

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

FREDERICK ROGERS,

Petitioner,

v.

WISCONSIN DEPARTMENT
of CORRECTIONS, LISA KENYON
and WILLIAM GROSSHAUS,

Respondent.

ORDER

04-C-980

This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Fox Lake Correctional Institution in Fox Lake, 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).

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

Petitioner Frederick Rogers is an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. Respondent Lisa Kenyon is a parole officer employed by the Wisconsin State Department of Corrections. Respondent William Grosshaus is the administrator of the division of community corrections.

Petitioner's mandatory release date is on September 7, 2005.¹ On April 26, 2004, plaintiff sent respondent Kenyon a document entitled "statement of information" in which he objected to his placement in the transitional living program, community residential confinement, intensive sanction program or electric monitoring program. Respondent Kenyon ignored this document and in her pre-parole investigation report, recommended petitioner's placement at the Rock Valley halfway house. In addition, she noted that she rejected the idea of allowing petitioner to return to his residence because of petitioner's conduct while in prison, his self-reported mental health issues and because there are children living at his residence. (Petitioner is serving a sentence for second degree sexual assault of a child.) Petitioner has no proven mental health issues and he did not sexually assault his own children, who are the children living at the residence.

¹In his complaint, petitioner alleges that he "will reach his mandatory release date on Sept[ember] 7, 2004." I will assume that this is a typographical error. Plaintiff states that he *will* reach his release date, suggesting that the date has not yet passed. He is still incarcerated at the Fox Lake Correctional Institution and does not complain that he is being held there wrongfully. According to public court records, plaintiff was sentenced to a combined nine years' imprisonment in cases 1998CF002318 and 1999CF001455 and began his sentence on September 7, 1999. 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]." Thus, it is likely that plaintiff intended to say that his mandatory release date is September 7, 2005.

DISCUSSION

I understand petitioner to allege that his planned placement in a halfway house violates his right to be released without further restriction on his mandatory release date. 42 U.S.C. § 1983 is not the proper procedural vehicle for bringing this challenge; this argument must be raised first in a petition for habeas corpus under 28 U.S.C. § 2254. Section 2254 provides a remedy to persons contending that they are “in custody” in violation of the Constitution while section 1983 authorizes civil actions for deprivations of constitutional rights. Although the potential exists for a substantial overlap between the two statutes, the Supreme Court has held on multiple occasions that when a person can obtain relief for a violation of federal law through a petition for a writ of habeas corpus, he may not bring a claim under § 1983 until he has prevailed under § 2254. E.g., Preiser v. Rodriguez, 411 U.S. 475 (1973). Even when a person seeks damages and not release, habeas corpus remains the sole federal remedy when a ruling in the plaintiff's favor would call into question the validity of his confinement. Heck v. Humphrey, 512 U.S. 477 (1994).

Although petitioner is not challenging his conviction or the length of his sentence, the Court of Appeals for the Seventh Circuit has held that a parolee's challenge to the conditions of his parole is a challenge to his custody because a parolee's confinement is defined not by his placement in a prison but by various lesser restrictions on his liberty. Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003). When a collateral attack has been

erroneously brought as a civil action, the general rule is that it should be dismissed without prejudice to the petitioner's refiling the claim in a habeas petition. Id. at 580. Accordingly, petitioner's complaint will be dismissed. However, in deciding whether to bring a habeas petition, petitioner should be aware that a mandatory release date is the date on which he is entitled to release on parole under state law, Wis. Stat. § 302.11; it is not the date on which he is entitled to unconditional release with full reinstatement of his federal constitutional rights, Williams, 336 F.3d at 581.

Petitioner has filed two additional motions in this case: one for a preliminary injunction and one for appointment of counsel. Because petitioner's complaint will be dismissed, these motions are moot and will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Frederick Roger's request for leave to proceed in forma pauperis on his claim that respondents Wisconsin Department of Corrections, Lisa Kenyon and William Grosshaus are intending to violate his civil rights by placing him in certain parole programs and a halfway house following his mandatory release date is DENIED and this case is DISMISSED without prejudice because the claim in the complaint is not cognizable in a civil action pursuant to 42 U.S.C. § 1983;

2. The unpaid balance of petitioner's filing fee is \$148.02; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

3. A strike will not be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g), because dismissal of an action for failure to use the proper avenue for relief is not a ground listed in § 1915(g) for recording a strike;

4. The clerk of court is directed to enter judgment for respondents and close the file.

Entered this 3rd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge