IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DENNIS NOEL,

Plaintiff, ORDER

v. 05-C-496-C

LENARD WELLS, Chairman,
and the WISCONSIN PAROLE COMMISSION,

Defendants.

- -

This is a civil action for declaratory and injunctive relief under 42 U.S.C. § 1983. Plaintiff Dennis Noel, an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, alleges that defendants violated his constitutional rights under the ex post facto clause and the First and Fourteenth Amendments of the United States Constitution. Plaintiff has paid the fee for filing his complaint. Nevertheless, because plaintiff is incarcerated, the court must screen his complaint before allowing his civil action to proceed. 28 U.S.C. § 1915A.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). When the litigant is a prisoner, the

court must examine the prisoner's claims, interpreting them broadly, and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is a prisoner incarcerated at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Lenard Wells is Chairman of the Wisconsin Parole Commission. Defendant members of the Wisconsin Parole Commission are individuals responsible for the discretionary release of parole-eligible inmates confined in the Wisconsin prison system.

In 1981, plaintiff was convicted of first degree murder and sentenced to an indeterminate term of life imprisonment. He is eligible for discretionary parole release. Between the time plaintiff was sentenced and the time he became eligible for parole, Wisconsin changed both the structure of its parole board and the procedures it used for considering parole applications. At the time plaintiff was sentenced, parole decisions were made by a panel of parole board members. Plaintiff believes that under the old procedures the panel could either recommend parole or defer reconsideration for a period of twelve months or less. Plaintiff also believes that panel recommendations were reviewed by both

the chairperson of the parole board and by the Secretary of the Department of Health and Social Services.

When plaintiff was sentenced in 1981, the parole board functioned under the authority of the Secretary of the Department of Health and Social Services. In the late 1980s, the parole board was removed from the supervision of the department and became an independent commission. Because the new parole commission is no longer under the authority of any higher agency or department, recommendations of individual parole commissioners are no longer reviewed by both the chairperson of the parole commission and the department secretary.

Parole consideration procedures changed during the 1980s. Under the new procedures, plaintiff has been forced to speak by telephone to "a single biased and opinionated individual parole commissioner," rather than receive consideration by a parole panel. Plaintiff believes that the new parole procedures are harsh because they subject plaintiff to the "whims, notions and prejudices" of a single commissioner. On at least one occasion, plaintiff's parole interview was terminated when the commissioner hung up the phone in the middle of plaintiff's interview.

Plaintiff's first parole hearing was held in June 1992, after he had served eleven years and three months of his sentence. Since then, he has been denied parole multiple times. In June 2000, plaintiff was denied parole and reconsideration of his parole was deferred for

forty-eight months. Plaintiff filed legal paperwork contesting the deferral but was unable to litigate his claim because he was transferred to a prison in Minnesota. In 2004, while he was still in Minnesota, plaintiff again received a forty-eight month parole deferral. He filed a writ of certiorari contesting this deferral. Shortly thereafter he was transferred to a Wisconsin prison. His legal paperwork was left behind in Minnesota, and plaintiff was again unable to fully litigate his case.

In April 2004 (twenty-three years and one month after plaintiff's sentence began), the parole commission informed plaintiff that he had served only twenty years of his life sentence.

DISCUSSION

Plaintiff contends that defendants are violating his rights under the ex post facto clause and the equal protection and due process clauses of the Fourteenth Amendment by subjecting him to parole procedures implemented after the date of his sentencing. He contends also that his due process rights were violated when his telephonic parole interview was terminated and that his First Amendment rights were violated when he was "dieseled from one state to another" in retaliation for his challenges to parole denial. Finally, plaintiff contends that defendants have miscalculated the amount of time he has served, a mistake that will result in his remaining confined for three additional years.

A. Change in Parole Procedures

1. Due process

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. However, in the absence of a protected liberty or property interest, individuals are not entitled to due process protection. Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). In the context of incarceration, protected liberty interests are generally restricted to freedom from restraints that impose on prisoners atypical and significant hardships outside those normally associated with prison life. Sandin v. Conner, 515 U.S. 472, 484 (1995). Plaintiff contends that he has a protected liberty interest in having his parole application reviewed under the parole procedures in place at the time he was sentenced. However, before he can proceed on this case, he must show that he has a protected liberty interest in receiving parole consideration at all.

There is no constitutional right to parole. Heidelberg v. Ill. Prisoner Review Bd., 163 F.3d 1025, 1026 (7th Cir. 1998). Nevertheless, a state may create a protected liberty interest in parole by enacting statutes that require parole release before the completion of a prisoner's term of confinement. Id.; see e.g. Wis. Stat. § 302.11 (mandating release after completion of two-thirds of a sentence to which the provision applies). Plaintiff is eligible

for parole under Wis. Stat. § 57.06(1), which provides that "the department *may* parole an inmate . . . when he or she has served twenty years of a life term less the deduction earned for good conduct." Wis. Stat. § 57.06(1) (1981-82) (emphasis added). Discretionary parole schemes like Wisconsin's do not create protected liberty interests. Heidelberg, 163 F.3d at 1026 ("A state creates an expectation of release that rises to the level of a liberty interest within the meaning of the due process clause if its parole system *requires* release whenever a parole board or similar authority determines that the necessary prerequisites exist.") (Emphasis added).

In the absence of a protected liberty interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery, 262 F.3d at 644. Because plaintiff has no liberty interest at stake in parole, his due process rights were not violated when he was subjected to parole procedures implemented after the time of his sentencing. Therefore, he will be denied leave to proceed on his claim that his Fourteenth Amendment rights were violated when he was subjected to parole procedures implemented after he was sentenced because the claim is legally meritless.

2. Equal protection

The equal protection clause of the Fourteenth Amendment directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473

U.S. 432, 439 (1985). I understand plaintiff to allege that he and all other criminal defendants sentenced in 1981 are members of a similarly situated class. Plaintiff contends that he was denied equal protection when he was subjected to parole consideration procedures that differed from those to which others in his self-styled "class" were subject. Plaintiff is mistaken. Because he and other criminal defendants sentenced in 1981 are not similarly situated with respect to the parole procedures to which they were subject, I will deny him leave to proceed on this claim as well.

Although plaintiff contends that he and all defendants sentenced in 1981 were similarly situated with respect to parole consideration, his claims do not reflect the reality of Wisconsin parole practice. First, defendants sentenced in 1981 received widely varying penalties. Of those sentenced to prison, some were given brief periods of incarceration. Others, like plaintiff, received life sentences. Many became eligible for parole after serving one half of the minimum term prescribed by statute for their offenses, while those serving life sentences became eligible for parole after serving twenty years minus good time credit. Wis. Stat. § 57.06(1) (1981-82). The result was that defendants sentenced in 1981 became parole-eligible at widely varying times and were subject to different parole procedures, depending upon the year or years in which they were considered for parole.

Between 1981 and 2005, the administrative code provisions governing parole consideration were amended repeatedly, tracking the explosion of Wisconsin's prison

population. In 1981, when Wisconsin's prison population stood at roughly 4,700 inmates, Wis. Admin. Code § HSS 30.05(4) provided: "parole consideration will be by two or more members of the board as assigned by the board chairperson." George Hill & Paige Harrison, Sentenced Prisoners Under State or Federal Jurisdiction (1977-98), Bureau of Justice Statistics (2000). In 1984, as the inmate population approached 5,000 prisoners, § HSS 30.05(4)(a) was created to permit consideration by one member of the board "only in maximum security institutions and only in months when the total number of inmates . . . who are eligible for parole consideration exceeds 400." Hill & Harrison, supra. By 1990, Wisconsin's prison population exceeded 7,000 inmates. Id. That same year, § HSS 30.05(4)(a) was repealed, leaving § 30.05(4) to provide for parole consideration by "one or more board members as assigned by the chairperson." Wis. Admin. Code § HSS 30.05(4) (1990). The provision has remained substantively unchanged since that time. Cf. Wis. Admin. Code § PAC 1.06(4) (2003) ("Parole consideration shall be by one or more commissioners as assigned by the chairperson.").

Plaintiff contends that "those of his class" received the right to be heard by a panel of parole board members, while he has been deprived of that alleged right. The history of the administrative code tells a different story. As prison populations have grown, parole procedures have changed accordingly. Plaintiff has not been singled out for differential treatment. Like all parole eligible inmates, he is given full consideration under the current

standards and procedures. I conclude that plaintiff's claim is legally meritless. He will not be given leave to proceed on his claim that he was denied equal protection.

3. Ex post facto application of law

In order to state a claim that he has been subjected to the ex post facto application of a new law, plaintiff must demonstrate that a retroactive procedural change created a significant risk of prolonging his incarceration. Garner v. Jones, 529 U.S. 244, 251 (2000). Plaintiff believes that Wisconsin's new parole procedures do this in three ways. First, review by a single commissioner creates a greater risk that he will be subject to an arbitrary or biased denial of parole. Second, the restructuring of the parole commission has denied him a full opportunity for review of individual parole commissioners' recommendations: where recommendations were once reviewed by both the chairperson of the parole board and the Secretary of Health and Social Services, now they are reviewed only by the chairperson. Third, the parole commission's "new" ability to defer reconsideration of parole for a period longer than twelve months decreases his opportunity for parole release.

Plaintiff's claims are without merit. Although plaintiff alleges that the new structure and procedures of the parole commission are harsh, the question is not whether plaintiff believes the new procedure is harsher than the old, but whether the new rule demonstrates a significant risk that plaintiff will be incarcerated longer as a result of the change. Garner

v. Jones, 529 U.S. 244, 255 (2000); Glascoe v. Bezy, --- F.3d ----, 2005 WL 2077511 at *4 (7th Cir. August 30, 2005). Because none of the procedures plaintiff challenges create a substantial risk that his confinement will be increased, he will be denied leave to proceed on all three of his ex post facto claims.

Plaintiff contends first that the ex post facto application of Wis. Admin. Code § PAC 1.06(4) makes it substantially less likely that he will be granted parole because it permits parole consideration by a single "biased and opinionated individual." In making this argument, plaintiff overlooks the fact that a single individual is just as likely to be biased *toward* him as biased against him. Plaintiff has not alleged any facts from which an inference may be drawn that he is more likely to be granted parole by two individuals than he is by one. Common sense would dictate the opposite result. The new procedure to which he objects is as likely to result in plaintiff's early release as it is to result in his prolonged incarceration.

Next, plaintiff contends that when the Wisconsin State Legislature removed the parole commission from the auspices of the Department of Health and Social Services, he was deprived of the opportunity to have recommendations of parole commissioners reviewed by both the parole board chairperson and the Secretary of the Department. Plaintiff misunderstands the operation of the review procedure.

According to the relevant Administrative Code provisions, never has the chairperson

or the secretary routinely reviewed denials of parole. Both then and now, the code provides for review only when parole has been recommended and subsequently is rescinded before an inmate has been released. Wis. Admin. Code § HSS 30.06(4) (1981); Wis. Admin. Code § PAC 1.07(5)(c) (2003). In addition, both the 1981 code and the current code permit the chairperson of the parole commission to reconsider parole at any time an inmate can document and verify an extraordinary situation. Wis. Admin. Code § HSS 30.06(8) (1981); Wis. Admin. Code § PAC 1.07(5)(b) (2003). However, this review is not routine. Plaintiff has not been deprived of any benefit and has not suggested how any retroactive procedural change has substantially increased the likelihood that his confinement will be increased.

Third, plaintiff contends that he was subject to an ex post facto application of law when "new" parole procedures permitted the parole board to defer reconsideration of his parole for a period longer than twelve months. In general, courts have held that new procedures decreasing the frequency of parole review will not constitute ex post facto violations unless a plaintiff can demonstrate that the new procedure will increase his period of confinement. See, e.g., Garner, 529 U.S. at 256 (upholding new procedure permitting eight-year parole deferrals for inmates serving life sentences); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995) (upholding new procedure permitting three-year parole deferrals for inmates convicted of multiple homicides).

In plaintiff's case, the "new" procedure to which he objects is not new at all and

therefore cannot extend his confinement. When plaintiff was sentenced in 1981, Wis. Admin. Code § HSS 30.05(2) read in relevant part: "Reconsideration [of parole] shall not be deferred for longer than twelve months except with the written approval of the secretary, the secretary's designee, or board chairperson." Today, Wis. Admin. Code § PAC 1.06(2) reads: "Reconsideration [of parole] shall not be deferred for longer than twelve months except with the written approval of the chairperson or the chairperson's designee." Now, as in 1981, the chairperson of the parole commission may authorize deferral of parole consideration for a period longer than twelve months. Because the procedure has not changed, it does not violate the ex post facto clause of the United States Constitution. Therefore, plaintiff's ex post facto claims will be dismissed because they are legally meritless.

B. Termination of Parole Interview

Plaintiff contends that he was denied due process when the parole commissioner conducting his telephonic parole review hearing terminated the phone call before the interview was complete. Again, plaintiff has a due process right under the Fourteenth Amendment only for constitutionally protected liberty interests. He does not have a protected interest in discretionary parole and therefore this claim is legally meritless. For this reason, I will dismiss this claim.

C. Retaliation

Plaintiff alleges that when he filed legal challenges to parole commission actions in 2000 and 2004, defendants retaliated against him by transferring him between Minnesota and Wisconsin prisons, causing him to miss legal deadlines and lose legal paperwork. He contends that these transfers were retaliatory and violated his right of access to the courts.

Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). However, in order to show that he has been denied access, a prisoner must allege facts suggesting that he "has suffered an injury over and above" the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). At a minimum, he must allege facts suggesting that the "blockage prevented him from litigating a nonfrivolous case." Id. Plaintiff's allegations fall short of this requirement.

Plaintiff asserts that he filed lawsuits challenging decisions by the parole commission to defer reconsideration of his parole. As I have already explained, plaintiff is not entitled to parole and therefore, has no constitutional basis for challenging denial of his parole. Plaintiff makes no other allegations in his complaint to suggest that his lawsuits had merit on any other ground. Because plaintiff has not alleged facts from which an inference may be drawn that defendants prevented him from litigating a nonfrivolous case, I will deny him leave to proceed on his claim that he was denied access to courts in violation of his

constitutional rights.

Plaintiff objects not only to his lost ability to litigate, but also to the underlying "retaliatory" transfer. To succeed on a retaliation claim, plaintiff must show that he engaged in constitutionally protected behavior and that his behavior was a substantial or motivating factor in defendants' negative treatment of him. Rasche v. Village of Beecher, 336 F.3d 588, 597 (7th Cir. 2003). The alleged retaliatory action need not violate the Constitution independently; otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000).

It is well established that inmates have a protected right to complain about prison conditions. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2003). Generally, it is sufficient for a plaintiff stating a claim for retaliation to specify the complaint he filed and the act of retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). ; See also Fed. R. Civ. P. 8(a). He need not provide a detailed chronology of events. Higgs, 286 at 439. Plaintiff has alleged that he filed lawsuits in 2000 and 2004 challenging the determinations of the Wisconsin parole commission. He alleges also that each time he filed a lawsuit, he was moved across state lines to a new prison. Although these allegations are sufficient to meet the applicable pleading requirements, plaintiff has omitted two essential prerequisites to any claim: he has not shown how the alleged violation of his rights can be redressed by

the relief he seeks, Knox v. McGinnis, 999 F.2d 1405, 1413 (7th Cir. 1993) and, even if he were to amend his complaint to seek money damages with respect to this claim, he has alleged no facts to suggest that the defendants he names were involved in any way with the transfer decisions.

In his complaint, plaintiff asks for declaratory relief and for "any other such relief as this Court deems appropriate." When a litigant seeks injunctive and declaratory relief, he must establish that he is in immediate danger of sustaining some direct injury. Feit v. Ward, 886 F.2d 848, 857 (7th Cir. 1989). Nothing in plaintiff's allegations suggests that he will be transferred yet again in retaliation for filing lawsuits in 2000 and 2004.

Moreover, plaintiff alleges no facts suggesting how defendant Lenard Wells or the individuals serving on the defendant parole commission might have been personally involved in arranging his transfers. In any suit brought under 42 U.S.C. § 1983, the plaintiff must establish each defendant's personal responsibility for the claimed deprivation of a constitutional right. An official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). In other words, for a supervisory official to be found liable under §1983, there must be a "causal connection, or an affirmative link, between the

misconduct complained of and the official sued." Smith v. Rowe, 76l F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. l983). Nothing in plaintiff's allegations suggest that the defendants he names played any part in the decisions to transfer him in 2000 and 2004. Because plaintiff has not requested any relief this court is capable of providing to him on his retaliation claim and because even if he had requested monetary relief, he has failed to allege any facts to suggest that the defendants he names were directly involved in arranging his transfers, I will dismiss plaintiff's retaliation claim as legally meritless.

D. Sentence Calculation

Finally, I understand plaintiff to contend that the Department of Corrections has miscalculated his sentence by three years. He alleges that his first parole hearing occurred in June 1992, after he had served eleven years and three months of his life sentence. Plaintiff alleges that in April 2004, the Department of Corrections informed him that he had served only twenty years of his sentence. I understand plaintiff to contend that this three-year, one-month difference in sentence calculation will result in his remaining confined for a longer period of time than if the additional time were credited to him.

Lawsuits challenging the duration of a prisoner's confinement may not be brought under 42 U.S.C. § 1983. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Preiser v.

Rodriguez, 411 U.S. 475, 489 (1973). Rather, the appropriate device for challenging unlawful imprisonment is a petition for habeas corpus. Preiser, 411 U.S. at 489. Plaintiff may raise challenges to the validity of his confinement only in a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 and only after he has exhausted all available administrative remedies. Therefore, plaintiff's claims regarding the miscalculation of his sentence will be dismissed without prejudice.

ORDER

IT IS ORDERED that

1. Plaintiff 's claims that defendants violated his constitutional rights under the ex post facto clause and the First and Fourteenth Amendments of the United States Constitution are DISMISSED with prejudice pursuant to 28 U.S.C. § 1915A because the claims are legally meritless.

2. Plaintiff's claim that he is entitled to earlier release is DISMISSED without prejudice to plaintiff's raising this claim in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 after he has exhausted his available state court remedies.

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which

relief may be granted . . . ." Because plaintiff's habeas corpus claim is part of the action and the court did not dismiss this claim for one of the reasons enumerated in § 1915(g), a strike will not be recorded against plaintiff under § 1915(g).

4. The clerk of court is directed to close the file.

Entered this 19th day of September, 2005.

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