IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID S. FREDERICK,

Plaintiff,

v.

MATTHEW J. FRANK, STEPHEN PUCKETT, MARGARET ALEXANDER and LENARD WELLS,

Defendants.

ORDER

04-C-684-C

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Plaintiff is presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Although plaintiff paid the full filing fee (and thus is not proceeding in forma pauperis), his complaint must still be screened pursuant to 28 U.S.C. § 1915A because he is a prisoner.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if plaintiff 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 his 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 plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In an order dated October 13, 2004, I concluded that plaintiff's original complaint in this case failed to meet Fed. R. Civ. P. 8(a)'s requirement that complainants submit a short and plain statement of their grievance. I gave plaintiff until December 5, 2004 to submit an amended complaint, which he has now done. Although much of the amended complaint is difficult to understand, I believe that it is sufficient to convey the gist of plaintiff's grievance. Therefore, I will accept it as complying with Rule 8(a). As best as I can tell, the material facts governing plaintiff's claim are as follows.

ALLEGATIONS OF FACT

At some point in late 1986 or early 1987, plaintiff was convicted of second degree sexual assault and battery and sentenced to two terms of imprisonment, one for fifteen years

and the other for twenty-four years, to run consecutively. On April 28, 1994, the then Governor of Wisconsin, Tommy Thmpson, issued a directive to the state department of corrections that had the effect of denying sex offenders parole eligibility. However, Governor Thompson advised the department that it would be unlawful to apply the directive retroactively.

On June 9, 1994, plaintiff was transferred to the Racine Correctional Institution where he began participating in an intensified behavioral modification program called AODA-Level Six. Shortly thereafter, Dr. Hands placed the program on the list of programming plaintiff would need to complete in order to be eligible for parole. Before plaintiff was able to complete the program, his participation was administratively terminated for some reason. Plaintiff asked to be returned to the program but was told that pursuant to Governor Thompson's directive, the program would not be available to him until eighteen months prior to February 20, 2012, plaintiff's mandatory release date. On October 26, 1999, plaintiff was transferred to a corrections facility in Whiteville, Tennessee, where the AODA-Level six program was available. Plaintiff participated and on May 11, 2001, completed the program. He was given two certificates of graduation.

On October 9, 2001, plaintiff asked to be placed in the sex offender treatment program, SOTP. Plaintiff had been enrolled in the program but was removed from it in 1993 for disciplinary reasons. Shortly after plaintiff asked to participate in this program,

Peggy Kanneberg, a Wisconsin department of corrections employee, directed that plaintiff be transferred to the Prairie Correctional Facility in Appleton, Minnesota. While at the Prairie facility, plaintiff learned that he would not be able to participate in the SOTP pursuant to Governor Thompson's directive.

On January 16, 2002, plaintiff applied for parole. Jayne Hackenback of the Wisconsin Parole Commission noted that plaintiff had satisfied all the programming requirements listed but noted that because plaintiff is a sex offender, it was unusual that the SOTP had been removed from his list. On April 9, 2002, defendant Lenard Wells concluded that plaintiff would be required to complete the program before he would be released on parole. This conclusion was reached in reliance on false information provided by defendants Matthew J. Frank, Stephen Puckett and Margaret Alexander. Plaintiff's parole committee concluded that participation in the SOTP had been removed from plaintiff's programming requirements list by mistake.

On April 27, 2002, plaintiff submitted an SOTP re-enrollment request form to defendant Alexander, the program director. On May 10, 2002, defendant Alexander told plaintiff that he could reapply when he returned to a Wisconsin facility. On October 23, 2003, plaintiff was transferred to the Oshkosh Correctional Facility in Oshkosh, Wisconsin. Plaintiff was placed on a specialized treatment unit and assigned to a social worker, Bob Kolinski, who advised plaintiff that he should expect to complete the SOTP within five

years. On October 29, 2003, defendant Alexander advised plaintiff that because of his prior termination in the program, his re-admission was considered to be of low priority.

Plaintiff appealed the decision of his parole review committee. On January 5, 2004, Molly Sullivan, section chief of the Wisconsin Bureau of Classification and Movement, informed plaintiff that although the bureau had authority to assign programs, entry dates are determined by the program provider. In addition, Sullivan said that she had spoken with defendant Alexander, who told her that plaintiff was on the waiting list for the SOTP but that because his mandatory release date was not until 2012, he was not listed as a priority entry. According to Sullivan, defendant Alexander said that the fact that plaintiff had been enrolled in the program in 1992-1993 had no bearing on his priority status.

Plaintiff appealed the decision of the parole review committee to defendant Frank. Defendant Puckett responded to plaintiff's appeal on behalf of defendant Frank by saying, "Your program requirement for SOTP will not be changed."

On February 17, 2004, defendant Alexander directed that a memo be issued to all inmates on the waiting list for the SOTP, informing them of a new pre-entrance program, SOAR, that they would have to complete before being admitted. On April 14, 2004, plaintiff asked Chris Krueger where he was on the waiting list for enrollment in SOAR. Krueger told plaintiff that all 1,000 plus inmates who needed treatment in SOTP were on the SOAR waiting list and that because plaintiff's mandatory release date was not until

2012, she would not be able to give him an entrance date until closer to that time.

DISCUSSION

Plaintiff brought this action under 42 U.S.C. § 1983, which provides a civil cause of action for the deprivation of a right secured by the Constitution and laws of the United States. It does not allow plaintiffs to sue for actions that seem unfair or even incorrect; plaintiffs can sue under § 1983 only if they allege the violation of a federally secured right. In order to make out a procedural due process claim, plaintiff must allege that he has been denied a liberty or property interest without being afforded certain procedures. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Plaintiff has no liberty interest in being released on parole before February 27, 2012.

There is no independent constitutional right to parole. Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998). A state may create a liberty interest in being granted parole through state law. Felce v. Fiedler, 974 F.2d 1484, 1490 (7th Cir. 1992). However, Wisconsin has not done so through its parole statute, Wis. Stat § 304.06. State ex rel. Gendrich v. Litscher, 2001 WI App 163, ¶ 7, 246 Wis. 2d 814, 822, 632 N.W.2d 878, 882 ("Wisconsin's discretionary parole scheme does not create a protectible liberty interest in parole"); see also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (whether state creates protected liberty interest

in parole depends upon whether parole is discretionary or mandatory under state law); State v. Borrell, 167 Wis. 2d 749, 772, 482 N.W.2d 883, 891 (1992) ("The possibility of parole does not create a claim of entitlement nor a liberty interest.").

In contrast, Wisconsin's mandatory release provision, Wis. Stat. § 302.11(1), provides that subject to enumerated exceptions "each inmate is entitled to mandatory release on parole by the department [when he has completed two-thirds of his sentence]." Citing the mandatory language in this provision, the Wisconsin Court of Appeals has concluded that "under Sandin, [an inmate] retains a liberty interest in not having his mandatory release date extended." Santiago v. Ware, 205 Wis. 2d 295, 315, 556 N.W. 2d 356, 364 (Ct. App. 1996) (citing Sandin v. Connor, 515 U.S. 472 (1995)); see also Gendrich, 2001 WI App 163, at ¶ 7. However, nothing in plaintiff's allegations suggests that his mandatory release date has been extended beyond February 27, 2012.

ORDER

IT IS ORDERED that plaintiff David S. Frederick is DENIED leave to proceed in forma pauperis on his claim that he was denied his due process rights and his case is DISMISSED for failure to state a claim on which relief can be granted. The clerk of court is directed to enter judgment for defendants Matthew Frank, Stephen Puckett, Margaret

Alexander and Lenard Wells and close this case. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 10th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge