

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

ORLANDO LARRY,

Petitioner,

v.

SARAH SCHMEISER,

Respondent.

ORDER

06-C-518-C

This is a proposed civil action for monetary relief brought under 42 U.S.C. § 1983. Petitioner Orlando Larry, who is presently confined at the Dane County Jail in Madison, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He 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. See 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).

Petitioner contends that respondent Sarah Schmeiser, who was appointed to provide legal services to him by the Wisconsin State Public Defender, failed to file a writ of certiorari on his behalf in his probation case. Petitioner cannot proceed in forma pauperis in this court on his claim because it is not a federal law claim over which this court has jurisdiction.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Orlando Larry is an inmate at the Dane County Jail in Madison, Wisconsin. Respondent Sarah Schmeiser is an attorney who was assigned to represent petitioner in his probation case. On March 10, 2005 respondent was appointed by the state public defender's office to file a writ of certiorari on petitioner's behalf in his "probation case."

On April 5, 2006, petitioner was sentenced in connection with the revocation of his probation to time served and was released. After his release, petitioner contacted respondent and asked for a copy of his probation file. Respondent told petitioner that he could stop by her office at anytime to pick it up. On April 6 or 7, 2006, petitioner stopped at respondent's office to pick up the copy of his file. At the time, respondent was not there. Petitioner reviewed the file and noticed that respondent had not filed the writ of certiorari he had requested. Petitioner waited for respondent to return the office and confronted her about this. When they spoke, respondent confirmed that she had not filed the writ of certiorari and said that she had been hired only to investigate whether there was merit to petitioner's claims. Petitioner was angry about this result and told respondent that a person did not need merit to file a writ of certiorari, just to win one. He complained to respondent that he felt that she lacked zeal in her representation of him. The discussion grew heated and ended after respondent yelled at petitioner and ordered him out of her office.

DISCUSSION

According to petitioner's complaint, respondent is a lawyer who took on an assignment relating to petitioner's "probation case" through an agreement with the Wisconsin public defender office. To obtain relief in this court on a claim that respondent violated his constitutional right to effective assistance of counsel, petitioner would have to

allege facts suggesting that respondent was acting “under color of state law” within the meaning of 42 U.S.C. § 1983. However, in Polk County v. Dodson, 454 U.S. 312 (1981), the Supreme Court held that a public defender does not act "under color of state law" when representing an indigent client and is therefore not subject to suit under § 1983. Finding that the attorney's functions and obligations were "in no way dependent on state authority," the Court emphasized that "except for the source of payment, [the] relationship became identical to that existing between any other lawyer and client." Id. at 318. Thus, even if respondent’s representation of petitioner was ineffective, it would not be a violation of federal law.

I conclude that petitioner's claim for damages against his lawyer is limited to a state law claim of legal malpractice. This court's power to hear state law claims arises only under 28 U.S.C. §1332, the statute governing diversity jurisdiction. Petitioner does not assert jurisdiction under this statute. However, even if he had, he has not alleged that he and respondent are citizens of different states, as is his burden. Cameron v. Hodges, 127 U.S. 322 (1888). Rather, it appears from petitioner’s complaint that both parties are citizens of Wisconsin.

ORDER

IT IS ORDERED that:

1. Petitioner Orlando Larry's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED for lack of subject matter jurisdiction;
2. The unpaid balance of petitioner's filing fee is \$337.70. This amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
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 I am dismissing petitioner's claim on the ground that this court lacks subject matter jurisdiction, and not for one of the reasons enumerated in 1915(g), a strike will not be recorded against him under § 1915(g).
4. The clerk of court is directed to close the file.

Entered this 16th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge