IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHI CA UNG,

ORDER

Petitioner,

v.

06-C-494-C

HARLEY LAPPIN, Director,
Federal Bureau of Prisons;
PETER NALLY, Regional Director,
North Central Region, Federal Bureau of Prisons,
RICARDO MARTINEZ, Warden, FCI-Oxford, WI,

Respondents.

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This is a proposed civil action for injunctive relief brought under 42 U.S.C. § 1983. Petitioner, Chi Ca Ung, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, alleges that respondents Harley Lappin, Peter Nally and Ricardo Martinez discriminated against him because of his race when they refused to admit him into a drug treatment program. He requests a temporary restraining order or preliminary injunction ordering respondents to admit him into the program.

In an order dated September 8, 2006, I concluded that petitioner was eligible to proceed in forma pauperis under 28 U.S.C. § 1915. I ordered him to make an initial

payment of $35.40, which the court has received. However, under the 1996 Prison Reform Litigation Act, the court is required to screen prisoner complaints 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 by law cannot be sued for money damages. 28 U.S.C. §1915A.

I conclude that petitioner has stated a claim upon which relief may be granted under the due process clause of the Fifth Amendment. He may proceed with his claim of race discrimination. However, his request for a temporary restraining order or preliminary injunction will be denied.

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). In his complaint, petitioner fairly alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Chi Ca Ung is incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. He is an Asian American. He applied to participate in the Residential Drug Abuse Program, which is available to certain prisoners with a "verifiable documented drug abuse problem." 28 C.F.R. § 550.56. Before entering prison, petitioner abused both alcohol and prescription drugs, which he obtained while he was a pharmacy student. He is

afraid that he will return to drugs after he is released if he does not receive appropriate treatment while in prison. The program provides a number of other benefits, including a potential for early release.

Petitioner satisfies all the requirements for eligibility in the program. Nevertheless, respondents denied his application, telling him that there was not enough documentation in his file demonstrating a drug problem. However, within the last year, respondents allowed numerous white prisoners to participate in the program, even though they had less documentation than petitioner did. At least one white prisoner had no documentation of a drug abuse problem.

DISCUSSION

I understand petitioner to contend that respondents discriminated against him because of his race in violation of the Constitution. Because respondents are federal employees, they are not bound by the equal protection clause of the Fourteenth Amendment, which applies only to state actors. However, the Supreme Court has held that the due process clause of the Fifth Amendment imposes the same obligation of equal treatment on the federal government. E.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n. 2 (1975).

The requirements for stating a discrimination claim are minimal. Plaintiffs are not required to come forward with evidence of their claim or even to plead all of a claim's

elements. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002); Kolupa v. Roselle Park Dist., 438 F.3d 713, 714 (7th Cir. 2006). Rather, it is sufficient if the plaintiff alleges that "discriminatory motives [led to] discriminatory treatment of him." Antonelli v. Sheehan, 81 F.3d 1422, 1433 (7th Cir. 1996). See also Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir.1998) (stating that allegation of "I was turned down a job because of my race" is enough to state race discrimination claim under equal protection clause); Glisson v. Sangamon County Sheriff's Dep't, 408 F. Supp. 2d 609, 625 (C.D. Ill. 2006) (holding that prisoner stated equal protection claim by alleging that "Defendant discriminated against him in terms of the type of confinement on the basis of his mental illness"); Smith v. Carrasco, 334 F. Supp. 2d 1094, 1101 (N.D. Ind. 2004) (holding that prisoner stated equal protection claim by alleging "other prisoners with similar political materials have been treated differently").

Construing his complaint liberally, I conclude that petitioner has alleged that each of the respondents denied his application to the drug treatment program because of his race. Because that is all that Fed. R. Civ. P. 8 requires, I will allow petitioner to proceed on that claim.

Petitioner should know that *proving* his claim will be much more challenging than simply *stating* a claim. To prevail at trial or survive a motion for summary judgment, petitioner will have to come forward with enough admissible evidence to allow a reasonable factfinder to find that petitioner's race was one of the reasons respondents denied

petitioner's application. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). Although one way that a plaintiff may prove discrimination is by showing that members of other races were treated more favorably, generally, he must show also that the others are "similarly situated" to him, meaning that there are not other legitimate reasons that justified treating them differently from the plaintiff. See, e.g., May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000).

There are numerous reasons why the other prisoners petitioner mentions may have been accepted into the program that have nothing to do with their race. They could have other evidence of needing drug treatment, they could have better disciplinary records, they could be considered more amenable to treatment or they could simply be better at persuading prison officials to allow them into the program. Thus, if petitioner intends to prove his claim by comparing himself to other prisoners, he will have to come forward with evidence showing not only that white prisoners were allowed into the program, but also that the white prisoners' circumstances are sufficiently similar to his own to permit a reasonable factfinder to infer a discriminatory intent. If he cannot do this, he will have to come forward with other evidence of discrimination, which may include discriminatory statements or other suspicious behavior. Troupe v. May Dept. Stores Co., 20 F.3d 734, 736 (7th Cir. 1994).

A second hurdle that petitioner must overcome is to show that each of the respondents was "personally involved" in the decision to deny his application. Unlike other

areas of law like torts and employment discrimination, under 42 U.S.C. § 1983, a prison official may not be held liable simply because he or she is a supervisor of the person who violated the plaintiff's rights. Rather, a plaintiff must show that each defendant either directly participated in the violation or knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he or she might see. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). At this stage of the proceedings, I will assume that each respondent was personally involved in the decision, but to prevail against any particular defendant, petitioner will have to show that he participated in the alleged violation.

Included in petitioner's complaint is a request for a temporary restraining order or preliminary injunction, which will be denied. As an initial matter, petitioner has not followed this court's procedures for filing a motion for injunctive relief, which require the moving party to support his motion with proposed findings of fact and affidavits or other evidentiary materials. (I have included a copy of these procedures with this order.) Petitioner has provided only his complaint, which cannot be considered as evidence. Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001).

However, even if I assumed the facts alleged in petitioner's complaint were true, petitioner would not have shown that he is entitled to injunctive relief at this time. Emergency injunctive relief is an extraordinary remedy that a court may grant in exceptional

circumstances only. To obtain an injunction, a party must show that "it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the defendants, adjusting the hardships for the probability of success on the merits." Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998).

At this time, petitioner has not shown that he has more than a negligible chance of success. As noted above, there are many reasons unrelated to race why other prisoners may have been treated more favorably than he was. Petitioner has submitted no evidence or even provided allegations tending to show that he was discriminated against because of his race. With respect to the balance of harms, petitioner has not suggested that he will lose his ability to enter the program if he does not gain immediate admission. On the other hand, it could cause significant disruption to the program and to petitioner's treatment if respondents were forced to accept him now and then later removed him from the program if he was unsuccessful in this lawsuit. Accordingly, petitioner's request for immediate injunctive relief will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Chi Ca Ung may proceed with his claim that respondents Harley

Lappin, Peter Nally and Ricardo Martinez discriminated against him on the basis of race in violation of the Fifth Amendment when they denied his application to the Residential Drug Abuse Program.

2. Petitioner's request for a temporary restraining order or preliminary injunction is DENIED.

3. The unpaid balance of petitioner's filing fee is $314.60; petitioner is obligated to pay this amount as described in 28 U.S.C. § 1915(b)(2).

4. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

5. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Petitioner is to complete the enclosed Marshals Service and Summons forms and return them to the court so that his complaint can be served on respondents, the United States Attorney for the Western District of Wisconsin and the United States Attorney

General, as required by Fed. R. Civ. P. 4(i). Petitioner may have until October 30, 2006, in which to complete and return the requested forms. If, by October 30, 2006, petitioner fails to submit the completed forms, I will dismiss this case for petitioner's failure to prosecute it.

Entered this 2d day of October, 2006.

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