UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Court of Appeals for the
Seventh Circuit

PLRA C.R. 3(b) FINAL ORDER

March 11, 2021

No. 20-2954	BRALEN LAMAR JORDAN, Plaintiff - Appellant v. KATHLEEN H. SAWYER, et al., Defendants - Appellees

Originating Case Information:

District Court No: 3:20-cv-50121
Northern District of Illinois, Western Division
District Judge Rebecca R. Pallmeyer

The pro se appellant was DENIED leave to proceed on appeal in forma pauperis by the district court on November 6, 2020. The pro se appellant has neither paid the $505.00 appellate fees nor filed a motion for leave to proceed on appeal in forma pauperis in the Appellate Court, as prescribed in *Fed. R. App. P. 24(a)*. Accordingly,

IT IS ORDERED that this appeal is **DISMISSED** for failure to pay the required docketing fee pursuant to Circuit Rule 3(b).

IT IS FURTHER ORDERED that the appellant pay the appellate fee of $505.00 to the clerk of the district court. The clerk of the district court shall collect the appellate fees from the prisoner's trust fund account using the mechanism of *Section 1915(b)*. *Newlin v. Helman, 123 F.3d 429, 433* (7th Cir. 1997).

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

Bralen Lamar Jordan (22702-009),	)	
	)	
Plaintiff,	)	
	)	No. 20 CV 50121
v.	)	Appeal No. 20-2954
	)	
Kathleen Hawkins Sawyor, et al.,	)	Judge Iain D. Johnston
	)	
Defendants.	)	

ORDER

Plaintiff's motion to proceed *in forma pauperis* on appeal [52] is denied. The Court certifies that the appeal is not taken in good faith. *See* 28 U.S.C. § 1915(a)(3). To proceed with his appeal, Plaintiff must either pay the appellate fee of $505 within fourteen days or seek review of this Court's denial of his *in forma pauperis* request in the United States Court of Appeals for the Seventh Circuit within thirty days of the entry of this order. Plaintiff's failure to either pay the filing fee or seek review of this order may result in the Court of Appeals' dismissal of his appeal for failing to prosecute it. The Clerk is directed to send a copy of this order to Plaintiff and to the United States Court of Appeals for the Seventh Circuit. Plaintiff's motion for leave to amend his complaint [50] is stricken for the reasons stated in the Court's October 22, 2020 order.

STATEMENT

Plaintiff Bralen Jordan, a federal prisoner at USP Thomson, filed this *pro se* lawsuit pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging Thomson officials used excessive force against him during his transfer to Thomson on December 13, 2019. By order dated September 25, 2020, another member of this Court dismissed this case because it was apparent Plaintiff had not exhausted administrative remedies prior to filing the lawsuit and entered final judgment. (Dkts. 39, 40.) Plaintiff appeals the judgment in this case and seeks leave to proceed *in forma pauperis* (IFP) on appeal. (Dkts. 44, 52.) Plaintiff's motion for leave to appeal *in forma pauperis* is denied.

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner seeking to appeal *in forma pauperis* must pay the full filing fee. He may, however, seek leave to pay the fee over time by submitting an affidavit including a statement of assets, along with "a certified copy of the trust fund account statement . . . for the prisoner for the 6-month period immediately preceding the filing of the . . . notice of appeal . . . ." 28 U.S.C. § 1915(a)(1)-(2). An inmate may not proceed IFP on appeal when the prisoner: (1) has not established indigence; (2) appeals in bad faith; or (3) has three strikes and is not under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(a)(2)-(3), (g); *see also* Fed. R. App. P. 24(a)(3)(A)-(B).

Plaintiff here has established his indigence and has not accrued three strikes. Therefore, the issue is whether he has appealed in good faith. "[A]n appeal taken in 'good faith' is an appeal that, objectively considered, raises non-frivolous colorable issues." *Eiler v. City of Pana*, No. 14-CV-3063, 2014 WL 11395155, at *1 (C.D. Ill. Nov. 1, 2014) (collecting cases); *Lee v. Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000) (explaining that a finding of no good faith is comparable to a finding that an appeal would be frivolous). "An appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit." *Smeigh v. Johns Manville, Inc.*, 643 F.3d 554, 565 (7th Cir. 2011) (citation and internal quotation marks omitted). If the district court certifies that an appeal is not taken in good faith, the appellant cannot prosecute the appeal *in forma pauperis*, but rather must pay the appellate fees in full for the appeal to go forward.

The Court finds that the appeal is not taken in good faith as Plaintiff fails to articulate any non-frivolous colorable issues in his notice of appeal that merit review. Plaintiff does not provide the basis for his appeal in the notice of appeal but does indicate in his IFP application that he disagrees with the Court's conclusion that he failed to exhaust administrative remedies. (Dkt. 52, pg. 1.) Plaintiff's submissions in this case, however, make it apparent he did not complete the grievance process before filing this lawsuit. (*See* Dkts. 1-1, pg. 24; Dkt. 24, pgs. 2-3.) Although prisoners need not allege that they have exhausted administrative remedies, dismissal on the pleadings is proper where a plaintiff "does not, and clearly could not, plead that he exhausted all administrative remedies." *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000). Plaintiff does not present any documentation or arguments suggesting the Court's determination was incorrect. Accordingly, Plaintiff has not articulated, and the Court does not discern, any grounds for appeal.

The Court therefore certifies that this appeal is not taken in good faith. Plaintiff must pay the full $505 filing fee within fourteen days of the date of this order or the Court of Appeals may dismiss his appeal for want of prosecution. *See Evans v. Ill. Dep't of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998). Payment shall be sent to the Clerk, United States District Court, 219 South Dearborn Street, Chicago, Illinois 60604, attn: Cashier's Desk, 20th Floor. Payment should clearly identify the name of the party to whom the payment applies, as well as the district court and appellate court case numbers assigned to this action. If Plaintiff wishes to contest this Court's finding that his appeal is not taken in good faith, he must file a motion with the United States Court of Appeals for the Seventh Circuit seeking review of this Court's certification, within thirty days of entry of this order. Fed. R. App. P. 24(a)(5).

Date: November 6, 2020

By: _____
Iain D. Johnston
United States District Judge

Exhibit United States Courts of Appeal 7th Circuit Order of Judgement(Dismissed)

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ORDER

January 11, 2021

Before

DIANE S. SYKES, *Chief Judge*
FRANK H. EASTERBROOK, *Circuit Judge*

No. 20-2954	BRALEN LAMAR JORDAN, Plaintiff - Appellant v. KATHLEEN H. SAWYER, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 3:20-cv-50121 Northern District of Illinois, Western Division District Judge Rebecca R. Pallmeyer	

The following are before the Court:

1. **PLRA MEMORANDUM IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS**, filed on December 4, 2020, by the pro se appellant.

2. **MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS**, filed on January 8, 2021, by the pro se appellant.

Upon consideration of the request for leave to proceed as a pauper on appeal, the appellant's motion filed under Federal Rule of Appellate Procedure 24, the district court's order pursuant to 28 U.S.C. § 1915(a)(3) certifying that the appeal was filed in bad faith, and the record on appeal,

IT IS ORDERED that the motion for leave to proceed on appeal in forma pauperis is **DENIED**. The appellant has not identified a good faith issue that the district court erred in dismissing his case. The appellant shall pay the required docketing fee within 14 days, or this appeal will be dismissed for failure to prosecute pursuant to Circuit Rule 3(b).

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

Bralen Lamar Jordan (22702-009),	)	
	)	
Plaintiff,	)	
	)	**Case No. 20 C 50121**
v.	)	
	)	**Hon. Rebecca R. Pallmeyer**
	)	
Kathleen Sawyor, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff's amended complaint [35] is dismissed without prejudice for failure to exhaust administrative remedies. All pending motions are denied as moot. This case is closed. Final judgment shall enter.

STATEMENT

Plaintiff Bralen Jordan is a federal prisoner at USP Thomson. In his amended complaint, Jordan asserts claims pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).[1] The court reviews those claims pursuant to 28 U.S.C. § 1915A, which requires courts to screen complaints filed by prisoners to ensure they state a valid claim against parties not immune from suit. *See Jones v. Bock,* 549 U.S. 199, 214 (2007); *Turley v. Rednour,* 729 F.3d 645, 649 (7th Cir. 2013). As explained in previous orders, a complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests" and provide sufficient facts "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,*

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[1] Plaintiff checked the box on the complaint form indicating that this suit was brought under 42 U.S.C. § 1983. Section 1983, however, applies to state, not federal, officials who violate a person's constitutional rights. *Ziglar v. Abbasi,* — U.S. —, 137 S. Ct. 1843, 1854 (2017). Actions against federal officials for violations of a person's constitutional rights must be brought under the implied private right of action theory first set forth in *Bivens.* Plaintiff also listed 42 U.S.C. §§ 233, 1202(e), 1231 as bases for his claims. These statutes are either inapplicable to Plaintiff's lawsuit or do not exist.

The court also notes that Plaintiff has not invoked the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1); 2679(b) or named the United States as a Defendant. Because a judgment on an FTCA claim may preclude later judgment against the individual defendants, 28 U.S.C. § 2676, the court declines to read an FTCA claim into the present complaint at this time—but the court notes that such a claim, like a *Bivens* claim, requires exhaustion of available administrative remedies prior to filing suit. *See* 28 U.S.C. § 2675; 42 U.S.C. 1997e(a). Based on Plaintiff's submissions in this case, it appears likely he did not exhaust those remedies before filing this lawsuit. (*see* [16-1], pg. 1.)

550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On initial review, 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), and construe *pro se* complaints liberally. *See Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam). The court, however, properly considers both the complaint and other public records in reviewing the complaint. *See Olson v. Champaign County, Ill.*, 784 F.3d 1093, 1097 n.1 (7th Cir. 2015) ("[W]e may take judicial notice of public records not attached to the complaint in ruling on a motion to dismiss under Rule 12(b)(6).")

Plaintiff's first complaint was dismissed because he had improperly joined unrelated claims in a single lawsuit. (*See* [33].) Plaintiff has now eliminated all Defendants but one: Thomson correctional officer Ellis Fells. (*See* [35].) As in the original complaint, Plaintiff states that between December 12 and 13, 2019, he was transferred from USP Lewisburg to USP Thomson by bus. (*Id.*, pg. 6.) In the early morning hours on December 13, 2019, the bus arrived at USP Terre Haute in Indiana to transfer the inmates to a second bus operated by Defendant Fells, Thomson officer McDowell, and several other Thomson correctional officers, which would transport them the rest of the way to Thomson. (*Id.*)

Plaintiff states he suffers from several medical conditions, including diabetes. He alleges that he began having a "sugar attack" at Terre Haute and his hands swelled to the size of softballs. ([35], pg. 6.) Plaintiff told Defendant Fells that he had chronic medical conditions, needed his medication, and that his handcuffs were too tight, but Fells responded by telling Plaintiff to "shut up." (*Id.*) Plaintiff repeated that his handcuffs were too tight and that he had chronic medical conditions, at which point Fells allegedly struck Plaintiff's face with his fist and McDonnell struck the other side of Plaintiff's face. (*Id.*) At Fells's instruction, several other officers punched Plaintiff's abdomen and tackled him to the ground, scraping his knees and knuckles. (*Id.*, pg. 10.) Plaintiff states he did not receive any medical attention for these injuries or for his diabetes before he was placed on the bus to Thomson. (*Id.*)

When the bus arrived at Thomson, Fells notified prison medical personnel that Plaintiff was diabetic and in distress, but also told medical staff Plaintiff had spit on him and that Plaintiff should be placed in four-point restraints. (*Id.*, pg. 7.) In fact, Plaintiff was placed in the shower when he arrived at Thomson, not in four-point restraints. (*Id.*) Medical personnel at Thomson refused to treat his diabetes or the injuries he received during the transfer. (Dkt. 35, pg. 7.)

Based on these events, Plaintiff seeks to state claims that Defendant Fells used excessive force against him and was deliberately indifferent to Plaintiff's medical needs during the bus transfer on December 13, 2019.

As an initial matter, although Plaintiff includes allegations relating to his medical treatment after he arrived at USP Thomson, Defendant Fells was not personally involved in Plaintiff's medical treatment after their arrival at the prison. Section 1983 creates a cause of action based on personal liability and predicated on fault, so to be held liable, an individual must have caused or participated in a constitutional deprivation. *See Kuhn v. Goodlow*, 678 F.3d 552, 556 (7th Cir. 2012); *Pepper v. Vill. of Oak Park*, 430 F.3d 809, 810 (7th Cir. 2005). Consequently, Fells was not responsible for any alleged deficiencies in Plaintiff's medical treatment once at Thomson and he in fact informed medical staff of Plaintiff's medical conditions. To the extent Plaintiff is

attempting to hold Fells liable for his medical treatment at Thomson, any such claims are dismissed.

Plaintiff also refers to Kathleen Sawyor, Harley Lappins, Charles Samuels, Ian Connors, Jeffery Ormond, E. Bradley, J.E. Drueger, Darrion Howard, Richard Winter, David Ebbert, C. Rivers, and "other department heads" as defendants in the body of the complaint, but does not name them as defendants in the case caption. (*See* [35], pg. 6.) Plaintiff appears to include these individuals in the amended complaint because of their supervisory roles in the federal prison system. When parties are not listed in the caption, this court will not treat them as defendants. *See* FED. R. CIV. P. 10(a) (noting that the title of the complaint "must name all the parties"); *Myles v. United States*, 416 F.3d 551, 551-52 (7th Cir. 2005) (holding that to be properly considered a party, a defendant must be "specif[ied] in the caption"). Moreover, there is no *respondeat superior* (or supervisor) liability under § 1983, *see Kinslow v. Pullara,* 538 F.3d 687, 692 (7th Cir. 2008), so high-level officials cannot be held liable under § 1983 merely because they oversee jail operations. A complaint's allegations must indicate that the supervisory official was somehow personally involved in the constitutional deprivation. *See Perkins v. Lawson*, 312 F.3d 872, 875 (7th Cir. 2002); *see also Perez v. Fenoglio*, 792 F.3d 768, 781 (7th Cir. 2015) (plaintiff "must allege that the defendant, through his or her own conduct, has violated the Constitution."). Plaintiff alleges no facts tying these officials to any of the alleged incidents. Any claims Plaintiff may be attempting to assert against these individuals are dismissed.

With regard to the claims against Defendant Fells, documents Plaintiff has submitted in this lawsuit make it apparent that he did not exhaust administrative remedies prior to filing this lawsuit. The Prison Litigation Reform Act (PLRA) requires that prisoners exhaust administrative remedies before pursuing their claims in federal court. 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement applies to *Bivens* actions, *Porter v. Nussle*, 534 U.S. 516, 524 (2002), and failure to exhaust will result in dismissal of the unexhausted claims. *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999); *Smoke Shop, LLC v. U.S.*, 761 F.3d 779, 787 (7th Cir. 2014). "Thus, if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim" in federal court. *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999).

As a general rule, prisoners need not allege that they have exhausted administrative remedies; failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 213-15 (2007); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002). But the court may dismiss a case "when the existence of a valid affirmative defense is [] plain from the face of the complaint." *Walker*, 288 F.3d at 1010; *see Jones*, 549 U.S. at 215; *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000) (dismissal on the pleadings is proper where a plaintiff "does not, and clearly could not, plead that he exhausted all administrative remedies").

Proper exhaustion requires that a prisoner file grievances and appeals in the place, at the time, and in the manner that the prison's administrative rules require. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). The Bureau of Prisons (BOP) provides processes for pursuing administrative remedies for federal inmates. *See* 28 C.F.R. §§ 542.10-542.19. BOP regulations set forth the following steps to complete the administrative grievance process: (1) an informal

attempt at resolution, 28 C.F.R. § 542.13(a); (2) an Administrative Remedy Request directed to the warden, 28 C.F.R. § 542.14(a); (3) an appeal to the BOP Regional Director, 28 C.F.R. § 542.15(a); and finally (4) an appeal to the BOP General Counsel. *Id.* Completion of each of these steps is required for an inmate to exhaust administrative remedies. *McCoy v. Gilbert*, 270 F.3d 503, 507 (7th Cir. 2001).

Plaintiff initiated this lawsuit on March 2, 2020. ([1-2], pg. 1.) The record shows, however, that he had not completed the administrative process by then: On December 23, 2019, Plaintiff submitted an Administrative Remedy Request regarding the December 13, 2019 events. ([1-1], pg. 24.) Plaintiff subsequently submitted an appeal of that grievance to the BOP General Counsel on March 25, 2020, and on May 22, 2020—well after filing this lawsuit--Plaintiff received notice that the appeal was still under review. (*See* [24], pgs. 2-3.)

Because Plaintiff failed to exhaust administrative remedies, his claims are dismissed without prejudice. This case is closed. All pending motions are denied as moot and final judgment will enter. If Plaintiff wishes to appeal, he must file a notice of appeal with this court within thirty days of the entry of judgment. *See* FED. R. APP. P. 4(a)(1). If Plaintiff appeals, he will be liable for the $505.00 appellate filing fee. *See Evans v. Ill. Dep't of Corr.*, 150 F.3d 810, 812 (7th Cir. 1998). If Plaintiff seeks leave to proceed *in forma pauperis* on appeal, he must file a motion for leave to proceed *in forma pauperis* in this court. *See* FED. R. APP. P. 24(a)(1).

ENTER:

Date: September 25, 2020

REBECCA R. PALLMEYER
United States District Judge