

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

RODNEY CUNNINGHAM, )

Plaintiff, )

v. )

No. 4:18CV753 DDN

JOHN SHARPE, )

Defendant. )

**OPINION, MEMORANDUM AND ORDER**

This matter is before the Court upon the motion of plaintiff Rodney Cunningham (registration no. 506801), an inmate at Northeast Correctional Center (“NECC”), for leave to commence this action without payment of the required filing fee. For the reasons stated below, the Court finds that the plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$10.20. See 28 U.S.C. § 1915(b)(1). Furthermore, after reviewing the complaint, the Court will partially dismiss the complaint and will order the Clerk to issue process or cause process to be issued on the non-frivolous portions of the complaint.

**28 U.S.C. § 1915(b)(1)**

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these

monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$51.00. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$10.20.

### **28 U.S.C. § 1915(e)**

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. An action is frivolous if it "lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 328 (1989); *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. *Spencer v. Rhodes*, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), *aff'd* 826 F.2d 1059 (4th Cir. 1987). A complaint fails to state a claim if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

### **The Complaint**

Plaintiff Rodney Cunningham, an inmate at NECC, brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his civil rights. Named as the sole defendant in this action is Correctional Officer John Sharpe. Plaintiff brings this action against Sharpe in both his individual and official capacities.

Plaintiff asserts that Correctional Officer John Sharpe intentionally placed him in danger by releasing him from his secured cell so that another inmate would have the ability to assault him. Plaintiff alleges that Sharpe then attempted to “cover-up” his actions by falsely accusing plaintiff of fighting and giving him a conduct violation for same.

Plaintiff seeks monetary damages in this action for defendant Sharpe’s purported intentional acts.

### **Discussion**

To state a failure-to-protect claim, a plaintiff is required to allege that defendants were aware of facts from which they could infer the existence of a substantial risk of serious harm to him, they actually drew the inference, and they failed to take reasonable steps to protect him. See *Farmer v. Brennan*, 511 U.S. 825, 836-38, 844 (1994). Assault by a fellow inmate constitutes “serious harm.” *Jensen v. Clarke*, 94 F.3d 1191, 1198 (8th Cir. 1996). And a single incident of violence may, in some circumstances, support a failure-to-protect claim. See *Young v. Selk*, 508 F.3d 868, 870-73 (8th Cir. 2007) (discussing potential for substantial risk where inmate told officials of cellmate’s threats, requested to be removed from cell immediately, said it was an emergency, and was subsequently attacked).

The Court finds that in this early stage of the litigation, plaintiff has alleged enough to support a failure to protect claim in this instance.<sup>1</sup> The Court, will therefore, request that the Clerk issue process on plaintiff’s claim against defendant in his individual capacity.

Accordingly,

**IT IS HEREBY ORDERED** that plaintiff’s motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

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<sup>1</sup> Plaintiff’s claim is valid against defendant only in his individual capacity. See *Will v. Michigan Dep t of State Police*, 491 U.S. 58, 71 (1989) (noting that neither a state entity, nor its officials, can be liable pursuant to 42 U.S.C. § 1983). Therefore, plaintiff’s allegations against defendant in his official capacity will be dismissed.

**IT IS FURTHER ORDERED** that the plaintiff shall pay an initial filing fee of \$10.20 within thirty (30) days of the date of this Order. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

**IT IS FURTHER ORDERED** that if plaintiff fails to pay the initial partial filing fee within thirty (30) days of the date of this Order, then this case will be dismissed without prejudice.

**IT IS FURTHER ORDERED** that the Clerk shall issue process or cause process to issue upon the complaint as to defendant Correctional Officer John Sharpe in his individual capacity. Defendant shall be served through the waiver agreement this Court maintains with the Missouri Attorney General’s Office.

**IT IS FURTHER ORDERED** that, pursuant to 42 U.S.C. § 1997e(g)(2), defendant John Sharpe shall reply to plaintiff’s claims within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

**IT IS FURTHER ORDERED** that the Clerk shall not issue process or cause process to issue upon the complaint as to plaintiff’s official capacity claims against defendant John Sharpe because these claims are legally frivolous or fail to state a claim upon which relief can be granted, or both.

**IT IS FURTHER ORDERED** that this case is assigned to Track 5B: Prisoner Standard.

An Order of Partial Dismissal will accompany this Memorandum and Order.

Dated this 17th day of May, 2018.



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HENRY EDWARD AUTREY  
UNITED STATES DISTRICT JUDGE