

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

MICHAEL J. PICKERIGN,
Plaintiff,

v.

MEMORANDUM and ORDER

JOHN PENDERGAST, STEVE
FLACKEY AND PATRICIA SALIMES,

06-C-069-S

Defendant.

Plaintiff Michael J. Pickerign was allowed to proceed in forma pauperis on his Eighth Amendment claims against John Pendergast, Steve Flackey and Patricia Salimes. In his proposed complaint he alleges that the defendants failed to protect him from assaults by other inmates when he was incarcerated in the Eau Claire County Jail in 2002 and 2003.

On April 27, 2006 defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. Plaintiff filed his opposition to this motion on May 19, 2006. No further briefing is necessary.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Michael J. Pickerign is an adult inmate at the Jackson Correctional Institution, Black River Falls, Wisconsin. At all times material to this action defendants John Pendergast and Steve Flackey were jail officers at the Eau Claire County Jail, Eau

Claire Wisconsin. Defendant Patricia Salimes was the Assistant Jail Administrator.

Plaintiff was incarcerated in the Eau Claire County Jail from March 2002 to April 2003 and from October 2003 until March 2004.

On November 26, 2004 plaintiff filed a 42 U.S.C. § 1983 action against defendants John Pendergast, Steve Flackey and Patricia Salimes in this Court claiming that his First Amendment rights had been violated. He alleges that while incarcerated in the Eau Claire County Jail from October 2003 to March 2004 the defendants interfered with his mail. On February 24, 2005 the Court granted defendants' motion for summary judgment in Case No. 04-C-900-S and entered judgment dismissing plaintiff's complaint and all claims contained therein.

In August 2005 plaintiff filed a similar complaint against the same defendants in Eau Claire County Circuit Court. On December 1, 2005 the Eau Claire County Circuit Court dismissed the complaint on the ground that plaintiff's claim was barred by the doctrine of claim preclusion.

MEMORANDUM

Defendants move for judgment in their favor based on the doctrine of claim preclusion. Claim preclusion bars the relitigation of the same cause of action between the same parties when the first litigation resulted in a valid final judgment on the

merits. Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003).

In plaintiff's previous action in this Court the parties were the same and a final judgment on the merits was entered. The claim arose from the same core of operative facts, plaintiff's incarceration in the Eau Claire County Jail prior to March 2004.

Plaintiff argues that the instant action should not be barred by claim preclusion because he is now pursuing an Eighth Amendment claim rather than a First Amendment claim. The doctrine of claim preclusion, however, bars litigation of claims that could have been raised in the previous action. See Federated Dep't Stores, Inc. V. Moitie, 452 U.S. 394, 398 (1981). In his previous action plaintiff could have raised his Eighth Amendment claims in addition to his First Amendment claims because they arose from his incarceration at the Eau Claire County Jail during the same time period. Since he did not, he is now barred from pursuing this claim by the doctrine of claim preclusion.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

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ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED because plaintiff's claims are barred by claim preclusion.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 25th day of May, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge