IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEONARD CHAMBERLAIN,

Petitioner,

v.

MARATHON COUNTY JAIL and
CAROL LUEDTKE,

Respondents.

ORDER

04-C-0698-C

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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Marathon County Jail in Wausa, 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 and in an order dated November 22, 2004, stayed petitioner's obligation to pay his first partial payment.

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, 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); 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 Leonard Chamberlain is currently confined at the Marathon County Jail in Wausau, Wisconsin. Respondent Carol Luedtke is a correctional officer at the Marathon facility.

On August 11, 2004, petitioner was sleeping in his cell when respondent Luedtke called his name over the intercom to let him know he had a visitor. Plaintiff stepped out of his cell and then remembered that he had left papers that he needed in his cell. Because

petitioner's cell-mate was on lock-down, his cell door locked behind him automatically. Petitioner told respondent that he needed to get back in his cell to get the papers and over the intercom, she told him to go ahead. Petitioner then told respondent Luedtke that he wasn't able to because the door was locked and respondent unlocked the cell door for him. As petitioner was getting his papers, respondent Luedtke called him an idiot over the intercom. Since that time, other inmates have begun calling petitioner an idiot.

On another occasion, petitioner was talking to another inmate when respondent Luedtke approached him and asked petitioner what he had just said. Petitioner told respondent he wasn't talking to her and she responded with a "racist" look.

DISCUSSION

Respondent Marathon County Jail is not capable of being sued under 42 U.S.C. § 1983 because it is a physical facility. Section 1983 actions can be brought only against a "person." With respect to respondent Luedtke, I understand petitioner to allege that she violated his constitutional rights by calling him an idiot and giving him a "racist" look, whatever that is. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), bigotry and intolerance should not be among them. See Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991) ("Racism is never justified; it is no less inexcusable and

indefensible merely because it occurs inside the prison gates."). Nevertheless, not all racial insensitivity violates the Constitution. The Court of Appeals for the Seventh Circuit has held that "verbal harassment does not constitute cruel and unusual punishment, deprive a person of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). Because the conduct about which petitioner complains is too minute to be of any constitutional import, he has failed to state a claim cognizable under federal law.

Petitioner cites Wis. Stat. 302.08, which provides that county jail wardens and superintendents must "uniformly treat the inmates with kindness." However, because petitioner has failed to make out a federal claim, I decline to exercise supplemental jurisdiction over any state law claim petitioner might have. See 28 U.S.C. § 1367(a) (district courts have supplemental jurisdiction over claims so related to claims in action that they form part of same case or controversy); see also Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or refuse jurisdiction over state law claims).

ORDER

IT IS ORDERED that petitioner Leonard A. Chamberlain is DENIED leave to proceed on his claim that respondent Carole Luedtke and the Marathon County Jail violated

his constitutional rights by subjecting him to a mean look and calling him an idiot. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because the claims in the complaint fail to state a claim upon which relief may be granted. The clerk of court is directed to enter judgment for defendants and close this case. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 9th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge