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

THOMAS MIKULANCE,

Plaintiff,

v.

OPINION AND ORDER

RICK RAEMISCH, RANDALL R. HEPP, KATHRYN ANDERSON, DEBORAH RYCHLOWSKI, CAROL BRIONES, TERRI MARCO, JODI DOUGHERTY, and JOHN DOE,

12-cv-158-wmc

Defendants.

Plaintiff Thomas Mikulance brings this action under 42 U.S.C. § 1983 against various Wisconsin Department of Corrections officers, from former Secretary Rick Raemisch down to the offender records supervisor for Jackson Correctional Institution, where Mikulance was formerly incarcerated. At the time of filing, Mikulance was an inmate at the Sturtevant Transitional Facility awaiting transfer to the Milwaukee Secure Detention Facility. He asked for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Mikulance has provided, the court has concluded that he is unable to prepay the full fee for filing this lawsuit and has made the initial payment of $18.49 required of him under § 1915(b)(1).

What remains for the court to determine is whether his proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Mikulance alleges that defendants deprived him of his Eighth Amendment

right to be free from cruel and unusual punishment by holding him in prison for longer than his court-ordered sentence. After examining the complaint, the court concludes that Mikulance may not proceed on his Eighth Amendment claim because it is barred by the doctrine articulated by the Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364 (1994);.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations generously, and hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Mikulance alleges, and the court assumes for purposes of this screening order, the following facts.[1]

A. Parties

Plaintiff Thomas Mikulance was previously a prisoner in the custody of the Wisconsin Department of Corrections ("WDOC") at the Jackson Correctional Institution ("JCI"). He filed this lawsuit after his release from JCI, but while being held at Sturtevant Transitional Facility awaiting a bed date at the Milwaukee Secure Detention Facility for an alcohol and drug treatment program. In June of 2012, he was released from the Milwaukee Secure Detention Facility, (*see* dkt. #12) and as of the time

[1] The court draws all facts from plaintiff's complaint and attachments to his complaint. *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) ("Attachments to the complaint become part of the complaint and the court may consider those documents in ruling on a motion to dismiss."). Three months after filing his complaint in this case, plaintiff sent the court a copy of a WDOC administrative complaint form (dkt. #11), alleging that guards at the Milwaukee Secure Detention Facility retaliated against him for filing this lawsuit. That retaliation claim involves a different set of defendants at a different prison engaging in different acts. It is not properly joined to the instant suit, and if Mikulance still wishes to pursue that claim he would need to do so in a separate action. *See* Fed. R. Civ. P. 20(a)(2)(A).

of this screening order he is currently out of prison. (*See* Change of Address Letters, dkt. #12, 13, 15.)

Mikulance complains that his prison sentence was miscalculated and that he spent too long in JCI. At the time of the events complained of, defendant Rick Raemisch was Secretary of the WDOC.[2] Defendant Kathryn Anderson was the chief legal counsel for the WDOC. Defendant Deborah Rychlowski was an employee of the Office of Legal Counsel for the WDOC responsible for legal matters relating to prisoner rights. Defendant Carol Briones was the records administrator for the WDOC. Defendant Randall R. Hepp was warden of JCI. Defendant Terri Marco was the offender records supervisor for JCI. Defendant Jodi Dougherty was the Institution Complaint Examiner ("ICE") for JCI.

B. Alleged Miscalculation of Sentence and Excessive Confinement

In April, 2006, Thomas Mikulance was out of prison and serving a period of extended supervision when he violated the conditions of his supervision. As a result, he was re-incarcerated at JCI and ordered to resume his sentence in prison, with credit for time spent in county jail.

Mikulance maintains the prison's calculation of his release under-counted the county jail credit listed in his re-confinement order. Specifically, Mikulance alleges that he was not credited for the first day of each stint in county jail before his re-incarceration at JCI.

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[2] The court notes that the current Secretary of the WDOC is Ed Wall, rather than Rick Raemisch.

After first getting his parole officer to correct an unrelated error on his re-confinement order, Mikulance wrote to JCI's offender records supervisor, Terri Marco, notifying her of the alleged failure to count the first day of every county jail stay. Marco responded "I have reviewed your sentence computation and it is correct." (Dkt. #1-1, p.7-8.) Mikulance then filed a formal prisoner complaint, which was rejected by internal complaint examiner Jodi Dougherty as outside the scope of the inmate complaint process. (Dkt. #1-1, p.10.) In rejecting Mikulance's complaint, Dougherty indicated that she had discussed the issue with Ms. Marco and confirmed that the calculation was correct according to the WDOC's practice of using the Julian Date Calendar.[3]

Mikulance appealed the complaint rejection to Warden Randall Hepp, who in affirming Dougherty's decision, explained that the complaint was outside the scope of the inmate complaint process. (Dkt. #1-1, pp.12, 14.) Mikulance then wrote to the records supervisor at Dodge Correctional Institution, but his correspondence was forwarded to Terri Marco, who reiterated her previous position that the sentence was calculated correctly. (Dkt. #1-1, pp.15-16.)

Mikulance requested a personal interview with Warden Hepp to explain his position, but Hepp refused. Mikulance also wrote Hepp a two-page memorandum outlining the legal authority for his position, but Hepp did not respond. (Dkt. #1-1, pp.17-20.) Mikulance then sent a legal memorandum to Secretary Raemisch, who

[3] The court assumes that this is a reference to a practice of starting and ending each day at noon, rather than midnight. See http://en.wikipedia.org/wiki/Julian_day (last visited July 10, 2013). Although the court dismisses this action for lack of a valid legal claim, it would appear that defendants -- particularly Ms. Marco -- could and should have done a better job explaining to Mr. Mikulance the operation and reasoning behind the DOC calendar system. Had they done so, perhaps this case would not have been filed.

forwarded it on to Warden Hepp. In response, Hepp again affirmed in writing that Mikulance's sentence was correctly calculated. (Dkt. #1-1, pp.23-25, 27.)

Mikulance sent another memorandum to Chief Legal Counsel Anderson, who directed Terri Marco to respond on her behalf. Marco outlined the history of amendments to Mikulance's Revocation Order and Warrant, set forth the dates in county jail that would be credited, and reiterated that the Department of Corrections' calculations were correct under the Julian Calendar system adopted for calculating time credit. (Dkt. #1-1, pp.26, 32.)

Mikulance alleges that he exhausted all available prison administrative remedies on May 28, 2009, and seeks leave to challenge his sentence calculation before this court pursuant to 42 U.S.C. § 1983.

OPINION

In *Heck v. Humphrey*, the Supreme Court held that unless a plaintiff can demonstrate that his or her conviction or sentence has already been invalidated (via appeal or timely habeas petition), he cannot proceed on any § 1983 suit that "would necessarily imply the invalidity of his conviction or sentence" if successful. 512 U.S. at 487. Later, the Supreme Court expanded the *Heck* rule to any claim in which the relief that the plaintiff seeks is "a determination that he is entitled to immediate release or a speedier release from . . . imprisonment." *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 1841 (1973).

Here, Mikulance seeks damages and declaratory relief arising out of a sentence calculation that he says was too long by three days.[4] If he were to succeed on this claim while in prison, his victory would result in a "speedier release" from imprisonment. *Id.* Because Mikulance does not allege that any state court or habeas action has found the calculation of his release date erroneous, his claim would seem to run afoul of *Heck* and *Preiser*.

The Seventh Circuit has indicated that "there is probably an exception to the rule of *Heck* for cases in which no route other than a damages action under § 1983 is open to the person to challenge his conviction." See *Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999). One example would be where a prisoner cannot bring a habeas suit because he or she is no longer in prison, but this exception applies only where a plaintiff has made *good faith efforts* to overturn the conviction or sentence while incarcerated. There is no exception to *Heck* "where a § 1983 plaintiff *could* have sought collateral [habeas] relief at an earlier time but declined the opportunity and waited until collateral relief became unavailable before suing. *Burd v. Sessler*, 702 F.3d 429, 436 (7th Cir. 2012) (emphasis in orginal).

From Mikulance's complaint and the documents attached to it, the court understands that the sentence calculation being challenged was made at the latest on May 4, 2009 (dkt. #1-1 at 7), and that he had fully exhausted his prison appeals process by May 28, 2009 (dkt. #1 at ¶28). At that time, Mikulance could have availed himself

[4] Mikulance also seeks injunctive relief on behalf of still-incarcerated "John Doe" plaintiffs, but he has been informed that he cannot represent a class of plaintiffs and has agreed to drop all claims except his own.

of the opportunity to bring a habeas suit, assuming he had not already forfeited the chance by letting the statute of limitations pass. According to the logic of *Burd*, his failure to even attempt relief via that avenue bars his current § 1983 lawsuit for declaratory relief and damages.

Mikulance also seeks relief in the form of a permanent injunction prohibiting all defendants from implementing or enforcing any prison sentence that uses the method of calculating county jail credit that he contends is erroneous under state law. Unlike his requests for relief stemming from his imprisonment specifically, this request for prospective injunctive relief does not necessarily violate *Heck*. This is because a favorable finding would not invalidate *his* sentence or let him out any sooner. *See Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) ("[T]he prisoner's claim for an injunction barring future unconstitutional procedures did not fall within habeas' exclusive domain."). As of the date of this order, however, it appears that Mikulance is no longer incarcerated (dkt. #15), and is not in any imminent danger of re-incarceration. As a result, Mikulance no longer has a "personal stake" in obtaining prospective injunctive relief and this claim, too, must be denied. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990) ("The parties must continue to have a 'personal stake in the outcome' of the lawsuit." (citations omitted)).

ORDER

IT IS ORDERED that:

(1) plaintiff Thomas Mikulance's request to proceed (dkt. #3) is DENIED; and

(2) plaintiff's claims arising out of the alleged miscalculation of his release date are DISMISSED with prejudice.

Entered this 19th day of September, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge