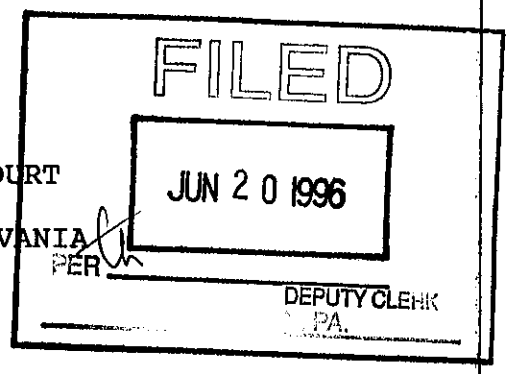

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

ALFONSO PERCY PEW,	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-96-1084
	:	
W.S. WARD, et al.,	:	(Judge Kosik)
	:	
Defendants	:	

ORDER

Background

Alfonso Percy Pew, an inmate presently confined at the State Correctional Institution at Camp Hill, Pennsylvania (SCI-Camp Hill), filed the above-captioned civil rights action pursuant to 42 U.S.C. § 1983 on June 14, 1996. Along with his complaint, the plaintiff has submitted an application requesting leave to proceed in forma pauperis under 28 U.S.C. § 1915. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996) (the "Act"), has changed substantially judicial treatment of civil rights actions by state and federal prisoners. For the reasons outlined below, the complaint will be dismissed without prejudice, pursuant to the Act, § 804(d)(subpara. g) (to be codified at 28 U.S.C. § 1915(g)), and the motion to proceed in forma pauperis will be granted only for the purpose of filing the complaint.

A provision of the Act bars a federal civil action by a prisoner moving to proceed in forma pauperis if he or she

> has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

§ 804(d) (subpara. g). As a procedural or jurisdictional rule, this new provision may be applied to litigation pending on the date of the statutory enactment. See generally Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994).

The instant plaintiff, while incarcerated, previously initiated the following civil actions in either this court or the United States District Court for the Eastern District of Pennsylvania, which were dismissed either as frivolous or for failure to state a claim upon which relief could have been granted (see Exhibits A-C): Pew v. Cox, Civil No. 93-4128 (E.D. Pa. closed August 20, 1993); Pew v. Kosik, Civil No. 95-143 (M.D. Pa. closed April 7, 1995); and Pew v. Moyer, et al., Civil No. 96-714 (M.D. Pa. closed June 7, 1996). There is no indication that this inmate is under "imminent danger of serious physical injury." Plaintiff is housed in the Special Management Unit ("SMU") at SCI-Camp Hill. In the complaint, plaintiff sets forth numerous allegations wherein he claims his constitutional rights and the rights of other inmates in the SMU have been violated by Defendants. For example, plaintiff contends that inmates in the SMU are deprived

of magazines, books and adequate food trays, access to the law library, participation in vocational, psychological and treatment courses and personal hygienic items such as deodorant, lotion and hair grease. He further contends that he and the other SMU inmates are harassed by being subjected to searches, being denied special religious diets and being required to wear shackles when they go outside. While plaintiff complains of the use of mace and cell extraction procedures in the SMU by the prison staff, plaintiff generally asserts his overall objection to the use of these procedures and does not point to any specific occasions when he was subjected to these procedures. He does not claim that he is presently being subjected to any of these procedures or that he is in any way under imminent danger of serious physical harm. Thus, under the Act the instant complaint must be dismissed as meritless.

AND NOW, THEREFORE, THIS 20th DAY OF JUNE, 1996, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for leave to proceed in forma pauperis (Doc. 2) is granted only for the purpose of filing this complaint.
2. The complaint is dismissed without prejudice pursuant to the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321,

§ 804(d)(subpara. g) (to be codified at 28 U.S.C. § 1915(g)) (April 26, 1996).

3. The Clerk of Court is directed to close this case.

4. Any appeal from this order will be deemed not taken in good faith. See 28 U.S.C. § 1915(a).

EDWIN M. KOSIK
United States District Judge

EMK:lq

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

AUG 18 1993

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ALFONSO PERCY PEW : CIVIL ACTION

v. :

R. COX : 93-4128

MEMORANDUM

LUDWIG, J. August 18th, 1993

Plaintiff has filed a pro se 42 U.S.C. §1983 civil rights complaint against a sergeant at the State Correctional Institution at Graterford. Plaintiff is alleging that the defendant violated his constitutional rights because he never returned plaintiff's television set.

With his complaint, plaintiff filed a request for leave to proceed in forma pauperis. As it appears he is unable to pay the cost of commencing this action, leave to proceed in forma pauperis is granted.

Plaintiff is alleging that the defendant failed to return his television set when he was transferred to another prison. "An unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Since the prison has a grievance procedure and Pennsylvania has a tort claim statute which appears to apply to property claims, a §1983

EXHIBIT "A"

action is not appropriate. See 42 Pa. C.S.A. §8550; Jones v. Waters, 570 F.Supp. 1292, 1298 (E.D. Pa. 1983). Therefore, plaintiff's complaint will be dismissed as frivolous pursuant to 28 U.S.C. §1915(d).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALFONSO PERCY PEW, :
Petitioner
:
vs. : CIVIL ACTION NO. 3:CV-95-143
(Judge Caldwell)
: (Magistrate Judge Blewitt)
EDWIN M. KOSIK, :
Respondent

FILED
HARRISBURG, PA
APR 07 1995
MARY E. D'ANDREA, CLERK
Per _____

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Alfonso Pew has filed a pro se petition for a writ of mandamus against Edwin M, Kosik, a judge of this court. Petitioner also seeks in forma pauperis status. Pursuant to our authority under 28 U.S.C. § 1915(d), we will dismiss the petition without service of process.

Pew alleges that Judge Kosik has been assigned three of Pew's civil actions and that the Judge has denied Pew appointment of counsel in each of them. Pew seeks an order requiring Judge Kosik to appoint counsel.

There appear to be two possible bases of our jurisdiction. First, under 28 U.S.C. § 1361, district courts have mandamus jurisdiction "to compel any officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." However, we cannot grant relief under this section because it does not apply to members of the judiciary. See

Certified from the record
Date 4/7/95
Mary E. D'Andrea, Clerk
Per _____ Deputy Clerk

EXHIBIT "B"

Seltzer v. Foley, 502 F. Supp. 600, 602 n.2 (S.D.N.Y. 1980). See also In re Fidelity Mortgage Investors, 690 F.2d 35, 39 (2d Cir. 1982) (citing Seltzer in reaching the same conclusion about a similarly worded statutory provision, 28 U.S.C. § 1391(e)).

Second, under the All Writs Act, 28 U.S.C. § 1651, district courts have mandamus jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." We cannot grant relief under this section either.

As recently stated by the Third Circuit, the writ must be issued in aid of the exercise of the court's jurisdiction and "the means selected must be analogous to a common law writ." See Jones v. Lilly, 37 F.2d 964, 967 (3d Cir. 1994). In the instant case, issuance of the writ would not aid our jurisdiction because we have no matters pending involving the petitioner. There also does not appear to be an analogous common law writ. We are unaware of any writ that could be issued at common law by a judge that in effect reverses an order of another judge of the same court who is handling the underlying litigation.

Further, it is well established that a writ of mandamus may be issued only when the following conditions have been met: "(1) that the petitioner have no other adequate means to attain the desired relief, and (2) that he show a clear and indisputable right to the relief sought." DeMasi v. Weiss, 669 F.2d 114, 117

(3d Cir. 1982). See also United States v. Santtini, 963 F.2d 585 (3d Cir. 1992).

While we will not address the second condition, we conclude that the petitioner cannot satisfy the first.[1] The denial of a motion for appointment of counsel can be adequately reviewed on appeal after final judgment in the underlying cases. See Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984).

Finally, acknowledging that the petitioner had sought review of his petition by the Chief Judge, we advise him that the outcome would have been no different if she had been assigned his petition since her status as the Chief Judge does not authorize her to oversee the judicial decisions of her colleagues.

AND NOW, this 7th day of April, 1995, upon consideration of the petition for a writ of mandamus and the motion for in forma pauperis status, it is ordered that:

1. The motion for in forma pauperis status is granted.

2. The petition for a writ of mandamus is denied.

3. The Clerk of Court shall close this file.

---

1. The first condition applies to both statutory sections. See Santtini, supra (section 1651); Fallini v. Hodel, 783 F.2d 1343 (9th Cir. 1986)(section 1361).

It is certified that any appeal from this order is frivolous, is not taken in good faith, and is lacking in probable cause.

William W. Caldwell
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

ALFONSO PERCY PEW,
Plaintiff

v.

DAVID S. MOYER, et al.,
Defendants

CIVIL NO. 3:CV-96-0714

(Judge Kosik)

ORDER

Background

Alfonso Percy Pew, an inmate at the State Correctional Institution in Dallas, Pennsylvania, filed this civil rights action on April 23, 1996, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Along with his complaint, which includes attached exhibits, the plaintiff submitted an application requesting leave to proceed in forma pauperis under 28 U.S.C. § 1915.

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996) (the "Act"), has changed substantially judicial treatment of civil rights actions by state and federal prisoners. For the reasons outlined below, the complaint will be dismissed, pursuant to § 804(a)(5) (subpara. (e)(2)(B)(ii) (to be codified at 28 U.S.C. § 1915(e)(2)(B)(ii)) of the Act, and the motion to proceed in forma pauperis will be granted only for the purpose of filing the complaint. As a procedural rule, this new statutory provision may be applied to a case pending on the date of enactment. See generally Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994); Scheidemann v. INS, No.

EXHIBIT "C"

95-3241, 1996 WL 255928 (3d Cir. 1996).

The plaintiff names three (3) SCI-Camp Hill officials as defendants and describes them as follows: Mr. Imschweiler, Mailroom Supervisor; David S. Moyer, Grievance Officer for Business Office; and Kenneth S. Kyler, Superintendent. Liberally construing the complaint of this pro se litigant, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972), he alleges as follows: On April 17, 1995 the plaintiff mailed a "pre-signed" money order for $100 to a business called Paladin Press in Boulder, Colorado as part of opening "a book purchasing account." Document 1 of the record, Exhibit A. Paladin Press refused the plaintiff's request and returned the money order with a letter dated "April 25, 1885 [sic]." Id. at Exhibit C. That envelope from Paladin Press, which is postmarked April 26, 1995 and which came through the regular mail, presumably arrived at SCI-Camp Hill a few days or a week later. Id. at Exhibit B.

The receipt of the money order--certifying that the money was deposited in the plaintiff's account--is dated May 25, 1995. Id. at Exhibit D. The receipt was prepared by defendant Imschweiler. The plaintiff did not know that his money order had been returned until he received the receipt. The pertinent Department of Corrections rule about "inmate accounting" states in part: "You may receive and disburse money from your individual account subject to the following: 1. A receipt will be furnished to each inmate for monies received from visitors or via mail (money

orders, certified checks, etc.)." On May 25, 1995, after he received the receipt, the plaintiff filed a grievance alleging that his money order

> was stolen here as it was received [as a] cash transaction B35149. Please Note: This certified payment of [$]100.00 is signed over on back to a business. Therefore this institution does not have power of attorney over payment [of] funds signed to a 3rd party. . . I am requesting [that] my money be sent out to business.

Id. at Exhibit E (brackets added). Contrary to the plaintiff's characterization of the receipt, it shows that a "mail order" not "cash" was received. Id. at Exhibit D. In regard to the involvement of defendants Moyer and Kyler in the alleged mishandling of the money order, the plaintiff avers that they "continue to deny Plaintiff a postdeprivation remedy hearing for the assessment of his funds . . . ." Document 1 of the record, p. 3.

There is another incident about which the plaintiff complains. Defendant Moyer, on June 30, 1995, returned to the plaintiff his request for copies of his inmate trust fund account without taking any action. Apparently, the plaintiff asked for some action in addition to being provided with copies of his account. After the plaintiff protested the fact that his request was not honored, Moyer responded, on July 14, 1995, to the plaintiff's grievance and stated, inter alia:

> On June 30, 1995 your request to the Business Office was returned to you unprocessed as the forma pauperis form submitted with your request

> did not require any action by the Business Office. Nevertheless, a copy of your account should have been returned to you as requested. Attached are the two copies of your account as requested by you.

Document 1 of the record, Exhibit H.

In summary, the plaintiff alleges that some or all of the defendants confiscated or stole his monies and unlawfully failed to provide him with copies of his inmate trust fund account. He avers in conclusory fashion that these actions were unlawful at least because they purportedly were taken in retaliation for the plaintiff's "exercising his rights to grievances and filing Civil Actions." Document 1 of the record, p. 3.

Discussion

A provision of the Act that amends the in forma pauperis statute mandates dismissal of a federal civil action if "the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted . . . ." § 804(a)(5) (emphasis added). Accordingly, the Act provides this new ground for summary dismissal of a complaint--failure to state a claim under Rule 12(b)(6). In Rule 12(b)(6) analysis, the court must accept the veracity of a plaintiff's factual allegations. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); White v. Napoleon, 897 F.2d 103, 106 (3d Cir. 1990). "The test for reviewing a 12(b)(6) motion is whether under any reasonable reading of the pleadings, plaintiff may be entitled to relief." Simon v. Cebrick, 53 F.3d

17, 19 (3rd Cir. 1995). A court is "'not required to accept legal conclusions either alleged or inferred from the pleaded facts.'" Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993) (quoting Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir. 1979)).

A plaintiff, in order to state a viable Section 1983 claim, must allege that the conduct complained of was committed by a person acting under color of state law and that said conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or by other laws of the United States. E.g., Cohen v. City of Philadelphia, 736 F.2d 81, 83 (3d Cir.), cert. denied, 469 U.S. 1019 (1984). A prerequisite for a viable civil rights claim is that a defendant directed, or knew of and acquiesced in, the deprivation of a plaintiff's constitutional rights. E.g., Monell v. Department of Social Serv. of the City of N.Y., 436 U.S. 658, 694-95 (1979). The court must be concerned with whether there appears to have been any violation of the United States Constitution rather than any "idea of how best to operate" a prison. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

First, the court addresses the plaintiff's alleged due process violations--that some or all of the defendants confiscated or stole his monies and unlawfully failed to provide him with copies of his inmate trust fund account. He also claims that he was denied an adequate post-deprivation remedy.

The Fourteenth Amendment of the Constitution provides in pertinent part: "No State shall . . . deprive any person of life,

liberty, or property, without due process of law . . . ." An intentional, unauthorized deprivation of an inmate's personal property does not violate the Constitution if there is an adequate post-deprivation remedy, e.g., the opportunity to file a tort action in state court. Hudson v. Palmer, 468 U.S. 517, 533 (1984). However, an intentional deprivation of an inmate's property by a prison official pursuant to "established state procedure" may rise to the level of a constitutional deprivation regardless of any available state post-deprivation remedy. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982).

Applying these due process principles, it is emphasized that the plaintiff does not claim that his $100 was never deposited into his inmate account. He apparently argues that he should have received the money order directly instead of receiving a receipt of deposit. But, considering the prison rule for receipt of funds for an inmate from outside the prison, there is no indication that the handling of the "pre-signed" money order was improper. The court cannot find that the plaintiff may have been deprived of his monies. He did not even know that the money order had been returned to him until the receipt was issued. The issue of a post-deprivation remedy is irrelevant here. Finally, Moyer's failure to promptly provide copies of the plaintiff's inmate trust fund account to him does not state a claim for violation of due process.

Next, the court considers the plaintiff's claims of

retaliatory conduct. The First Amendment, which applies to actions by state as well as federal officials, prohibits, inter alia, "abridging the . . . right of the people . . . to petition the Government for a redress of grievances." It is well-settled that an act committed in retaliation for exercise of a constitutionally protected right violates Section 1983 even if the act, when committed for a non-retaliatory reason, would have been proper. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Peterkin v. Jeffes, 855 F.2d 1021, 1036 n.18 (3d Cir. 1988); Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981). Referring to Milhouse, where the plaintiff claimed that he had been subjected to a series of disciplinary actions beginning just days after he had filed a civil rights suit against prison officials, the Peterkin court stated: "Where a prisoner alleged that he was retaliated against for filing a civil rights complaint against prison officials, we held that the right of access implicates the first amendment's petition clause." 855 F.2d at 1036 n.18. However, "[c]laims of unconstitutional retaliation are particularly troublesome because they are fraught with the potential for abuse." Blizzard v. Hastings, 886 F. Supp. 405, 409 (D.Del. 1995). In order to state a claim for retaliation, conclusory allegations will not suffice and the complaint must "allege[] facts giving rise to a colorable suspicion of retaliation," e.g., a series of events indicating retaliation. Flaherty v. Coughlin, 713 F.2d 10, 13 (2d Cir. 1983). Accord Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994);

Abdul-Akbar v. Department of Corrections, 910 F. Supp. 986, 1000 (D.Del. 1995); Guglielmo v. Cunningham, 811 F. Supp. 31, 36-37 (D.N.H. 1993).

Turning to the case sub judice, the plaintiff fails to allege a series of events suggesting any retaliation by Imschweiler or Kyler. Likewise, in regard to defendant Moyer's failure to promptly provide copies of the plaintiff's inmate trust fund account to him, the court finds that no retaliation claim has been stated.

AND NOW, THEREFORE, THIS 7th DAY OF JUNE, 1996, IT IS HEREBY ORDERED THAT:

1. Plaintiff's complaint is dismissed without prejudice pursuant to the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, § 804(a)(5) (subpara. (e)(2)(B)(ii) (to be codified at 28 U.S.C. § 1915(e)(2)(B)(ii)) (April 26, 1996).

2. Plaintiff's motion to proceed in forma pauperis (Document 2 of the record) is granted only for the purpose of filing the complaint.

3. The Clerk of Court is directed to close this case.

EDWIN M. KOSIK
United States District Judge

EMK:ar