

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM LUCAS,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 19-213WES
	:	
D.C.Y.F. and HEATHER FOGG,	:	
Defendants.	:	

SUPPLEMENTAL REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge.

On April 25, 2019, Plaintiff William Lucas, a prisoner, filed a *pro se*¹ civil rights form complaint against “D.C.Y.F.,” the Rhode Island Department of Children, Youth and Families (“DCYF”), and Heather Fogg, who is sued “personally and professionally.” ECF No. 1. Along with his complaint, Plaintiff filed an Application to Proceed without Prepayment of Fees and Affidavit (the “IFP motion”), ECF No. 2, which has been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A). I issued a report and recommendation (“R+R”) on May 7, 2019, highlighting deficiencies tainting both the IFP motion and the complaint and recommending that the Court direct Plaintiff to file an amended complaint curing those deficiencies and that Plaintiff file his prisoner trust fund account statement. ECF No. 3.

While the R+R was still pending, several developments occurred that affect its conclusions. First, on May 15, 2019, Plaintiff filed “Amendment to Claim,”² together with a

¹ Because Plaintiff is *pro se*, I have employed a liberal construction of his filings, the same analytical lens through which I reviewed his original complaint. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Instituto de Educacion Universal Corp. v. U.S. Dep’t of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

² It is apparent from this filing that Plaintiff means to add the new factual content to his original complaint, rather than to have his “Amendment” constitute a standalone amended complaint superseding the original complaint. Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (“An amended complaint, once filed, normally supersedes the antecedent complaint.”). Accordingly, I analyze ECF Nos. 1 and 5 collectively as if they were consolidated in a single operative pleading.

motion for an extension of time.³ ECF Nos. 4, 5. Second, Plaintiff has now filed his prisoner trust fund account statement, so Plaintiff's IFP eligibility is established and his IFP motion is ripe for decision. See 28 U.S.C. § 1915(a)(2). In the interest of judicial economy, I am issuing this supplemental report and recommendation to take these developments into account. The supplemental report and recommendation does not supersede the already-issued R+R.

Based on his "Amendment," Plaintiff now claims that Heather Fogg, a DCYF social worker, removed Plaintiff's daughter from his custody "for no app[a]rent reason" other than indicating DCYF "doesn't feel comfortable with [Plaintiff.]" ECF No. 5 at 1. Plaintiff alleges that the only notice he received was a phone call from Ms. Fogg, and that none of his conduct with his daughter justifies the removal. Id. According to Plaintiff, he was "blackma[i]led" because Ms. Fogg "demanded [his] daughter be removed from [his] custody or she would charge [him] with kidnapping." Id. Plaintiff also asserts that having his daughter raised outside of his care is contrary to his religious views as a Roman Catholic because neither his aunt nor DCYF can provide his daughter with an appropriate religious upbringing. Id. There is no indication in the pleading that these events arose in connection with a judicial proceeding in the Rhode Island Family Court.

These factual allegations result in a pleading (including both iterations) that cures some, but not all, of the deficiencies of the original complaint standing alone. Because the newly added facts refer only to actions of Ms. Fogg, not to DCYF, all claims against DCYF should now be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim because they do

³ The motion for an extension appears to seek thirty additional days for Plaintiff to file an amended pleading because Plaintiff is expecting to receive certain material from DCYF. Because I am issuing this new report and recommendation, which resets Plaintiff's obligation to file an amended complaint, effectively affording him an extra thirty days, he no longer needs such relief. To the extent that the motion to extend was intended to relate to Plaintiff's objection to the R+R, such an extension is also no longer needed because that deadline is reset by the issuance of this report and recommendation. The ruling on the motion for an extension will be set forth in a separate Text Order.

not set forth sufficient facts regarding DCYF's actions toward Plaintiff. R+R at 3-4 (citing Laurence v. Wall, No. CA 09-427 ML, 2009 WL 4780910, at *2 (D.R.I. Dec. 10, 2009)).

Further, with the recovery of money damages the only viable prayer for relief,⁴ all claims against DCYF and Ms. Fogg in her official capacity should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) because they are barred by Rhode Island's sovereign immunity. Id. at 4 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989); J.R. v. Gloria, 599 F. Supp. 2d 182, 184 (D.R.I. 2009)). That leaves the individual capacity claims seeking money damages against Ms. Fogg. At this early stage on this limited record, I do not recommend dismissal of them, although subsequent litigation may reveal that she is shielded by qualified immunity, among other defenses.⁵ Id. at 4-5 (citing Hatch v. Dep't for Children, Youth & Their Families, 274 F.3d 12, 25-26 (1st Cir. 2001)). However, Plaintiff is still obliged to file a single amended complaint incorporating the entirety of his claims in one pleading that can be served on Ms. Fogg.

The Court closes with a caution addressed to Plaintiff. Under federal law, "IFP status is not available to a prisoner who has brought three or more cases that were dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted." Martinez v. Duffy, C.A. No. 18-21WES, 2018 WL 1224458, at *1 (D.R.I. Mar. 8, 2018). Specifically, the IFP statute provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court

⁴ The original complaint asked for money damages ("the maximum amount possible"), but also asked the Court "to overturn [Plaintiff's] open adoption agreement, 'because [he] was blackmailed.'" ECF No. 1 at 5. While the latter amounts to a prayer for non-monetary damages, the pleading is utterly devoid of any facts related to this prayer for relief. And were the Court to speculate that this prayer for relief relates to a proceeding in the Rhode Island Family Court, it would likely be subject to dismissal based on Younger abstention and/or the Rooker-Feldman doctrine. Accordingly, to the extent that the complaint asks this Court to interfere in an adoption, I recommend that such claim be dismissed.

⁵ In allowing the Fogg claims to proceed, I do not reach the question whether they are barred by the doctrine of *res judicata*, deeming it premature to perform that analysis. See n.6, *infra*.

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.

28 U.S.C. § 1915(g). Based on his history of refileing the same or related claims, Plaintiff is on the brink of becoming a “three-striker” who will be barred from IFP status except in extreme circumstances as long as he remains a prisoner.⁶ If he files an amended complaint, which I recommend that he be afforded leave to do, but the claims against Heather Fogg in her individual capacity are subsequently dismissed as frivolous, malicious, or for failure to state a claim, he may not qualify for IPF status again unless he plausibly alleges that he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g)

Based on the foregoing, I recommend that Plaintiff’s claims against DCYF and his claim seeking the reopening of an adoption should be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). I further recommend that all claims for monetary relief against DCYF and Ms. Fogg in her official capacity should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) because they are barred by Rhode Island’s sovereign immunity. What remains are claims for money damages against Ms. Fogg in her individual capacity, which are presently articulated in both the original complaint and in the “Amendment to Claim.” With respect to those claims, I recommend that Plaintiff be afforded thirty days from the Court’s adoption of the

⁶ This caution is based on the two strikes Plaintiff acquired for filing lawsuits that this Court recently dismissed as frivolous and for failure to state a claim. Lucas v. DiMuro, C.A. No. 19-269JJM; Lucas v. DiMuro, C.A. No. 19-199JJM. Also troubling is the dismissal of a third case earlier this year. Lucas v. State of R.I. Dep’t of Children, Youth and Families, C.A. No. 18-530JJM (“18-530”). This case (18-530) appears to be very similar to the instant case, in that both allege that Plaintiff was denied due process and equal protection by DCYF when it took his daughter for no reason. Compare 18-530, ECF No. 2 at 6, with 19-213, ECF No. 1 at 5. In 18-530, DCYF’s motion to dismiss based on failure to state a claim, Younger abstention and the Rooker-Feldman doctrine was granted by Text Order on February 15, 2019. Although that dismissal does not count as a strike because claims as to one defendant were dismissed pursuant to Fed. R. Civ. P. 4(m), see Fourstar v. Garden City Grp., Inc., 875 F.3d 1147, 1151-52 (D.C. Cir. 2017), it creates a serious risk that the instant case might be dismissed based on the doctrine of *res judicata*, which “preclud[es] the parties or their privies from relitigating issues that were or could have been raised in that action,” or based on the finding that it is frivolous and malicious repeatedly to bring the same unavailing claim. Uzamere v. United States, No. 13-505 S, 2013 WL 5781216, at *4 (D.R.I. Oct. 25, 2013), aff’d, 13-2454 (Apr. 11, 2014); Koolen v. Mortg. Elec. Registration Sys., Inc., 953 F. Supp. 2d 348, 351 (D.R.I. 2013).

recommendation to file a single amended complaint that incorporates in one document all of the elements of Plaintiff's claims for monetary damages against Heather Fogg in her individual capacity. As soon as he does, the IFP motion will be granted and the amended complaint can be served.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
May 24, 2019