

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

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JONATHAN McCORD,

Petitioner,

v.

DANIEL BERTRAND, Warden  
and GLEN RIPLEY, Institution  
Complaint Examiner,

Respondents.  
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ORDER

05-C-068-C

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, 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 Jonathan McCord is an inmate in segregation at the Green Bay Correctional Institution. Petitioner is unable to earn wages and receives no gifts. Respondent Dan Bertrand is Warden at the Green Bay Correctional Institution and respondent Glen Ripley is an inmate complaint examiner. Under Wis. Stat. § 302.04, a warden has the duty to enforce Department of Corrections regulations, administer the prison, govern its officers and discipline its inmates.

On October 14, 2004, a nurse examined petitioner. After the examination, the nurse asked petitioner to sign a co-payment slip for \$7.50. Petitioner refused to sign the slip, showing the nurse his copy of the Wisconsin Administrative Code § DOC 316, which addresses medical, dental and nursing co-payments. The nurse stated that she was not familiar with the provision. The administrative code has more authority than prison policies and internal management procedures.

Petitioner filed an inmate complaint about the matter. On October 18, 2004, respondent Ripley dismissed petitioner's complaint without an investigation. In the dismissal of petitioner's complaint, respondent Ripley fabricated false statements in order to charge petitioner a co-payment. Ripley's dismissal reads:

Per DOC 316.05, all inmates will be charged a \$7.50 medical co-pay for each inmate-initiated health services request resulting in a face-to-face contact with a health care provider. This is regardless of whether the inmate is currently earning wages or not. The key word is "currently." Earning wages at least one time during one's incarceration qualifies him for the co-pay. Inmates will not be denied health care for refusing to sign the disbursement. Health care will be rendered. Based on the above, it is recommended this complaint be dismissed.

The Green Bay Correctional Institution segregation handbook lists several exclusions to the co-payment, including persons who reside in a § 938.02(15m) state secured correctional facility and who do not have the opportunity to earn wages. Wis. Stat. § 938.02(15m) defines "secured correctional facility" as "a correctional institution operated

or contracted for by the department of corrections or operated by the department of health and family services for holding in secure custody persons adjudged delinquent.” “Secured correctional facility” includes the Mendota juvenile treatment center and a facility authorized under §§ 938.553(3)(b), 938.538(4)(b) or 938.539(5).

On November 21, 2004, petitioner wrote respondent Bertrand asking him why he was being charged a \$7.50 co-payment when he has no opportunity to earn wages. Respondent Bertrand replied, “This is a DOC Rule and [there is] nothing I can do about it.”

#### DISCUSSION

Petitioner alleges that when respondents charged him a \$7.50 copayment for nursing services at the Green Bay Correctional Institution, they violated his procedural due process rights and Wis. Admin. Code § DOC 316.05. According to petitioner, because he was in segregation and unable to earn wages, he should have been excluded from owing a co-payment under his Admin. Code ch. 316 and the segregation handbook.

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. A procedural due process claim against government officials requires proof of inadequate procedures and interference with a liberty or property interest. Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Liberty interests are “generally limited to freedom

from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted).

Petitioner has not alleged that respondents interfered with a liberty or property interest. Moreover, petitioner was able to voice his opposition to the \$7.50 co-payment through the inmate complaint system. Petitioner’s underlying concern appears to be respondents’ application of Wis. Admin. Code § DOC 316.05. This is a state law claim. Because petitioner has not stated a constitutional violation, I will decline to exercise supplemental jurisdiction over petitioner’s state law claim and therefore deny him leave to proceed in forma pauperis. 28 U.S.C. § 1367(c)(3). Petitioner is free to file an action in state court on the state law issue.

#### ORDER

IT IS ORDERED that:

1. Petitioner Jonathan McCord’s request for leave to proceed in forma pauperis on his procedural due process claim is DENIED because the claim is legally frivolous. I decline to exercise supplemental jurisdiction on petitioner’s state law claim that respondents misinterpreted Wis. Admin. Code § DOC 316.05;

2. The unpaid balance of petitioner's filing fee is \$147.66; 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 petitioner pursuant to § 1915(g) because petitioner's state law claim is part of the action and the court did not dismiss that claim on the grounds that it is frivolous, malicious or fails to state a claim upon which relief may be granted; and

4. This case is DISMISSED and the clerk of court is directed to close the file.

Entered this 3rd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge