

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

JOE LEE,

Petitioner,

v.

WILLIAM CHARLEBOIS, #9 and
CITY OF PORTAGE POLICE DEPARTMENT,

Respondents.

ORDER

08-cv-658-bbc

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Joe Lee, who is presently confined at the Columbia Correctional Institution in Portage, 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 fee for filing this lawsuit. I previously assessed petitioner an initial partial filing fee of \$3.90 as required under § 1915(b)(1). Petitioner paid \$4.00 in satisfaction of his initial partial payment.

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, 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. 28 U.S.C. § 1915(e).

Because petitioner alleges facts from which it may be inferred that respondent William Charlebois violated the Fourth Amendment's prohibition against unreasonable seizure of a person by using excessive force in arresting petitioner, I will grant him leave to proceed against respondent Charlebois. However, I will deny his request for leave to proceed against respondent City of Portage Police Department because a municipal agency cannot be sued.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

On January 10, 2008, respondent Charlebois arrested petitioner. During the arrest respondent jumped on petitioner's back and placed petitioner in a head lock, causing petitioner pain and injuries to his neck, shoulders and back. Respondent's action was unnecessary because petitioner was subdued and complying with respondent's directions during the arrest.

DISCUSSION

Petitioner's claim arises under the Fourth Amendment because the alleged use of force occurred in the course of an arrest. Graham v. Connor, 490 U.S. 386 (1989); Morfin v. City of East Chicago, 349 F.3d 989, 1004 (7th Cir. 2003). "Whether an officer used excessive force during an arrest is determined under the 'objective reasonableness' standard." Smith v. City of Chicago, 242 F.3d 737, 743 (7th Cir. 2001). Factors to be considered include "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." Id. (alterations in original) (quoting Graham, 490 U.S. at 396). Ultimately, a court must "balance the amount of force used in relation to the danger posed to the community or to the arresting officers." Id. at 743.

Petitioner alleges that respondent Charlebois jumped on his back and placed petitioner in a headlock even though petitioner was subdued and compliant. At this early stage of the case, these allegations are sufficient to state a claim against respondent Charlebois for violation of petitioner's right under the Fourth Amendment to be free from unreasonable seizure of his person and petitioner will be granted leave to proceed against respondent Charlebois.

Petitioner also names the City of Portage Police Department as a respondent. Under Fed. R. Civ. P. 17(b), state law determines whether a particular entity has the capacity to be

sued. As other courts have recognized, Wisconsin municipalities may be sued, Wis. Stat. § 62.25, but individual agencies and departments may not, including police departments. Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 995-96 (E.D. Wis. 2000), *criticized on other grounds in* Driebel v. City of Milwaukee, 298 F.3d 622, 641-42 (7th Cir. 2002); Buchanan v. City of Kenosha, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999); see also Calmese v. Fleishauer, No. 06-C-644-C, 2006 WL 3361204, at *3 (W.D. Wis. Nov. 17, 2006). Generally, litigants seeking redress for wrongs committed by the police must sue either the officers who violated their rights or the municipality (usually a city or county) that has authority over the police department.

Even if petitioner had named as a respondent the municipality in which the police department is located, he has not alleged any actions by the municipality. Further, under § 1983, a municipality may not be held liable simply because it employs an individual who may have violated the law; rather, a city is liable only if it had a policy or custom that caused the constitutional violation. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); see also City of Canton v. Harris, 489 U.S. 378, 389 (1989) (only where municipality's failure to train employees evidences "deliberate indifference" can such failure be a city "policy or custom" actionable under § 1983). Petitioner has not suggested that it was a custom or official policy of the police department or the city for its police officers to jump on an arrestee's back or put him in a headlock when the arrestee is subdued and

complying with the officers' directions. Rather, petitioner's claim is that a particular officer violated his Fourth Amendment rights by using excessive force to arrest him. Accordingly, petitioner's request for leave to proceed on his claim against respondent City of Portage Police Department will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Joe Lee's request for leave to proceed in forma pauperis is DENIED with respect to his claim against respondent City of Portage Police Department for failure to state a claim upon which relief may be granted; respondent City of Portage Police Department is DISMISSED from this case.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent William Charlebois violated petitioner's Fourth Amendment rights to be free from an unreasonable seizure of his person by using excessive force in arresting petitioner.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show

on the court's copy that petitioner has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

7. Included with this order is a blank United States Marshals summons and service form. Petitioner must fill out a form for the respondent and return it to the court by January 5, 2009, so that respondent can be served with petitioner's complaint and this order. If, by January 5, 2009, petitioner fails to return the filled out summons and service form he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice.

8. Because I have dismissed one or more claims asserted in petitioner's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against petitioner.

Entered this 12th day of December, 2008.

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