

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

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EARL D. PHIFFER,

Plaintiff,

v.

Warden, GREGORY GRAMS and  
Sgt. PISCHKE, individually and in  
their official capacities,

Defendants.

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ORDER

09-cv-286-slc<sup>1</sup>

This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff Earl D. Phiffer, 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. He has also filed a motion for appointment of counsel. From the financial affidavit plaintiff has given the court, I conclude that he is unable to prepay the full fee for filing this lawsuit. Plaintiff has paid the initial partial payment of \$7.15 as required under

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<sup>1</sup> While this court has a judicial vacancy, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

§ 1915(b)(1).

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). However, because plaintiff is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if he 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. After examining petitioner's complaint, I find that plaintiff has failed to state a claim upon which relief may be granted and he will be denied leave to proceed under the in forma pauperis statute. Further, because plaintiff's complaint will be dismissed, his motion to appoint counsel will be denied as moot.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

##### A. Parties

Plaintiff Earl D. Phiffer is a prisoner currently confined at the Columbia Correctional Institution in Portage, Wisconsin. Defendant Gregory Grams is the warden at the Columbia Correctional Institution. Defendant Sgt. Pischke is a correctional officer employed at the Columbia Correctional Institution.

### B. The February 3, 2009 Incident

On February 3, 2009, plaintiff was eating lunch when defendant Pischke noticed that plaintiff had an extra bun on his tray. Pischke told plaintiff to throw the bun away and plaintiff complied. After plaintiff had finished his lunch, he walked over to Pischke's desk to obtain some soap. Pischke told plaintiff that he would write plaintiff up for theft because he had taken an extra bun. Plaintiff responded that he had thrown the bun away at Pischke's request. Plaintiff proceeded to call Pischke a racist. Pischke told plaintiff that it was plaintiff who was a racist. Plaintiff walked away from the conversation to speak with another inmate. Several seconds later, plaintiff felt an object hit his chest. It bounced off his chest and he caught it, discovering that it was a roll of toilet paper. When plaintiff looked to see who had thrown the toilet paper at him, he saw several officers laughing along with Pischke. Some nearby inmates were laughing as well.

### DISCUSSION

Plaintiff alleges that defendant Pischke violated his constitutional rights under the Eighth Amendment's prohibition on cruel and unusual punishment when Pischke hit plaintiff in the chest with a roll of toilet paper. Plaintiff alleges that being hit with the roll was "excessive force." He is wrong. Being hit by a roll of toilet tissue thrown at a slow enough speed that one can catch it cannot be an Eighth Amendment excessive force

violation. Although plaintiff may have been upset by having a roll of toilet tissue hit him in the chest, the circumstances do not rise to the level of a constitutional violation. Plaintiff has failed to state a claim upon which relief may be granted.

#### ORDER

IT IS ORDERED that:

1. Plaintiff Earl D. Phiffer's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED for failure to state a claim upon which relief may be granted;

2. Plaintiff's motion to appoint counsel is DENIED as moot;

3. Plaintiff 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 the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full;

4. Because I have dismissed the claim asserted in plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff;

5. The clerk of court is directed to close this case.

Entered this 8<sup>th</sup> day of July, 2009.

BY THE COURT:

*Barbara B. Crabb*

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BARBARA B. CRABB

District Judge