IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN P. COLE,

Petitioner,

v.

OPINION AND ORDER
00-C-486-C

KENNETH R. MORGAN, Warden
Racine Correctional Institution;
DENNIS JANIS, RCI Business Director;
SUE FRANTZ, RCI Business Manager;
JENIFER WINIRASKI, RCI Complaint Examiner;
RICHARD VERHAGEN, Administrator Division
of Adult Institutions; WILLIAM SHAFT, DAI Complaint
Examiner; JOHN RAY, DAI Corrections Complaint Examiner;
and STAN DAVIS, Assistant Attorney General

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Jonathan Cole, who is presently confined at the Racine Correctional Institution in Racine, Wisconsin, submitted a proposed complaint in August 2000. In a letter dated October 10, 2000, petitioner asked that the court allow him to dismiss his case voluntarily. In an order entered on October 18, 2000, I gave petitioner until November 1, 2000, to confirm his intention to dismiss this case voluntarily or to advise the

court that he wishes to proceed with the case, noting that whether or not he decided to dismiss voluntarily, he would owe the remaining balance of the $150 filing fee. In a letter received on October 30, 2000, petitioner indicated that he does not want to dismiss this case voluntarily and submitted a proposed amended complaint. In deciding whether to grant petitioner leave to proceed in forma pauperis, I will treat petitioner's amended complaint as the operative pleading in this case and will disregard the original proposed complaint.

Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1). Subject matter jurisdiction is present. See 28 U.S.C. §§ 1331, 1343.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money

damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

At all times relevant to this complaint, petitioner Jonathan Cole, an African-American male, was an inmate at Columbia Correctional Institution or Racine Correctional Institution. Respondents Kenneth Morgan, Dennis Janis, Sue Frantz, Jenifer Winiraski and Catherine Brennan are employees of Racine Correctional Institution. Respondents Richard Verhagen, William Shaft and John Ray are state employees who work for the division of adult institutions. Respondent Stan Davis is an employee of the Wisconsin Department of Justice. All respondents are white.

On November 17, 1997, petitioner had a hearing at Columbia Correctional Institution. As a result of the hearing, petitioner was placed in administrative confinement. To appeal the

outcome of the hearing, petitioner filed a petition for a writ of certiorari in Columbia County Circuit Court, Cole v. Endicott, Case No. 98-CV-121. On January 28, 1998, petitioner was transferred from Columbia Correctional Institution to Racine Correctional Institution. When petitioner arrived at Racine Correctional Institution, he was placed in segregation. Petitioner was transferred because of his alleged assault of a white inmate. The inmate population at Racine Correctional Institution is predominantly African-American.

Petitioner was assigned to administrative confinement in accordance with Wis. Admin. Code § DOC 308, which was in effect prior to the passage of a newer version of Wis. Admin. Code, which became effective on December 1, 1997. According to the old version of § DOC 308, petitioner was entitled to quarterly reviews of his classification in administrative confinement. The newer version allowed for only two reviews each year. Petitioner had four hearings at which his status was reviewed. The hearings were held on August 18, 1997; June 15, 1998; January 7, 1999; and June 28, 1999.

On August 16, 1999, Columbia County Circuit Court Judge Richard L. Rehm vacated and remanded the decision of Columbia Correctional Institution officials to confine petitioner to segregation. Respondents Davis, Morgan, Brennan and Winiraski received a copy of Judge Rehm's decision and respondents Davis, Verhagen, Morgan, Winiraski and Brennan knew or should have known that the circuit court had vacated and remanded the decision placing

petitioner in administrative confinement. Respondents Davis, Verhagen, Morgan, Winiraski and Brennan had the authority and discretion to order a new hearing for petitioner consistent with the circuit court's order. Respondents Davis, Verhagen, Morgan, Winiraski and Brennan ignored Judge Rehm's decision. The decisions reviewing petitioner's confinement were invalidated by the circuit court's order because respondents relied on the same reasoning as the initial hearing officers in deciding to keep petitioner confined in segregation.

Petitioner filed an inmate grievance, complaining about his confinement in segregation. Respondents Winiraski and Davis rejected petitioner's grievance. As the reviewing authority, respondent Morgan agreed with respondents Winiraski and Davis and failed to comply the circuit court's order. On appeal, respondents Shift and Verhagen ignored the circuit court's order.

On March 17, 1999, petitioner mailed a notice of claim to the Wisconsin Attorney General's office. Respondents Jones and Frantz manage Racine Correctional Institution's business office. Respondent Janis intercepted petitioner's mail before it reached the institution's mail room. Respondent Janis refused to send petitioner's notice of claim, stating "indigent inmates are only permitted to send notice of claim to a 'court' by certified mail." In a letter dated August 16, 1999, Judge Rehm wrote to petitioner and respondent Davis that a letter sent to the court by petitioner was delayed 32 days. On November 1, 1999, respondent Frantz

refused to allow petitioner to mail his notice of claim regarding his unlawful confinement in segregation and as a result, petitioner filed a grievance. Respondents Morgan and Brennan dismissed petitioner's grievance and respondent Ray dismissed petitioner's appeal.

At some point, respondent Brennan acted as petitioner's advocate. Petitioner requested certain documents and respondent Brennan told him that she would not get the documents.

Respondent Frantz has delayed and denied petitioner's legal mail repeatedly. Respondent Janis denied petitioner's legal mail, including his "notice of claim." Respondent Janis wrote petitioner conduct report #965574 after petitioner told him that he was wrong to deny petitioner's mail. Respondents Morgan, Winiraski, Brennan and Verhagen stopped replying to petitioner and failed to remove him from administrative confinement. Petitioner has spent over three years in administrative confinement because of his challenges to respondents' decision to confine him.

OPINION

A. Conspiracy

Petitioner alleges that respondents conspired to put petitioner in administrative confinement. To establish a claim of civil conspiracy, petitioner must show "a combination of

two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. A bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. See Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999). Nothing in petitioner's complaint supports such an inference. Petitioner has provided no explanation how respondents would have conspired to keep petitioner in administrative confinement. In addition, petitioner has failed to allege when the conspiracy was formed. See Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [respondents] was formed.") The basis for petitioner's conspiracy claim appears to be that respondents Jones, Frantz and Janis played a role in interfering with the notice of claim he tried to send to the Wisconsin Attorney General's office

and that respondents Brennan, Morgan and Ray played a role in denying his grievance about the interference with the notice of claim. These facts are insufficient to establish respondents conspired to keep petitioner in administrative confinement. Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim for his failure to state a claim upon which relief may be granted.

B. Retaliation

I understand petitioner to be alleging that in retaliation for his using the judicial process, respondents Frantz and Janis denied him his legal mail and that respondents Morgan, Winiraski, Brennan and Verhagen failed to respond to his complaints or to remove him from administrative segregation. In addition, I understand petitioner to be alleging that respondent Janis retaliated against him by giving him a conduct report after petitioner complained to respondent Janis that he should not have denied petitioner's legal mail. A prison official who takes action against a prisoner to retaliate against the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395,

1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient simply to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342.

A bare allegation that respondents Frantz Morgan, Winiraski, Brennan and Verhagen retaliated against petitioner because of his use of the judicial process is insufficient to state a viable retaliation claim. Although liberal pleading standards apply at this stage of the litigation, petitioner has failed to allege even the bare minimum for a retaliation claim agaisnt these respondents. He has failed to allege what lawsuits he had filed, whether respondents knew that he filed a lawsuit or whether any of the respondents were named as defendants in those lawsuits. Without allegations to indicate when petitioner filed a lawsuit and when respondents' alleged retaliatory acts occurred, petitioner's allegations are insufficient to establish "'a chronology of events from which retaliation may be inferred.' " Black, 22 F.3d 1395. Petitioner's allegation that respondent Janis wrote petitioner a conduct report after petitioner complained that respondent Janis had interfered with petitioner's legal mail is sufficient to state a claim of retaliation at this stage. Although petitioner will be granted leave to proceed on his retaliation claim against respondent Janis, I express no opinion at this time whether petitioner's complaint to respondent Janis is sufficient to establish that he exercised a constitutional right sufficient to warrant constitutional protection. Respondent Janus may brief the issue on a motion to dismiss if he chooses to file one.

C. State Law Claims

I will decline to exercise supplemental jurisdiction over any state law claims that petitioner alleges in his complaint. He has not raised any state law claims that are related to his federal claim of retaliation. See 28 U.S.C. § 1367 ("the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.")

D. Contempt of Court

I understand petitioner to allege that respondents are in contempt of court because of their refusal to comply with Columbia County Circuit Court Judge Rehm's decision to vacate the decision to confine petitioner to segregation. Petitioner is mistaken in his belief that this court has the authority to hold respondents in contempt of court for ignoring another court's order. The proper forum for such relief is in the court that entered the order, Columbia County Circuit Court.

ORDER

IT IS ORDERED that

1. Petitioner Jonathan Cole's request for leave to proceed in forma pauperis on his retaliation claim against respondent Janis is GRANTED;

2. Petitioner's request for leave to proceed in forma pauperis on his conspiracy claim and on his retaliation claim against respondents Morgan, Winiraski, Brennan and Verhagen is DENIED;

3. Service of this complaint will be made promptly after petitioner submits to the clerk of court one (1) completed marshals service forms and two (2) completed summonses, one for respondent Janis and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service, summons forms before November 21, 2000, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute;

4. In addition, petitioner should be aware of the requirement that he send respondent a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondent, he should serve the lawyer directly rather than respondent. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to

respondent's attorney; and

5. The unpaid balance of petitioner's filing fee is $147.15; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 8th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge