

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

TIMOTHY SCOTT ACKERMANN,
Petitioner,

ORDER
04-C-845-C

v.

JOHN POWERS,
Respondent.

This is a proposed civil action for injunctive relief, brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner Timothy Ackermann alleges that respondent John Powers, a physician at a Veterans Affairs hospital in Tomah, Wisconsin, sexually assaulted petitioner on two occasions while he was seeking treatment there. Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there

is an arguable basis for a claim in fact or law. Neitzke v. Williams, 490 U.S. 319 (1989). However, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a respondent who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. § 1915(e)(2).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Timothy Ackermann is a resident of Sparta, Wisconsin. Respondent John Powers was a physician at a Veteran's Affairs hospital in Tomah, Wisconsin. He is a registered sex offender. In mid-January 1999, petitioner had an appointment to see respondent about back problems. At this appointment, respondent rubbed petitioner's penis with his bare hand but stopped because petitioner's penis was not becoming erect. Respondent gave petitioner a slip to return in two weeks.

At the second appointment, on January 29, 1999, respondent directed petitioner to undress. After petitioner did so, respondent tried to tear petitioner's penis from his body. In addition, respondent attempted to perform fellatio on petitioner. Petitioner noticed blood coming from his penis and told respondent to stop.

When petitioner complained about the incident, respondent told the other doctors at the hospital that petitioner was a liar and only seeking narcotics and "red flagged" him so

that petitioner could not get further treatment. These incidents have ruined petitioner's marriage.

DISCUSSION

A. Substantive Due Process

The substantive component of the due process clause “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331 (1986). Not all unwanted touching by a public official amounts to a violation of an individual's bodily integrity sufficient to support a constitutional violation. Alexander v. DeAngelo, 329 F.3d 912, 916 (7th Cir. 2003). However, touching that amounts to sexual assault implicates the substantive due process liberty interest in bodily integrity. Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997) (allegation of coercion to engage in oral sex states substantive due process claim); Alexander, 329 F.3d at 916 (“rape committed under color of state law is [] actionable under 42 U.S.C. § 1983” as due process violation).

Petitioner has alleged more than mere unwanted touching. He complains of conduct so invasive that it constitutes sexual assault. Id.; see also Hawkins v. Holloway, 316 F.3d 777, 785 (8th Cir. 2003) (comparing cases holding that rape and sexual molestation constitute substantive due process violations to cases holding that offensive conduct does not

implicate constitutional rights, even if it includes unwanted touching of non-sexual nature,). Thus, petitioner has stated a claim for the violation of his substantive due process interest in his bodily integrity.

B. Statute of Limitations

“Bivens actions, like actions under § 1983, are considered as personal injury claims and are governed by the personal injury statute of limitations and tolling laws in the state where the alleged injury occurred.” Delgado-Brunet v. Clark, 93 F.3d 339, 342 (7th Cir. 1996). In Wisconsin, the applicable statute of limitations is six years. Wis. Stat. § 893.53; Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997). Although petitioner has filed suit approximately five years and ten months after the alleged violation, his claim is not time-barred.

C. Relief Sought

_____ Petitioner does not indicate that he is seeking monetary or declaratory relief. In his prayer for relief, petitioner asks this court “to take this petafle (sic) off the streets, hospitals or near any children.” Further, petitioner states that he “wants [Powers] in prison so he can’t mess no-ones (sic) mind up or hurt them.” This kind of relief may be appropriate in a criminal action against the respondent brought by state or federal prosecutors, but it is not

appropriate relief in a civil action designed to make petitioner whole for the constitutional injury alleged. In any event, a claim becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 455 U.S. 478, 481 (1982). Thus, where a petitioner can show only past exposure to allegedly unconstitutional conditions, he has standing to seek monetary relief, but does not have standing to seek injunctive or declaratory relief. Olzinski v. Maciona, 714 F. Supp. 401, 411 (E.D. Wis. 1989)(citing Robinson v. City of Chicago, 868 F.2d 959, 966-67 (7th Cir. 1989)). Courts recognize exceptions to the general rule in cases that are “capable of repetition, yet evading review.” However, this exception is limited to those situations in which 1) the challenged action is too short in duration to be fully litigated prior to its cessation and 2) a reasonable expectation exists that the same parties would be subjected to the same action again. Murphy, 455 U.S. at 482. This situation does not apply in petitioner’s case.

Although petitioner does not ask for money damages, I will allow him to submit a supplement to his complaint to specify the amount of money damages he seeks so that his complaint conforms with the form of pleadings required under Fed. R. Civ. P. 8(a).

ORDER

IT IS ORDERED that

1. Petitioner Timothy Scott Ackermann's request for leave to proceed in forma pauperis is GRANTED with respect to his substantive due process claim that respondent John Powers sexually assaulted him.

2. Petitioner may have until February 3, 2005, in which to complete and return the enclosed marshals service and summons forms so that the United States Marshal can serve petitioner's complaint on the respondent. Petitioner is responsible for providing the marshals service with an address at which respondent Powers may be found. If petitioner does not know the respondent's address and is unable to learn it before February 3, 2005, I will dismiss his case.

3. Petitioner may have until February 3, 2005, in which to supplement his request for relief indicating whether he wants the court to award him monetary damages. If petitioner fails to respond by that time, or if he responds and indicates that he is not interested in pursuing money damages, I will dismiss his case.

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 petitioner 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 13th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge