IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STERLING HARDAWAY,

Petitioner,

v.

DANIEL T. DILLON, Judge,

Respondent.

ORDER

05-C-142-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 Kettle Moraine Correctional Institution in Plymouth, 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. 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); 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 is an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Respondent Daniel Dillon is a judge for the Rock County Circuit Court.

On May 3, 2004, respondent Dillon sentenced petitioner to 10 years in prison, four years in prison and six years' probation for his failure to return to the Huber dorm at the Rock County jail in Janesville, Wisconsin. The district attorney prosecuted petitioner with "avenge" because petitioner had a conflict of interest with the prosecutor and respondent. Respondent Dillon acted adversely to petitioner while imposing his sentence.

DISCUSSION

This is the second lawsuit that petitioner has filed in relation to the sentence imposed upon him on May 3, 2004. In an order dated March 3, 2005, I dismissed petitioner's complaint alleging denial of access to the courts against the Rock County Sheriff Department and Eric Runaas as legally frivolous and a strike was recorded against him. Case No. 05-C-064-C. I noted that petitioner's lawsuit was really an attempt to overturn his 10-year sentence and that Heck v. Humphrey, 512 U.S. 477 (1994), forbids a convicted person from seeking damages on any theory that implies the invalidity of his conviction unless he first gets the conviction set aside. Now petitioner is suing respondent Daniel Dillon for essentially the same purpose. He appears not to understand what he was told. Under Heck, 512 U.S. at 487, a convicted person cannot raise claims of constitutional violations under 28 U.S.C. § 1983 relating to his conviction until he can show that he has succeeded in having his conviction "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" under 28 U.S.C. § 2254. Petitioner still has not made the required showing. This court cannot convert his complaint into a petition for habeas corpus on its own. Copus v. City of Edgerton, 96 F.3d 1038, 1039 (7th Cir. 1996) (citing Heck, 512 U.S. 477).

Even if petitioner had made a showing that he followed the procedure dictated by Heck, he would not be able to sue respondent Dillon for any acts he took in his judicial capacity. Few doctrines are more solidly established at common law than the absolute immunity of judges from liability for their judicial acts, even when they act maliciously or corruptly. Mireles v. Waco, 502 U.S. 9 (1991). This immunity is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, which has an interest in a judiciary free to exercise its function without fear of harassment by unsatisfied litigants. Pierson v. Ray, 386 U.S. 547, 554 (1967). The scope of judicial immunity is defined by the functions it protects, not by the person to whom it attaches. Forrester v. White, 484 U.S. 219 (1988). However, it is unquestioned that immunity applies to "the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court." Id. Because petitioner's claim is barred under both Heck and the doctrine of judicial immunity, I will deny petitioner leave to proceed in forma pauperis on his claim against respondent Dillon and record a second strike against him.

ORDER

IT IS ORDERED that:

1. Petitioner Sterling Hardaway's request for leave to proceed in forma pauperis on his claim against respondent Daniel Dillon is DENIED and this case is DISMISSED as legally

frivolous;

2. The unpaid balance of petitioner's filing fee is $225.63; 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 30th day of March, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge