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

AMAN SINGH,

OPINION & ORDER

Plaintiff,

v. 14-cv-507-jdp

K. MARKS, CATHY JESS, PAUL KEMPER, MS. BELLIS, UNNAMED RCI PROGRAM REVIEW COMMITTEE MEMBERS, UNNAMED APPEAL ADMINISTRATOR OF THE DOC OFFENDER CLASSIFICATION AND MOVEMENT, UNNAMED MEMBERS OF THE ACT 28 REPEAL IMPLEMENTATION COMMITTEE, MS. SEITZ, EMILY NELSON, KATHY NAGLE, EDWARD WALL, and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

Plaintiff Aman Singh, a resident of Greenfield, Wisconsin, has submitted a proposed civil action under 42 U.S.C. § 1983, alleging that various prison officials unconstitutionally deprived him of opportunities to participate in programs while he was incarcerated at the Racine Correctional Institution that could have earned him early release, rescinded "positive adjustment time" that he had earned, and denied his open records requests about changes to early-release programs. After filing his original complaint, plaintiff submitted a motion for leave to amend the complaint and a proposed amended complaint. I will grant plaintiff's motion for leave to amend his complaint and consider the amended complaint as the operative pleading in this case. *See* Fed. R. Civ. P. 15(a).

Plaintiff seeks leave to proceed with his case *in forma pauperis*, and the court has already determined that he need not prepay any portion of the filing fee. The next step is for the court to screen plaintiff's amended complaint and dismiss any portion that 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. *See* 28 U.S.C. § 1915. In screening 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). After review of the complaint with this principle in mind, I conclude that plaintiff may proceed on First Amendment retaliation and Fourteenth Amendment equal protection claims about being denied entry in the Earned Release Program and ex post facto claims about the invalidation of his positive adjustment time. I will deny him leave to proceed on the remainder of his claims.

ALLEGATIONS OF FACT

The following facts are drawn from the amended complaint. Plaintiff Aman Singh was formerly a prisoner at the Racine Correctional Institution after being convicted in two state criminal cases, Milwaukee County Circuit Court Nos. 11CF4004 and 11CF4192. The judge in those cases made plaintiff eligible for the Earned Release Program ("ERP"). Prisoners who complete ERP earn mandatory early release. Placement into ERP is decided by the Program Review Committee ("PRC").

Plaintiff had PRC review scheduled for March 2013. Defendant Ms. Bellis, plaintiff's social worker, recommended that plaintiff not be placed in ERP because he was appealing his convictions. Defendant PRC Chair K. Marks and John or Jane Doe committee members refused to place plaintiff in the program.

Bellis told plaintiff that defendant Warden Paul Kemper ran the program. Plaintiff wrote to Kemper asking if he agreed with the decision. Kemper told plaintiff that he was rejected for the program because of a policy stating that prisoners appealing their cases would not be accepted. Plaintiff served longer in prison than he otherwise would have because of this decision.

Plaintiff appealed the decision but it was upheld by defendant Doe Appeal Administrator. Defendant Cathy Jess, the administrator of Adult Institutions, approved the policy.

In March 2013 and February 2014, plaintiff was denied work release privileges by defendants Marks and PRC members, even though plaintiff was rated as "low risk" by the standards normally used to assess prisoners for this program. Plaintiff's appeals were denied by defendant Appeal Administrator.

Plaintiff had "other early release opportunities" that were created by 2009 Wis. Act 28, including "positive adjustment time." However, those provisions were repealed by 2011 Wis. Act 38. Defendant Jess rescinded the policies "upon recommendation of the unnamed members of the Act 28 Repeal Implementation Committee." Dkt. 5 at 2-3. After plaintiff had served enough time to qualify for early release under these provisions, defendants records assistant Emily Nelson and records supervisor Ms. Seitz refused to process plaintiff's petitions. Plaintiff ultimately prevailed in state court habeas corpus proceedings regarding the ex post facto elimination of his positive adjustment time. *See State ex rel. Singh v. Kemper*, 2014 WI App 43, 353 Wis. 2d 520, 846 N.W.2d 820. However, even after this ruling, plaintiff was told by defendants Jess, Seitz, Kemper, and Parole Commission Chair Kathleen Nagle that the provisions remained repealed and that they would take no action on his petition. Defendant Edward Wall, secretary of the DOC, "officially administers" the policies denying plaintiff's early release.

Plaintiff made an open records request to defendant Seitz for statistics concerning the number of prisoners granted early release before and after repeal of 2009 Wis. Act 28. Plaintiff's request was denied under Wis. Stat. 19.32(3), which prohibits prisoners from making open

records requests. If plaintiff was not indigent, he could have hired an attorney to make the open records requests for him.

ANALYSIS

A. Earned Release Program

Plaintiff alleges that defendants Bellis, Marks, and John or Jane Doe PRC committee members refused to place plaintiff in the Earned Release Program because he was appealing his conviction. Plaintiff argues that his First Amendment rights were violated by defendants retaliating against him for appealing his conviction, and that his right to equal protection under the law was violated by these decisions.

To state a claim for retaliation under the First Amendment, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009). I conclude that plaintiff has stated a First Amendment claim against defendants. A prisoner has a constitutionally protected right to pursue appellate litigation in his criminal cases, it is likely that rejection from the Earned Release Program would deter a person of ordinary firmness from exercising his rights in the future, and plaintiff alleges that defendants took the actions they did specifically because of plaintiff's appeal. While it is possible that defendants will be able to show that there was a legitimate penological reason for their decisions, at this point I will allow plaintiff to proceed on his retaliation claims.

Plaintiff also argues that his right to equal protection under the law was violated by these decisions. In evaluating whether a plaintiff has stated an equal protection claim, a court first determines whether the challenged actions target a suspect class or address a fundamental right. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 637 (7th Cir. 2007). If so, a higher degree of scrutiny (strict or intermediate) will be applied to evaluate the government's actions. *Id.*; *see also Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). If not, the court will apply a rational basis test to determine whether the challenged actions were "rationally related to a legitimate state interest." *St. John's United Church of Christ*, 502 F.3d at 637–38.

Prisoners are not a suspect class, *Johnson v. Daley*, 339 F.3d 582, 585-86 (7th Cir. 2003), and plaintiff does not have a fundamental right to the Earned Release Program. Even so, I conclude that plaintiff has stated at least an arguable equal protection claim that there is no rational basis to keep prisoners out of certain programs because they are appealing their convictions. It may become obvious as the case proceeds either that the facts are not exactly as plaintiff alleges they are, or that there is a rational basis for the determination made by defendants, but at this stage of the proceedings, I will let plaintiff proceed on this claim.

At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen Crocker will explain the process for plaintiff to use discovery to identify the names of the Doe defendants and to amend the complaint to include the proper identities of these defendants.

B. Work release

Plaintiff also alleges that defendants Marks and John or Jane Doe PRC committee members denied his requests for work release privileges even though all other inmates who were rated "low risk" were granted that privilege, and that his appeals were denied by defendant Doe

Appeal Administrator. Unlike his claim regarding the Earned Release Program, I do not understand plaintiff to be saying that this decision was made in retaliation for pressing his criminal appeal.

Because plaintiff does not identify a class of discriminated individuals for this claim, I understand him to be bringing a "class of one" equal protection claim. Under this type of claim, a plaintiff must plead both that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment. *Jordan v. Cockroft*, 490 F. App'x 813, 815 (7th Cir. 2012). Because plaintiff does not explain *why* he was discriminated against, I cannot allow him to proceed on these claims, at least at this point. *See Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 899 (7th Cir. 2012) (per curiam) (Posner, J., leading opinion) ("The plaintiff must plead and prove both the absence of a rational basis for the defendant's action and some improper personal motive . . . for the differential treatment."). I will give plaintiff a short deadline to supplement his complaint with additional allegations showing why plaintiff believes he was discriminated against.

C. Ex post facto elimination of plaintiff's early release credits

I understand plaintiff to be alleging that the ex post facto elimination of his "Positive Adjustment Time" by defendants Jess and Doe "Act 29 Repeal Implementation Committee" members, as well as the decisions by defendants Nelson and Seitz to refuse to process plaintiff's petitions for early release, forced him to serve more time in prison than he should have. I also understand plaintiff to allege that even after the Wisconsin Court of Appeals ruled that the elimination of this time violated the ex post facto clauses of the United States and Wisconsin Constitutions, defendants Jess, Seitz, Kemper, and Nagle still refused to credit him with the time he had earned. Therefore I will allow plaintiff to proceed on ex post facto claims against

these defendants.

Plaintiff also alleges that defendant DOC Secretary Wall "officially administers" the policies denying his early release, but this is not enough to show that Wall had any personal involvement in authoring or applying the policies that injured plaintiff. Because plaintiff must demonstrate that each defendant was personally involved in a deprivation of his constitutional rights, *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001), I will not allow plaintiff to proceed on a claim against Wall.

D. Open records

Plaintiff argues that the Wisconsin open records law denying prisoners access to most records, Wis. Stat. § 19.32(3), is unconstitutional because he, as an indigent prisoner, is not allowed to request documents pertaining to other prisoners, whereas a prisoner with sufficient funds could have an attorney request those documents.[1] I will not allow plaintiff to proceed with this equal protection claim because courts have upheld similar restrictions on prisoners' use of open records laws. *See, e.g.*, *Giarratano v. Johnson*, 521 F.3d 298, 304-05 (4th Cir. 2008) ("the district court cited a variety of rational reasons for the VFOIA prisoner exclusion. For one, inmates could abuse VFOIA and unduly burden state resources. Additionally, excluding prisoners could conserve state resources and prevent frivolous requests."); *Leija v. Koselka*, 2007 WL 2950787, at *3 (E.D. Mich. Oct. 10, 2007) ("The prisoner-exclusion provision of the Michigan Freedom of Information Act is rationally related to a legitimate interest in preventing

---

[1] The general rule under that law is that "any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a). But under Wis. Stat. § 19.32(3), "a committed or incarcerated person" may not make a request under the open records law unless he "requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law."

scarce governmental resources from being squandered by prisoners' frivolous requests for information.").

That plaintiff casts his claim as a violation of *indigent* prisoners' equal protection rights does not significantly alter the analysis. Plaintiff does not allege that the law burdens a fundamental right, nor he does not allege that he is a member of a protected class. *See Maher v. Roe*, 432 U.S. 464, 471 (1977) ("this Court has never held that financial need alone identifies a suspect class"); *Johnson v. Daley*, 339 F.3d 582, 585-86 (7th Cir. 2003) (prisoners are not a suspect class). The purpose of conserving state resources by excluding prisoners' records requests is served by allowing attorneys to make requests because it is reasonable to assume that attorneys are less likely to make the type of frivolous requests that spurred creation of the prisoner exception to the open records law. Therefore plaintiff fails to state an equal protection claim about the open records law.

E. Naming Department of Corrections as a defendant

Although plaintiff names the Wisconsin Department of Corrections as a defendant, the DOC cannot be sued in a § 1983 action, *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (states or state agencies are not "persons" within the meaning of 42 U.S.C. § 1983). Accordingly, I will dismiss the DOC from this case.

ORDER

IT IS ORDERED that:

1. Plaintiff Aman Singh's motion for leave to amend his complaint, Dkt. 4, is GRANTED. Plaintiff's amended complaint, Dkt. 5, will be considered the operative pleading in this action.

2. Plaintiff is GRANTED leave to proceed on the following claims:

   a. First Amendment retaliation claims and Fourteenth Amendment equal protection claims against defendants Bellis, Marks, Kemper, Jess, John or Jane Doe PRC committee members, and Doe Appeal Administrator for refusing to place plaintiff in the Earned Release Program because he was appealing his conviction.

   b. Ex post facto claims against defendants Jess, John or Jane Doe "Act 29 Repeal Implementation Committee" members, Nelson, Seitz, Kemper, and Nagle for eliminating plaintiff's early release credits.

3. Plaintiff is DENIED leave to proceed on the following claims:

   a. Equal protection claims regarding the denial of work release privileges.

   b. An ex post facto claim against defendant Wall.

   c. Equal protection claims regarding the application of Wisconsin open records law.

4. Defendants Wall and Wisconsin Department of Corrections are DISMISSED from the case.

5. Plaintiff may have until May 26, 2015, to submit a supplement to the complaint further explaining his work release equal protection claims.

6. Summonses and copies of plaintiff's complaint and this order are being forwarded to the United States Marshal for service on defendants.

7. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve defendants' lawyer directly rather than defendants themselves. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

8. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered May 11, 2015.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge