physical contact occurred between himself and respondent Dyess. The closest petitioner comes to alleging physical contact between himself and respondent Dyess is his allegation that respondent Dyess "became outraged and grabbed the back of the chair" in which petitioner was sitting. Even if I were to assume that respondent Dyess grabbed petitioner as well as the chair, petitioner admits that respondent Ragnow-Guzy told respondent Dyess immediately to stop his actions and that respondent Dyess did stop. As for respondent Ragnow-Guzy, the only contact she had with petitioner occurred when she patted down petitioner before giving him permission to use the bathroom. In sum, the facts alleged do not show that any force was ever applied by respondents on February 14, 2004, much less excessive force.

Regarding the threat made by respondent Dyess, allegations of verbal threats do not establish a constitutional claim. See Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir. 1987) (derogatory remarks do not constitute constitutional violation); McDowell v. Jones, 990 F.2d 433, 434 (8th Cir.1993) (verbal threats and name calling directed at inmate not

actionable under § 1983); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (prison official's use of vulgar language did not violate inmate's civil rights); Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985) (verbal threats by correctional officer do not amount to a constitutional violation). In addition, although respondent Dyess's refusal to allow petitioner to use the bathroom may have made petitioner uncomfortable, it does not rise to the level of a constitutional violation.

ORDER

IT IS ORDERED that:

1. Petitioner Bobby Joe Johnson, Jr.'s request for leave to proceed in forma pauperis on his Eighth Amendment claims is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is $ 149.28; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 1st day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge