

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 23-1833

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Lewis Eugene Day

Plaintiff - Appellant

v.

Anne L. Precythe, Director, Missouri Department of Corrections; Julie Kempker, Director,  
Missouri Division of Probation & Parole

Defendants - Appellees

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Appeal from U.S. District Court for the Western District of Missouri - Jefferson City  
(2:23-cv-04009-BCW)

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**JUDGMENT**

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

Appellant's motion to amend notice of appeal and motion for appointment of counsel are denied as moot.

May 26, 2023

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

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**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

LEWIS EUGENE DAY,

Plaintiff,

vs.

ANNE L. PRECYTHE, et al.,

Defendants.

Case No. 2:23-cv-04009-BCW -P

**ORDER**

Plaintiff is a civilly-committed offender confined at the Southeast Missouri Mental Health Center in Farmington, Missouri. He has filed *pro se* this civil rights action pursuant to 42 U.S.C. § 1983, seeking relief for certain claimed violations of his federally protected rights. Doc. 1.

**In Forma Pauperis**

Plaintiff has moved for leave to proceed *in forma pauperis* without the prepayment of court fees or costs. Because the United States Court of Appeals for the Eighth Circuit has ruled that the inmate account procedures of the Prison Litigation Reform Act (PLRA) do not apply to persons who are mental patients, *see Perkins v. Hedricks*, 340 F.3d 582, 583 (8th Cir. 2003); *Kolocotronis v. Morgan*, 247 F. 3d 726 (8th Cir. 2001), Plaintiff will be granted provisional leave to proceed *in forma pauperis*.

**Standard**

As the Court has determined that Plaintiff does qualify to proceed *in forma pauperis*, the Court now considers whether the complaint nonetheless should be dismissed because it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from relief. *Martin-Trigona v. Stewart*, 691 F.2d 856, 857 (8th Cir. 1982) (citing 28 U.S.C. § 1915(e)(2)(B)(i)-(iii)). More specifically, the Court “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b). A claim is frivolous if it lacks an arguable basis in fact or in law. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). The term “frivolous” in this context “embraces not only the inarguable legal conclusion,

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but also the fanciful factual allegation.” *Id.*; see also *Wilson v. Johnston*, 68 Fed. Appx. 761 (8th Cir. 2003) (court may dismiss complaint proceeding *in forma pauperis* as “frivolous, and disregard clearly baseless, fanciful, fantastical, or delusional factual allegations”).

In reviewing a *pro se* complaint at this early stage, the Court gives the complaint the benefit of every doubt, no matter how unlikely. See *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). A “pro se complaint must be liberally construed, and ‘pro se litigants are held to a lesser pleading standard than other parties.’” *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 922 n.1 (8th Cir. 2010) (citations omitted). However, this standard does not excuse pro se complaints from alleging “sufficient facts to support the claims advanced.” *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004); see *Frey v. City of Herculanum*, 44 F.3d 667, 672 (8th Cir. 1995) (holding that *pro se* complaint fell “short of meeting even the liberal standard for notice pleading” where it was “entirely conclusory” and gave “no idea what acts the individual defendants were accused of that could result in liability”).

### Complaint

Plaintiff asserts claims against two defendants: (1) Anne L. Precythe, Director Missouri Department of Corrections; and (2) Julie Kempker, Director Missouri Division of Probation & Parole. Doc. 1. Plaintiff asserts claims against Defendants concerning the length of his civil commitment. Specifically, Plaintiff alleges as follows:

Missouri Department of Corrections filed an false complaint that I may be an SVP. Three (3) days after I filed grievances as advised by ACLU of MO, on (6 Nov. 17), (84) days before my max date of (1/29/18). Never released me back on parole. Committed me as an SVP in an cover-up and for financial gain to murder me in confinement for the rest of my natural life!

Doc. 1 at 6-7 [sic]. Plaintiff further states:

Missouri Division of Probation and Parole reincarcerated me off of parole, did not honor my deferments by Mental Health. The whole time I was reincarcerated as a parole violator from (2/15/12) to (1/29/18), never released me.

*Id.* at 7[sic].

For relief, Plaintiff requests \$10 million in actual damages, \$40 million in punitive damages, and to be released from commitment. *Id.* at 6.

### Analysis

In this action, Plaintiff has asserted claims against Defendants Anne L Precythe and Julie Kempker solely in their official capacities. Under § 1983, a plaintiff may recover damages from

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"[e]very person who, under the color of any statute . . . or regulation" causes "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." However, the Eleventh Amendment prohibits "any [federal] suit . . . commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. The United States Supreme Court has held that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 71 (1989). When an individual state official is sued in his or her official capacity, "it is no different from a suit against the State itself." *Id.*; see *Hafer v. Melo*, 502 U.S. 21, 2 (1991). Therefore, under the Eleventh Amendment, "a state is generally not subject to suit by citizens in federal court absent the state's consent." *Thomas v. Gunter*, 32 F.3d 1258, 1261 (8th Cir. 1994); see *Will*, 491 U.S. at 65 (holding a state is "not a person within the meaning of § 1983"); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Plaintiff's official capacity claims fail.

Therefore, because Plaintiff has failed to state a claim upon which relief can be granted against Defendants, this case is dismissed without prejudice.

#### **Conclusion**

Accordingly, it is **ORDERED** that this case is summarily dismissed without prejudice for failure to state a claim.

**IT IS SO ORDERED.**

/s/ Brian C. Wimes  
BRIAN C. WIMES, JUDGE  
UNITED STATES DISTRICT COURT

Dated: February 8, 2023

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**UNITED STATES COURT OF APPEALS  
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No: 23-1833

Lewis Day

Appellant

v.

Anne L. Precythe, Director, Missouri Department of Corrections and Julie Kempker, Director,  
Missouri Division of Probation & Parole

Appellees

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Appeal from U.S. District Court for the Western District of Missouri - Jefferson City  
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**ORDER**

The petition for rehearing by the panel is denied.

July 14, 2023

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

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