UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
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Chicago, Illinois 60604

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ORDER

March 5, 2019

By the Court:

No. 18-3483	LARRY B. RUBIN, Plaintiff - Appellant v. HECTOR SANCHEZ, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:18-cv-06332 Northern District of Illinois, Eastern Division District Judge John J. Tharp	

Upon consideration of the **MOTION TO FILE INSTANTER**, filed on March 5, 2019, by the pro se appellant,

IT IS ORDERED that the motion is **GRANTED** and the mandate is **RECALLED**. The clerk of this court shall file the tendered petition for rehearing **INSTANTER**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LARRY BRUCE RUBIN, Plaintiff, v. HECTOR SANCHEZ; DIONNE CALDERONE; STATE OF ILLINOIS DEPT. OF HUMAN RIGHTS, Defendants.	)	No. 18 C 06332 Judge John J. Tharp, Jr.

ORDER

For the reasons set forth in the Statement below, the Court grants the plaintiff's application for leave to proceed *in forma pauperis* [4]. The plaintiff may proceed without prepayment of the filing fee. The Court finds, however, that the plaintiff's complaint fails to state a claim. The complaint is dismissed with prejudice as to the Illinois Department of Human Rights and without prejudice as to the individual defendants. The plaintiff's motion for attorney representation is also denied. Any amended complaint must be filed by October 18, 2018. See statement for details.

STATEMENT

Plaintiff Larry Bruce Rubin brings a *pro se* complaint pursuant to 42 U.S.C. § 1983 against defendant State of Illinois Department of Human Rights ("IDHR"). He also names as defendants two IDHR employees. The complaint alleges that the defendants violated Rubin's constitutional rights. Along with his *pro se* complaint, Rubin filed an application to proceed *in forma pauperis* ("IFP") and a motion for attorney representation.

Under 28 U.S.C. § 1915, the federal IFP statute, indigent plaintiffs are permitted to commence a civil action without prepaying the administrative costs (*e.g.*, the filing fee) of the lawsuit. Rubin's IFP application demonstrates that he qualifies for IFP status. According to his application, Rubin has never been employed. His only income is $8,820.00/year in social security benefits. Because Rubin's total yearly income translates to only $735/month, the Court finds that payment of the $400 filing fee would be an undue financial hardship. Accordingly, Rubin's IFP application is granted.

In reviewing an IFP application, however, courts must also screen the complaint. 28 U.S.C. § 1915(e)(2); *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1022-23 (7th Cir. 2013). This means that the Court must dismiss the complaint, or any claims therein, if it determines that the complaint or claim is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see also Coleman v. Labor & Indus. Review Comm'n of Wis.*, 860 F.3d 461, 465 (7th Cir. 2017) (stating that § 1915(e) "instructs the court to dismiss the case at any time if, among

other things, the action fails to state a claim on which relief may be granted") (internal quotation marks and citation omitted); *Smith-Bey v. Hosp. Adm'r*, 841 F.2d 751, 757 (7th Cir. 1988) ("If the complaint submitted along with the petition is frivolous, the district court must deny leave to proceed in forma pauperis under § 1915(a) . . . .").

Courts screen IFP complaints in the same manner that applies when a defendant moves to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6). *See Maddox v. Love*, 655 F.3d 709, 718 (7th Cir. 2011). A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted) (internal quotation marks omitted). Under federal pleading standards, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Stated differently, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "In reviewing the sufficiency of a complaint under the plausibility standard, [courts] accept the well-pleaded facts in the complaint as true." *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013). Courts also construe *pro se* complaints liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Rubin alleges that on May 3, 2017, he was the victim of a hate crime. He states that he subsequently dialed 311 to report the crime, but that the operator, after learning that he is Jewish, told him that she would "delete the entire call." Rubin alleges that he then filed a claim (presumably a discrimination claim) with the State of Illinois Department of Human Rights against the City of Chicago. The complaint states that the Department of Human Rights has not sent Rubin any written notification regarding his claim in months, and that the two defendant employees told Rubin that it was "being reviewed." Rubin states that he feels the Department discriminated against him, resulting in severe emotional distress.

Rubin's complaint boils down to an allegation that the Illinois Department of Human Rights violated his constitutional rights when it failed to adequately investigate his discrimination claim arising from the City of Chicago's handling of his phone call. There are at least two fundamental and related problems with this claim. First, Rubin cannot maintain a federal civil rights cause of action for damages against a state agency. A state and its agencies are not suable "persons" within the meaning of § 1983. *Thomas v. Illinois*, 697 F.3d 612, 613 (7th Cir. 2012) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989)). The same holds true for state employees sued in their official capacities. Rubin does not allege whether he is suing the individual defendants in their official or personal capacities, but the complaint fails to state a claim in either case. If sued in their official capacities, the employees are not suable persons; if sued in their personal capacities, the complaint fails to allege that they had any personal involvement with the alleged violation (rather, it alleges only that these individuals spoke to Rubin on the phone and reported to him that the investigation was in progress).

And second, even if § 1983 permitted suits for damages against state agencies, the Constitution bars them. Under the Eleventh Amendment, states have immunity from suit in federal courts. "A state and its agencies cannot be subject to a federal suit without the state's consent."

Haynes v. Indiana Univ., No. 17-2890, 2018 WL 4201640, at *4 (7th Cir. Sept. 4, 2018). This immunity extends to state agencies and state employees sued in their official capacities. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). And again, the complaint fails to state whether the individual defendants are being sued in their personal capacities and fails to allege that they were personally involved in the discriminatory conduct Rubin alleges.

Relatedly, the complaint also fails to state a plausible claim that the state or its employees discriminated against him. The complaint expressly alleges that the conduct at issue was negligent, not intentional (or even reckless), as would be required to state a claim for discrimination by state actors. *Strominger v. Brock*, 592 F. App'x 508, 511–12 (7th Cir. 2014) (observing that the Seventh Circuit has yet to decide whether discriminatory animus or deliberate indifference is required to show intentional discrimination, but holding that "[m]ere negligence is insufficient under either standard"). And "negligence" is an apt characterization of the conduct the complaint describes, which is not even that the state failed to investigate Rubin's claim but rather that it has not done so with sufficient alacrity. A claim that a government bureaucracy has not responded quickly enough falls far short of plausibly alleging intentional discrimination.

The complaint, then, must be dismissed. The claim against the IDHR "seeks monetary relief against a defendant who is immune from such relief" and must therefore be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii). Ordinarily, an initial dismissal pursuant to § 1915(e) is without prejudice; plaintiffs generally must be given an opportunity to cure pleading deficiencies. But with respect to the IDHR claim, any such amendment would be futile; Rubin cannot, by repleading, avoid the obstacles presented by § 1983's suable person requirement and the Eleventh Amendment. Accordingly, the dismissal of the IDHR claim is with prejudice. The claims against the individual defendants are dismissed without prejudice; if he can do so consistent with the requirements of Rule 11 of the Federal Rules of Civil Procedure, Rubin has leave to amend those claims within 28 days to address whether the individual defendants are being sued in their personal capacities and, if so, to cure the other pleading deficiencies noted above. In the absence of a timely amended complaint, this action will be dismissed.

Finally, Rubin's motion for appointment of counsel is denied without prejudice. There is no constitutional or statutory right to court-appointed counsel in federal civil litigation. District courts, however, have discretion to request an attorney to represent indigent litigants. *Pruitt v. Mote*, 503 F.3d 647, 649 (7th Cir. 2007). Motions for attorney representation are granted only if 1) the indigent plaintiff has made reasonable attempts to secure counsel on his own, and 2) "the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it." *Id.* at 654. Rubin's motion states that in seeking representation, he contacted only the Legal Assistance Foundation of Chicago. By contacting only one organization, he has failed to make "reasonable attempts" to secure counsel on his own. Further, according to his motion, Rubin is a college graduate. This suggests that he is competent to provide a factual narrative of the events on which his claim is based, which is all that is required at this early stage in the litigation. Therefore, his motion for attorney representation is denied without prejudice.

Date: September 20, 2018

John J. Tharp, Jr.
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 13, 2019

Before

WILLIAM J. BAUER, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-3483

LARRY B. RUBIN,
Plaintiff-Appellant,

v.

HECTOR SANCHEZ, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:18-cv-6332

John J. Tharp, Jr.,
Judge.

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant on March 5, 2019, all members of the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing is hereby DENIED.