

Williams, 109 S. Ct. 1827 (1989), the district court held that Naum could make no argument in law or fact to support his claims, and thus dismissed the complaint under 28 U.S.C. § 1915(d).

We have reviewed Naum's appellate brief as well as the record on appeal. We agree with the district court that this action is meritless for substantially the reasons set forth in its order of dismissal, a copy of which is attached hereto. Accordingly, the appeal is dismissed pursuant to 28 U.S.C. § 1915(d).

APPEAL DISMISSED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED

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ROBERT D. DENNIS
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

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

JAMES NAUM,

Plaintiff

vs.

No. CIV-89-1433-A

OKLAHOMA BOARD OF CORRECTIONS,
GARY MAYNARD, Director,

Defendants

DOCKETED

ORDER OF DISMISSAL

Plaintiff, appearing pro se and in forma pauperis, has filed his civil rights complaint pursuant to 42 U.S.C. §1983, wherein he challenges the policy and procedure used in a disciplinary proceeding against him at Jess Dunn Correctional Center (JDCC) in Taft, Oklahoma. An earlier lawsuit, identical to the instant complaint except for its inclusion of the warden of JDCC as a defendant, was dismissed for lack of venue. Naum v. State of Oklahoma, CIV-89-1234-A. Rather than filing his action in the Eastern District, where venue is proper, plaintiff has simply omitted the warden of the institution as a party defendant and sues the Oklahoma Board of Corrections and Gary Maynard, its director, alleging that the policies of the Oklahoma Board of Corrections and the warden's implementation of these policies are in violation of the United States Constitution. Plaintiff seeks damages, actual and punitive, as well as injunctive and declaratory relief which would have the effect of returning the earned credits taken as a

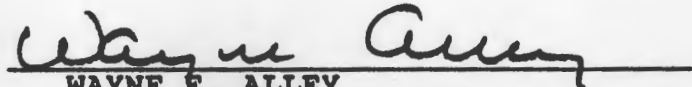
result of the disciplinary action against him. Consistent with Phillips v. Carey, 638 F.2d 207 (10th Cir. 1981) (per curiam), cert. denied, 450 U.S. 985 (1981), the Court has undertaken a preliminary review of this in forma pauperis complaint to determine if it is frivolous or otherwise without merit.

The Board of Corrections is immune under the Eleventh Amendment to the United States Constitution from liability for damages in an action brought against it. Griess v. State of Colorado, 841 F.2d 1042, 1044 (10th Cir. 1988) (per curiam); Meade v. Grubbs, 841 F.2d 1512, 1525 (10th Cir. 1988). The Director of the Board of Corrections, sued only in his official capacity, is likewise immune. Rozek v. Topolnicki, 865 F.2d 1154 (10th Cir. 1989); Griess v. State of Colorado, 841 F.2d at 1045; Meade v. Grubbs, 841 F.2d at 1525-1526. In any event, Maynard, the Director of the Department of Corrections, is not a proper party defendant where he did not personally participate in the disciplinary hearing, see Bennett v. Passic, 545 F.2d 1260, 1262-1263 (10th Cir. 1976), and is not liable under respondeat superior for constitutional violations of his subordinates. Polk County v. Dodson, 454 U.S. 312, 325 (1981); Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691-695 (1978). Plaintiff nowhere alleges Maynard's participation in the acts complained of, nor can any facts alleged by plaintiff be construed to state a cause of action, under the above standard, against Maynard. Finally, insofar as plaintiff seeks injunctive or declaratory relief, his action presents a challenge to the fact or duration of his

confinement and thus is only cognizable as a petition for writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973). As plaintiff has not exhausted his state remedies, the Court will not entertain any request for habeas corpus relief. 28 U.S.C. §2254(b) and (c); Preiser v. Rodriguez, 411 U.S. at 489-494.

For the foregoing reasons, the Court holds that plaintiff can make no argument on the law or facts in support of his claim for relief and dismissal is therefore appropriate under 28 U.S.C. §1915(d). Neitzke v. Williams, ____ U.S. ____, 109 S.Ct. 1827 (1989). Accordingly, plaintiff's complaint is dismissed.

IT IS SO ORDERED this 16th day of August, 1989.


WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

Entered in judgment docket 8-17-89