

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BOBBY MOSS,)	
)	
Plaintiff,)	4:09CV3101
)	
v.)	
)	
TECUMSEH PRISON,)	MEMORANDUM OPINION
)	
Defendant.)	
_____)	

Plaintiff filed his complaint on May 15, 2009, and was given leave to proceed in forma pauperis on June 17, 2009 (Filing Nos. [1](#) and [10](#)). The Court now conducts an initial review of the complaint to determine whether summary dismissal is appropriate under [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#).

I. SUMMARY OF COMPLAINT

_____ Plaintiff filed his complaint on May 15, 2009, against Tecumseh State Prison ("TSP") (Filing No. [1](#) at CM/ECF p. 1). Plaintiff is currently incarcerated at TSP in Tecumseh, Nebraska. (*Id.*)

Plaintiff, an African American, alleges that TSP has kept plaintiff in administrative segregation longer than a similarly situated white inmate. (*Id.* at CM/ECF pp. 1-2.) Specifically, plaintiff alleges that he was involved in a fight with a white inmate. (*Id.*) Because of this fight, plaintiff has been confined in administrative segregation for a year, while the white inmate was only confined in administrative segregation for

three days. (*Id.*) Plaintiff also alleges that he “ha[s] no access to the law library.” (*Id.* at CM/ECF p. 2.) Plaintiff seeks monetary damages in the amount of \$2,500.00. (*Id.*) Plaintiff also seeks injunctive relief in the form of a court order that directs defendant to transfer plaintiff “out of Tecumseh State Prison.” (*Id.*)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The Court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. See [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#). The Court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#); [28 U.S.C. § 1915A](#).

Therefore, where a pro se plaintiff does not set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed” for failing to state a claim upon which relief can be granted. [Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 \(2007\)](#) (overruling [Conley v. Gibson, 355 U.S. 41 \(1967\)](#), and setting new standard for failure to state a claim upon which relief may be granted). Regardless of whether a plaintiff is

represented or is appearing pro se, the plaintiff's complaint must allege specific facts sufficient to state a claim. See [Martin v. Sargent, 780 F.2d 1334, 1337 \(8th Cir. 1985\)](#). However, a pro se plaintiff's allegations must be construed liberally. [Burke v. North Dakota Dep't of Corr. & Rehab., 294 F.3d 1043, 1043-44 \(8th Cir. 2002\)](#) (citations omitted).

Liberally construed, plaintiff here alleges federal constitutional claims. To state a claim under [42 U.S.C. § 1983](#), a plaintiff must allege a violation of rights protected by the United States Constitution or created by federal statute and also must show that the alleged deprivation was caused by conduct of a person acting under color of state law. [West v. Atkins, 487 U.S. 42, 48 \(1988\)](#); [Buckley v. Barlow, 997 F.2d 494, 495 \(8th Cir. 1993\)](#).

III. DISCUSSION OF CLAIMS

The Eleventh Amendment protects states and state agencies from suit by private citizens. [Doe v. Nebraska, 345 F.3d 593, 597 \(8th Cir. 2003\)](#). However, Eleventh Amendment immunity is not absolute. [Id.](#) The Supreme Court has recognized that Congress may override a state's sovereign immunity or a state may waive its immunity by consenting to suit. [Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 \(1999\)](#). In addition, under the doctrine of [Ex Parte Young, 209 U.S. 123 \(1908\)](#), private citizens can bring suit

against a state official for prospective injunctive relief without violating the Eleventh Amendment. [Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525, 530 \(8th Cir. 2005\)](#).

Here, plaintiff only sues Tecumseh Prison, a state agency. (Filing No. [1](#) at CM/ECF p. 1.) There is no indication that Congress has overridden the state's immunity or that the state waived its immunity in this matter. In addition, the *Ex Parte Young* doctrine does not extend to states or state agencies. See [Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1017 \(8th Cir. 2006\)](#) (recognizing that only state officials, as opposed to state agencies, can be sued for prospective injunctive relief and dismissing claims against state agency), *vacated on other grounds*, [127 S.Ct. 3000 \(2007\)](#); see also [Kentucky v. Graham, 473 U.S. 159, 167 n.14 \(1985\)](#); [Alabama v. Pugh, 438 U.S. 781, 781-82 \(1978\)](#). Accordingly, defendant is entitled to sovereign immunity and plaintiff's complaint must be dismissed. A separate order will be entered in accordance with this memorandum opinion.

DATED this 29th day of June, 2009.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court