

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

ROBERT STANLEY DuROSS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ORDER

05-C-79-C

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Oakhill Correctional Institution in Oregon, 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); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Robert DuRoss is a Wisconsin state inmate currently incarcerated at the Oakhill Correctional Institute in Oregon, Wisconsin. He was transferred there on December 29, 2004, from the Dodge Correctional Institution in Waupun, Wisconsin. At some earlier point, plaintiff had surgery on his back and had been prescribed pain medication.

On December 20, 2004, plaintiff sent a slip to the Oakhill facility health services unit requesting an extra mattress and complaining that his pain medication had been changed when he was transferred. Plaintiff noted that lying on the hard mat and steel plate provided

as a bed was causing him back pain. The pain in plaintiff's back and legs caused his temporomandibular joint disorder to flare, which in turn caused him earaches and migraine headaches. Plaintiff continued to send the health services unit requests for pain medication. The unit staff told plaintiff that he would have to make a co-payment if he wanted to see a doctor and plaintiff responded that he was unable to pay the required co-payment. Plaintiff filed an inmate complaint and complained to the facility psychiatric department about the situation to no avail. The response he received to his inmate complaint did not address the problem he had described. In addition, plaintiff received a major conduct report for acting disrespectfully because of the grievance he filed. To date, plaintiff has not received an extra mattress or his prescribed pain medication and he continues to experience significant back pain.

DISCUSSION

Plaintiff's allegations suggest possible violations of his Eighth and First Amendment rights. The Eighth Amendment prohibits prison officials from acting with deliberate indifference towards plaintiff's serious medical needs, Estelle v. Gamble, 429 U.S. 97, 104 (1976); Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997), and the First Amendment prohibits them from retaliating against him for complaining about prison conditions, Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Nonetheless, plaintiff's only named

defendant is the state of Wisconsin and “a state is not a ‘person’ subject to a damages action under § 1983.” Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003). Although plaintiff has failed to make out a claim against a “person” subject to suit under § 1983, I will give him an opportunity to amend his complaint to name appropriate defendants.

If plaintiff intends to take this opportunity, there are several points he should bear in mind while drafting his revised complaint. First, liability under § 1983 must be based on a defendant’s personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F. 3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Thus, plaintiff should attempt to identify the individual prison officials who he has reason to believe are responsible for denying him an extra mattress, his prescribed pain medication and for issuing him a conduct report in response to the inmate complaint he filed. In addition, he should make allegations identifying the specific act or acts of each named defendant took that violated his constitutional rights.

Second, the doctrine of respondeat superior, under which a superior may be liable for a subordinate’s tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Accordingly, plaintiff should name supervisory officials as defendants only if he believes they were personally involved with the wrongs he complains of and not simply because they were the supervising others who were.

Third, if plaintiff does not know the names of the officials whom he wishes to sue, he should indicate that he wishes to sue a “John Doe” or “Jane Doe,” depending on the official’s gender, and provide as much information as he can that might assist the court in identifying this individual. In addition, plaintiff should name the Oakhill facility warden as defendant for the purpose of identifying the Doe defendant(s) if he finds it necessary to use this option.

Finally, if plaintiff intends to pursue a First Amendment retaliation claim, he will need to provide additional information identifying the inmate complaint he filed for which he received a conduct report. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (despite minimal nature of pleading requirements, inmate must at least specify the suit or complaint he filed for which he was retaliated against). Ideally, plaintiff might provide the inmate complaint identification although providing the date on which he filed the complaint would be sufficient. If plaintiff fails to submit an amended complaint by April 11, 2005, I will dismiss it without prejudice to his refileing it at some later point.

ORDER

IT IS ORDERED that plaintiff will have until April 11, 2005, in which to amend his complaint identifying as defendants those prison officials he believes were personally involved in the wrongs about which he complains. If plaintiff fails to submit an amended

complaint by that date, I will dismiss his claims without prejudice to his refiling them in the future.

Entered this 28th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge