

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

TIMOTHY W. ANDERSON,

Petitioner,

v.

DENNIS D. HILLSTEAD, Sheriff,
CAPT. KAREN M. HUMPHREY and
LT. KRIS ANDERSON,

Respondents.

ORDER

08-cv-287-bbc

This is a proposed civil action brought pursuant to 42 U.S.C. § 1983. Petitioner Timothy Anderson, a prisoner, seeks leave to proceed in forma pauperis. In a previous order, I directed petitioner to make an initial partial payment of \$11.09, which the court has received.

Because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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 and 1915A. Having reviewed petitioner's complaint, I conclude that the case must be dismissed

for petitioner's failure to state a claim upon which relief may be granted.

Petitioner's allegations are sparse, but it is clear from what he does allege that he cannot succeed on any of his claims. His primary claim appears to be that respondents Karen Humphrey and Kris Anderson were taking his mattress out of his cell from 8:30 am to 4:30 pm while he was incarcerated at the jail in St. Croix County. (Petitioner is now at the Waupun Correctional Institution.) Courts generally agree that the Eighth Amendment entitles prisoners to a mattress. Lyons v. Powell, 838 F.2d 28 (1st Cir. 1988); Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Maxwell v. Mason, 668 F.2d 361, 363 (8th Cir.1981); Oladipupo v. Austin, 104 F. Supp. 2d 654 (W.D. La. 2000). Cf. Townsend v. Fuchs, 522 F.3d 765, 773-74 (7th Cir. 2008) (wet and moldy mattress may violate Eighth Amendment). However, I am not aware of any authority suggesting that prisoners are entitled to a mattress during the day. Prisoners need a mattress to sleep, but petitioner does not suggest that he was required by jail officials to sleep during the day or that he has a medical condition that would require him to do so. Petitioner cannot prevail on this claim.

Second, petitioner says that he was "harassed" at the jail because he is gay. Bigotry in any form is reprehensible and it should not be condoned in any part of society. Although prisoners are expected to endure many "harsh" and "restrictive" conditions as "part of the penalty . . . for their offenses," Rhodes v. Chapman, 452 U.S. 337, 347 (1981), intolerance should not be among them. Cf. Santiago v. Miles, 774 F. Supp. 775, 777 (W.D.N.Y. 1991)

("Racism is never justified; it is no less inexcusable and indefensible merely because it occurs inside the prison gates.")

Nevertheless, not all offensive acts violate the Constitution. Even when a prison official uses derogatory language, the Court of Appeals for the Seventh Circuit has held that "verbal harassment does not constitute cruel and unusual punishment, deprive a person of a protected liberty interest or deny a prisoner equal protection of the laws." DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2002).

Petitioner briefly mentions a number of other issues, such as a "bad back" and officers "playing a radio out loud at 4:30 a.m." None of these issues appear to rise to the level of a constitutional violation and, in any event, petitioner does not identify who is responsible for any injuries he may have suffered. Each of the respondents is a supervisory official; such officials may not be held liable for the actions of others unless they "kn[e]w about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir.1995). A sheriff or other supervisory official may not be held liable simply because he has authority over a lower ranking officer who is alleged to have violated the petitioner's constitutional rights.

ORDER

IT IS ORDERED that

1. This case is DISMISSED for petitioner Timothy Anderson's failure to state a claim upon which relief may be granted.

2. A strike will be recorded in accordance with 28 U.S.C. § 1915(g)

3. The unpaid balance of petitioner's filing fee is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

Entered this 11th day of June, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge