IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL D. HARRIS,

Petitioner,

v.

JOHN McKENNA, JEAN YOUNG and BARBARA SUTTON,

Respondents.

ORDER

04-C-501-C

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This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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 alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Michael Harris is a 37 year-old black male presently confined at the Redgranite Correctional Institution in Redgranite, Wisconsin. Prior to his incarceration at Redgranite, petitioner was confined at the Oshkosh Correctional Institution, serving a six-year sentence for burglary. The Wisconsin Department of Corrections scheduled petitioner for mandatory release on May 13, 2003 and required him to submit a release plan.

Respondent John McKenna serves as a parole agent for the Wisconsin Department

of Corrections in Wisconsin Rapids, Wisconsin. Respondent Jean Young is a supervisor in the parole department in Wisconsin Rapids. Respondent Barbara Sutton is Regional Chief of Probation and Parole of Wood County in Wautoma, Wisconsin.

On or about May 7, 2003, petitioner met with his social worker at the Oshkosh Correctional Institution to determine his release plan. Petitioner explained that he had made arrangements to return to the home of his parents, Clifton and Rosalyn Harris, in Wisconsin Rapids, Wisconsin. Petitioner had lived with his parents prior to his incarceration. Petitioner did not have any money to get his own apartment.

Petitioner's social worker attempted to verify petitioner's residence and contacted respondent McKenna. Respondent McKenna was familiar with petitioner's family because he was supervising petitioner's brother's probation and knew that petitioner's family had a Rottweiler dog. A few days before petitioner's release, respondents McKenna and Young told petitioner's social worker and mother that petitioner would not be allowed to return home because of the Rottweiler. The dog has been part of petitioner's family for more than eight years and has never misbehaved or been the subject of a complaint or violation notice.

After speaking with respondents McKenna and Young, petitioner's social worker told petitioner that Wisconsin Rapids is "a small white town and because you are black, they do not want you there." In addition, petitioner had a child with a woman from Wisconsin Rapids. The woman's mother is involved with the social services department. Court

proceedings had been held in which petitioner's parental rights were threatened. Petitioner believes that the woman's mother and parole agents were trying to keep him out of town so that he would lose his parental rights to the child.

On May 13, 2003, arrangements were made for petitioner to be released to his parents' home on the condition that his parents got rid of the family dog. Petitioner and his family knew that if petitioner did not follow his parole agent's orders and instructions he could be returned to prison for violating the conditions of his parole.

As ordered, petitioner saw his parole agent, respondent McKenna, on May 13, 2003. When petitioner arrived at McKenna's office, McKenna threatened and intimidated petitioner with aggressive tones and gestures. McKenna threatened to send petitioner and his brother to jail if petitioner did not sign a set of restrictions that were designed for a sexual predator. Specifically, McKenna's restrictions included no contact with children or women without McKenna's expressed approval. Petitioner reminded McKenna that he was not a sexual predator and he refused to sign his list of restrictions. Petitioner believed that the restrictions were designed to force him to violate the conditions of his parole by keeping him away from his daughter. Respondent McKenna threatened petitioner with jail if he refused to sign the list of restrictions.

Petitioner and respondent McKenna discussed petitioner's need to get an apartment because of the family dog. Petitioner explained that he planned to stay with a friend until

he and his parents could find him his own apartment. Although petitioner and his parents could not afford a separate apartment, petitioner found one and informed respondent McKenna of the address on May 16, 2003.

Upon his release from prison, petitioner found employment as a laborer at Pride Stone in Nekoosa, Wisconsin. The job did not pay enough to cover petitioner's expenses, so petitioner viewed the position as temporary and sought better employment with higher pay.

On June 10, 2003, petitioner found a better job that would be permanent. Petitioner was scheduled to see McKenna on June 14, 2003 and planned to inform him of the job change during that visit. However, petitioner's former employer called McKenna and informed him that petitioner had quit his job on June 10, 2003. After petitioner picked up his last check from Pride Stone, he asked his neighbor to drive him to cash his check. As they were driving, a police officer stopped the car for speeding and ordered all occupants out of the vehicle. The officer issued citations to the driver and petitioner for failure to wear seat belts and released them.

Petitioner planned to inform respondent McKenna of the seat belt violation during his June 14, 2003 visit. However, when petitioner arrived at McKenna's office on June 14, 2003, McKenna had petitioner arrested and began threatening him. McKenna revoked petitioner's parole in Wood County because of the police contact and the change of job.

McKenna ordered petitioner to report to Milwaukee parole agent Watson. Milwaukee is a place petitioner wished to avoid because he had made a lot of mistakes. By requiring him to return to Milwaukee, McKenna forced him to leave his family and his new job. Petitioner complied with McKenna's order and reported to Watson with his mother. Watson and Watson's supervisor believed that McKenna exceeded his authority by making petitioner sign sexual predator rules and forcing him to live outside his parents' home; they believed McKenna's actions to be discriminatory.

Watson and Watson's supervisor gave petitioner and his mother forms to file a formal complaint against respondents McKenna and Young. Petitioner and his mother filled out the complaint form and wrote to respondent Sutton, but to no avail.

Watson and Watson's supervisor told petitioner that he was allowed to return to Wood County until the situation cleared up. Petitioner returned to Wood County as Watson advised. On July 25, 2003, petitioner obtained a free lance roofing job from Northern Steel. When respondent McKenna discovered that petitioner was working and living in Wood County, he harassed petitioner by showing up at his apartment at 7:00 a.m. and asking him why he was in town.

On August 1, 2003, McKenna had petitioner arrested at work for unknown reasons, even though he was no longer petitioner's parole officer. After spending a week in jail, petitioner was released to Watson. Watson told petitioner that he would have to terminate

the lease of his current apartment and notify Northern Steel that he could no longer be employed there. Petitioner and his mother wrote and called respondent Sutton about this decision, but again to no avail.

On October 5, 2003, Watson ordered petitioner to sign rules that he had to remain in Milwaukee. Again, petitioner was forced to quit his job and move away from his home, family, children and fiancé to a city where he has no support, family or job.

DISCUSSION

I understand petitioner to argue that respondents exceeded their authority when they imposed conditions on his parole such as where he could live, with whom he could be in contact and when he could change jobs. Petitioner wants to live in Wood County at his parents' home, to be in contact with his child and to change jobs at his own discretion. Because respondents imposed conditions that did not meet petitioner's preferences, petitioner contends that they denied him due process in violation of the United States Constitution. In addition, petitioner contends that respondents conspired to discriminate against him because of his race when they imposed conditions on his parole and sent him to Milwaukee after he failed to wear a seat belt and changed jobs. Petitioner contends that respondent McKenna violated his constitutional rights when he had him arrested after Watson advised him to return to Wood County. Finally, I understand petitioner to argue

that respondent Sutton violated his rights when she did not provide a favorable response to his written complaints about respondents McKenna and Young.

Petitioner cannot succeed on his argument that respondents exceeded their authority by imposing restrictions on his parole. Even though a prisoner is released on parole, he is not subject to the same liberties as nonprisoner citizens. Rather, "parole is an established variation on imprisonment of convicted criminals." Morrissey v. Brewer, 408 U.S. 471, 478 (1972). "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Id. at 477. Parole officers have broad discretion in imposing parole conditions. Id. at 479. These conditions typically require parolees to seek permission from their parole officers before "changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness." Id. at 478.

However, parole officials may not impose parole conditions for reasons of race discrimination. See, e.g., Alonzo v. Rozanski, 808 F.2d 637, 638 (7th Cir. 1986). The equal protection clause of the Fifth and Fourteenth Amendments prohibits government actors from applying different legal standards to similarly situated individuals. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Discriminatory intent may be established by showing an unequal application of a policy or system, but

conclusory allegations of racism are insufficient. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986). In addition, claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under 42 U.S.C. § 1983 or §1985(3). In pleading a conspiracy, it is sufficient for a plaintiff to indicate "the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). Although petitioner will need to prove that there was "an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage'" to succeed on his claim, 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)), it is not necessary that he plead the overt act in order to state a valid claim. Walker, 288 F.3d at1007.

Petitioner alleges that because he is black, respondents conspired to impose parole conditions that they knew he would violate. For example, they knew he wanted to live at home and that he wanted to see his daughter, yet they imposed restrictions that made it difficult for him to live at home and impossible to see his child. Petitioner alleges that after speaking with respondents McKenna and Young, petitioner's social worker told him that his hometown is "a small white town and because you are black, they do not want you there." Petitioner has alleged sufficient facts to state an equal protection claim under the minimum pleading requirements of Fed. R. Civ. P 8(a). Shah v. Inter-Continental Hotel Chicago

Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002); Walker, 288 F.3d at 1007 ("[T]here is no requirement in federal suits of pleading the facts or the elements of a claim."). Accordingly, plaintiff will be allowed to proceed on his equal protection claim against respondents McKenna, Young and Sutton.

Because plaintiff has identified the parties, general purpose and the approximate time frame of the alleged conspiracy, he will be permitted to proceed on his claim of conspiracy under both 42 U.S.C. §§ 1983 and 1985(3) against respondents McKenna and Young. However, nothing in petitioner's complaint supports an inference that respondent Sutton was part of a conspiracy to impose parole conditions on the basis of petitioner's race. Therefore, I will allow petitioner to proceed on his conspiracy claim only as it applies to respondents McKenna and Young.

Although petitioner has met the minimal pleading requirements for stating a claim of conspiracy, Walker, 288 F.3d at 1007-08, he should be aware that conspiracy claimants bear a heavy burden of proof. To succeed on his claim under § 1983, plaintiff will need to adduce evidence showing that respondents reached an understanding to deprive him of his constitutional rights. Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003). In order to succeed on his claim under § 1985(3), plaintiff will need to prove "(1) the existence of a conspiracy, (2) a purpose of depriving a person or class of persons of equal protection of the laws, (3) an act in furtherance of a conspiracy, and (4) an injury to person or property or a

deprivation of a right or privilege granted to U.S. citizens." Green v. Benden, 281 F.3d 661, 665 (7th Cir. 2002) (citing Hernandez v. Joliet Police Department, 197 F.3d 256, 263 (7th Cir.1999)). Specifically, petitioner will need to adduce evidence to show that respondents' acts were motivated by discriminatory animus towards petitioner's race. Majeske v. Fraternal Order of Police, Local Lodge No. 7, 94 F.3d 307, 311 (7th Cir.1996). Under either section, petitioner may be able to prove the existence of an agreement through circumstantial evidence, "but only if it is sufficient to permit a reasonable jury to conclude that a meeting of the minds had occurred and that the parties had an understanding to achieve the conspiracy's objectives." Green, 281 F.3d at 666; see also Williams, 342 F.3d at 785.

Petitioner contends that respondent McKenna violated his constitutional rights when he had him arrested and detained in jail for one week after Watson advised petitioner to return to Wood County. Petitioner states that McKenna was not his parole officer at that time and therefore did not have the authority to have him arrested. However, petitioner admits that McKenna did not know why petitioner had returned to Wood County after McKenna had ordered him to serve his parole in Milwaukee. Furthermore, after petitioner's arrest, Watson ordered petitioner to stay in Milwaukee, suggesting that petitioner should not have returned to Wood County. In addition, there is no cause of action under the Fourteenth Amendment for denial of due process for wrongful imprisonment when there are

adequate state remedies for false arrest, false imprisonment, and malicious prosecution. Hood v. City of Chicago, 927 F.2d 312, 314 (7th Cir. 1991) (citing Guenther v. Holmgreen, 738 F.2d 879 (7th Cir. 1984)). Petitioner does not allege that he has no state remedies. Therefore, I will deny petitioner leave to proceed on his due process claim against respondent McKenna concerning false arrest and unlawful detention.

Finally, to the extent that petitioner argues that respondent Sutton violated his rights by not responding favorably (or at all) to his written complaints about respondents McKenna and Young, his claim fails. The right to petition the government for redress of grievances does not guarantee a favorable response from government officials or indeed any response. See, e.g., Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988) (Fourteenth Amendment does not protect state-created inmate grievance procedures and alleged violations of these grievance procedures do not state claim under § 1983).

ORDER

IT IS ORDERED that

1. Petitioner Michael D. Harris's request for leave to proceed in forma pauperis on his due process claims against respondents John McKenna, Jean Young and Barbara Sutton is DENIED;

2. Petitioner's request for leave to proceed in forma pauperis on his equal protection

claim against respondents McKenna, Young and Sutton is GRANTED;

3. Petitioner's request for leave to proceed in forma pauperis on his conspiracy claim is GRANTED as to respondents McKenna and Young and DENIED as to respondent Sutton;

4. Petitioner's request for leave to proceed in forma pauperis on his claim that respondent Sutton violated his rights when she failed to respond favorably to his complaints is DENIED;

- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.
- Petitioner should keep 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 unpaid balance of petitioner's filing fee is $137.50; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).
- The clerk of court will forward copies of petitioner's complaint and completed

Marshals Service and summons forms to the U.S. Marshal, who will serve petitioner's complaint on respondents.

Entered this 7th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge