

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

JEROME ANTHONY THEUS,

Plaintiff,

v.

WARDEN RANDALL HEPP and
DEPUTY WARDEN CHRIS A. KRUEGER,

Defendants.

OPINION AND ORDER

15-cv-115-bbc

Pro se prisoner Jerome Anthony Theus has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that correctional officers took the towel he had brought with him from the Racine Correctional Institution to the Fox Lake Correctional Institution. Under 28 U.S.C. § 1915A, I must screen plaintiff's proposed 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. Even construing plaintiff's complaint generously, as I must, Haines v. Kerner, 404 U.S. 519, 521 (1972), I cannot find that it states a claim. I find also that it is frivolous. Accordingly, plaintiff's complaint will be dismissed and he will be assessed a strike under § 1915(g).

OPINION

Plaintiff alleges that defendant Warden Randall Hepp allowed a correctional officer to take a towel plaintiff brought with him from the Racine prison when he was transferred to the Fox Lake prison. Plaintiff had the Racine towel from September 2014 until it was confiscated in January 2015. Review of the materials plaintiff attached to his complaint reveals that the prison determined that the towel in plaintiff's possession was prison-owned and was contraband under prison rules, which is why it was confiscated and made the subject of a conduct report. Plt.'s Cpt., dkt. #1, exh. #2.

As an initial matter, plaintiff does not explain how either defendant was involved in the decision about the towel, other than to say that the warden allowed it to happen because of his supervisory status. This is insufficient to state a claim under 42 U.S.C. § 1983. Kuhn v. Goodlow, 678 F.3d 552, 555-56 (7th Cir. 2012) (defendant in § 1983 case must be "directly and personally involved" in constitutional deprivation). Furthermore, although the taking of prisoners' property may be a violation of the United States Constitution in some contexts, plaintiff has not alleged that *his* property was confiscated. Munson v. Gaetz, 673 F.3d 630, 637 (7th Cir. 2012) (due process claim only if deprived of protected interest in property). Rather, plaintiff says that a towel he brought from another state prison was taken. Prohibition of the possession of property *in prison* is not necessarily a deprivation of property under the Fourteenth Amendment because prisons are permitted to enforce rules about what prisoners may possess in the prison in order to maintain safety and security. Id. at 638. Thus, plaintiff has not identified a constitutional violation.

Even assuming the truth of all of the facts plaintiff alleges, his complaint fails to state a claim upon which relief may be granted. Jones v. Bock, 549 U.S. 199, 215 (2007). It is clear that the loss of a towel that was not plaintiff's property is not a constitutional violation, which means that plaintiff's complaint is frivolous. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (holding that failure to state a claim and a frivolous complaint are not the same standard but that "a complaint . . . is frivolous where it lacks an arguable basis either in law or in fact"). Accordingly, plaintiff will be denied leave to proceed and he will be assessed a strike under § 1915(g).

ORDER

IT IS ORDERED that

1. Plaintiff Jerome Anthony Theus is DENIED leave to proceed on his claims against defendants Warden Randall Hepp and Deputy Warden Chris A. Krueger and his complaint is DISMISSED as frivolous and for failure to state a claim upon which relief may be granted.
2. In accordance with 28 U.S.C. 1915(g), plaintiff will be assessed a strike.
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). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.
4. The clerk of court is directed to enter judgment for defendants and close this case.

5. Because the case will be closed, plaintiff's motion for assistance in recruiting counsel, dkt. #6, is DENIED as moot.

Entered this 2d day of April, 2015.

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