

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN A. CONWAY,

Plaintiff,

v.

MR. THURMER, MR. PICARD,
MS. GUSE and MR. ALDRICH,

Defendants.

OPINION AND ORDER
00-C-383-C

This is a civil action for monetary relief in which plaintiff Steven A. Conway contends that defendants Mr. Thurmer, Mr. Picard, Ms. Guse and Mr. Aldrich retaliated against him in violation of his constitutional rights. Currently, plaintiff is an inmate at Kenosha Correctional Center in Kenosha, Wisconsin; however, at all relevant times, he was an inmate at Kettle Moraine Correctional Institution in Plymouth, Wisconsin. In an order entered October 26, 2000, I granted plaintiff leave to proceed in forma pauperis on his retaliation claim against defendants Thurmer, Picard and unknown Kettle Moraine Correctional Institution staff. In an order entered January 10, 2001, I allowed plaintiff to file an amended complaint and granted him leave to proceed in forma pauperis on his retaliation

claims against defendants Guse and Aldrich. In that same order, I denied him leave to proceed in forma pauperis on all other claims against all other proposed defendants for his failure to state a claim upon which relief may be granted.

Presently before the court is defendants' motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6). Defendants contend that plaintiff failed to exhaust his administrative remedies before filing suit as required by 42 U.S.C. § 1997e(a) and that his complaint fails to state a viable retaliation claim. Defendants also contend that they are entitled to qualified immunity. In support of their motions, defendants have submitted documents relating to plaintiff's exhaustion efforts within the inmate complaint review system. Consideration of this documentation is necessary to reach a decision on the motion. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. For this reason, a court may take judicial notice of the documents without converting the motion to dismiss into a motion for summary judgment. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corporation v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997)).

Because it is not clear whether plaintiff appealed the decisions of the program review committee to terminate him from his job, Alcoholics Anonymous and the Nexus drug and alcohol treatment program pursuant to Wis. Admin. Code § DOC 302.19(9), defendants'

motion will be stayed until May 17, 2001 to allow plaintiff to submit such proof if he has any.

In his amended complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

I. AMENDED COMPLAINT

A. Parties

Plaintiff Steven Conway is an inmate at Kettle Moraine Correctional Institution. Defendant Mr. Picard is the administrator of the institution's school building. At all relevant times, defendant Mr. Thurmer was the acting security director and security director. Defendant Ms. Guse is a social worker in charge of the institution's Alcoholics Anonymous program. Defendant Mr. Aldrich is a Nexus Specialist at the institution's alcohol and other drug treatment unit.

B. Alcoholics Anonymous

On November 9, 1999, plaintiff was the victim of an assault and battery while at work in the institution's library. Plaintiff was charged with fighting. Plaintiff spent 16 days in adjustment segregation. He was found not guilty of fighting and guilty of disruptive conduct because he had raised his voice before the attack to alert his supervisor that he was

being threatened. While plaintiff was in segregation, he sent an interview request form to defendant Guse. Plaintiff told defendant Guse that he was the victim of an attack and would have to miss his Alcoholics Anonymous meetings as a result. Previously, this was sufficient for an excused absence from the meetings. Defendant Guse said regardless whether he was guilty, plaintiff would be terminated from Alcoholics Anonymous if he missed two meetings. Defendant Guse's message was that plaintiff would be terminated from the program if he requested a hearing. Plaintiff exercised his right to a hearing, missed two meetings and was terminated from the program.

C. Job

On or around November 26, 2000, plaintiff was released from segregation. On or around November 27, 2000, plaintiff returned to work. Flores, plaintiff's attacker, returned to the same job two days before plaintiff. As a result, plaintiff and Flores were forced to work in a small area eight hours a day, causing plaintiff to fear for his safety. Over a month after returning to work, plaintiff mentioned his fear to his sister on the phone. Plaintiff's sister called the institution and spoke with defendant Thurmer about her concerns for plaintiff's safety. Defendant Thurmer called plaintiff to his office and asked him, "What the hell is your problem? Why do I have outsiders calling me about you?" Plaintiff said he did not ask his sister to call. After plaintiff complained, defendant Thurmer told him on January

3, 2000, that he and Flores would both be fired and that plaintiff would be put in segregation if he persisted in his requests to have Flores charged in a court.

On or about January 4, 2000, plaintiff was called to defendant Picard's office. Picard told plaintiff that he was fired and that he should return to his unit and not enter the school building until he had seen the program review committee. Plaintiff asked defendant Picard why he had been fired, pointing out that he had perfect job evaluations, had worked at the job for four and a half years with no problems and had worked 56 hours each week for 40 hours' worth of pay. Defendant Picard responded that defendant Thurmer had told him to fire plaintiff. Defendant Picard was in charge of the program review committee hearing at which plaintiff's termination was affirmed. The hearing was held on February 8, 2000.

D. Nexus Alcohol and Drug Treatment Program

Plaintiff was housed on the alcohol and other drug addiction treatment unit. On or around March 15, 2000, plaintiff began the Nexus drug and alcohol program. At the meetings, plaintiff had to stand up and state how he was feeling. At the meetings, he discussed his feelings about his case that was pending in federal court. Prison staff frowned upon this and seemed to view plaintiff as a bad influence because he was standing up for his rights. Social worker Wood made disparaging remarks after plaintiff said that he was pleased by his lawyer's comments that his case was going well.

On or around May 9, 2000, plaintiff stood up at the meeting to say that he was upset because his lawsuit had been dismissed. Approximately one week later, he mentioned that he was disappointed because he was not going to be represented by counsel on appeal. Around May 19, 2000, he was terminated from the program by defendant Aldrich for pursuing lawsuits, eating pretzels and talking to himself during study time. According to the program handbook, these are not terminable offenses. In May 1999, the program review committee affirmed plaintiff's termination from the program and imposed 90 days' involuntary unassigned status.

II. ADMINISTRATIVE COMPLAINTS

A. KMCI-1999-64724

On November 19, 1999, plaintiff filed offender complaint KMCI-1999-64724 in which he complained about the actions of his advocate in his disciplinary proceeding. On November 30, 1999, the institution complaint examiner recommended dismissal of plaintiff's complaint. On December 1, 1999, the reviewer accepted the examiner's recommendation and dismissed the complaint.

B. KMCI-1999-65919

On December 9, 1999, plaintiff filed KMCI-1999-65919 in which he complained

about thirteen different alleged violations. Among these, he complained that he was “kicked out of AA due to above,” referring to his fight with Flores. On December 9, 1999, the complaint examiner determined that it was a complaint about disciplinary action and rejected it, stating, “The issue of this complaint has been addressed in a former complaint filed by the inmate.” On December 15, 1999, plaintiff filed a request for corrections complaint examiner review. On December 23, 1999, the corrections complaint examiner affirmed the dismissal of the complaint, adding that Wis. Admin. Code § DOC 310.09(1) requires that “an inmate shall only include one issue in each complaint.” On December 28, 1999, the Secretary adopted the corrections complaint examiner’s recommendation.

C. KMCI-2000-2215

On January 18, 2000, plaintiff filed offender complaint KMCI-2000-2215 in which he alleged that he was fired from his job the day after his sister called the prison to express her concern for plaintiff’s safety and that defendant Thurmer had threatened to fire plaintiff if he complained about the altercation with Flores or requested that criminal charges be brought against Flores. On February 15, 2000, the complaint examiner recommended dismissal of the complaint, interpreting it as a complaint about a decision by the program review committee, which is outside the scope of the inmate complaint review system. On February 16, 2000, the reviewer adopted the examiner’s recommendation and dismissed the

complaint. On February 22, 2000 and March 10, 2000, plaintiff filed requests for corrections complaint examiner review. On March 23, 2000, the corrections complaint examiner affirmed the dismissal, stating,

DOC 310.08(3), Wis. Adm. Code, mandates that appeals under DOC 302.19(9), Wis. Adm. Code, be exhausted before an inmate may use the ICRS to challenge the procedure used by the program review committee. Lacking evidence the complainant appealed the PRC decision at issue prior to filing this complaint, he had failed to exhaust available remedies and it is thus recommended this complaint be dismissed as outside the scope of the ICRS. Also noted for the record is that this appeal was not timely filed in accordance with DOC 310.13(1), Wis. Adm. Code.

On March 24, 2000, the Secretary adopted the corrections complaint examiner's recommendation.

D. KMCI-2000-6746

On February 28, 2000, plaintiff filed offender complaint KMCI-2000-6746, in which he wrote, "I was . . . removed from job 2 months after return to job as retaliation for sister calling prison to express for my safety when assailant was put back on job w/ me." On March 9, 2000, the complaint was rejected as being outside the scope of the inmate complaint review system because it complained about a program review committee issue.

E. KMCI-2000-15021

On May 22, 2000, plaintiff filed offender complaint KMCI-2000-15021 in which he complained that he was terminated from the Nexus treatment program because he was stressed. On June 7, 2000, plaintiff's complaint was rejected as being outside the scope of the inmate complaint review system because it pertained to a program decision.

F. KMCI-2000-16077

On June 5, 2000, plaintiff filed offender complaint KMCI-2000-16077 in which he complained that his termination from the Nexus program constituted double punishment. On June 13, 2000, the institution complaint examiner recommended plaintiff's complaint be dismissed as outside the scope of the inmate review complaint system. On June 13, 2000, the reviewer adopted the examiner's decision and dismissed plaintiff's complaint.

OPINION

Plaintiff contends that defendants Thurmer and Picard fired him from his job in retaliation for his and his sister's complaints following his altercation with another inmate, that defendant Guse terminated his participation in Alcoholics Anonymous in retaliation for his exercise of a right to a hearing and that defendant Aldrich terminated him from the Nexus drug and alcohol treatment program in retaliation for his discussion of a lawsuit

during program meetings. Defendants contend that plaintiff failed to exhaust his administrative remedies on his claims before he filed suit. Under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” The term “prison conditions” is defined in 18 U.S.C. § 3626(g)(2), which provides that “the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.” The Court of Appeals for the Seventh Circuit has held that “a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits.” Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has stated that “if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to

obtain relief through administrative procedures.” Massey, 196 F.3d at 733. Further emphasizing the importance of exhausting administrative remedies before filing suit, the court of appeals has made clear that “[t]here is no futility exception to § 1997e(a),” Perez, 182 F.3d at 537; see also Massey, 196 F.3d at 733, and that a prisoner's request for monetary damages that are unavailable under the administrative complaint system does not allow a prisoner to avoid 42 U.S.C. § 1997e’s exhaustion requirement. See Perez, 182 F.3d at 537-38; see also Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust administrative remedies when seeking money damages not available through prison grievance procedure).

Wis. Admin. Code § DOC 310.04 requires that “[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14.” Plaintiff filed six offender complaints pursuant to § DOC 310.09 following his altercation with Flores.

In two of his offender complaints, see KMCI-2000-2215 and KMCI-2000-6746, plaintiff complained that his termination from his job was retaliatory. Defendants contend that complaint KMCI-2000-2215 does not establish that plaintiff exhausted his administrative remedies because the complaint examiner, the corrections complaint examiner and the secretary rejected the complaint because it pertained to a program review committee

decision that was outside the scope of the inmate complaint review system. Defendants argue that complaint KMCI-2000-6746 fails to establish that plaintiff exhausted his administrative remedies on his claim against defendants Thurmer and Picard for two reasons: plaintiff did not appeal the examiner's rejection of his complaint to the corrections complaint examiner or the Secretary and the complaint examiner interpreted plaintiff's grievance as a complaint about a program review committee issue and rejected it as being outside the scope of the inmate complaint review system pursuant to Wis. Admin. Code § DOC 310.08(2)(b).

Section DOC 310.08(2)(b) states "An inmate may use the [Inmate Complaint Review System] to raise significant issues regarding rules, living conditions, and staff actions affecting institution environment, except any of the following: . . . (2) A program review committee's decision." There is an alternative mechanism for administrative review of decisions made by the program review committee, including decisions relating to job and program assignments. Wis. Admin. Code § DOC 302.19(9) states "An inmate may appeal the PRC's decision concerning a program assignment to the superintendent within 10 days after receipt of the decision." Section § 1997e(a) requires an inmate to exhaust "such administrative remedies as are available"; administrative remedies are not limited to the inmate complaint review system. In order to exhaust his administrative remedies on his claim that defendants Picard and Thurmer retaliated against him by firing him from his job,

plaintiff needed to raise this issue in an appeal pursuant to § DOC 302.19(9).

All of the reasons for requiring administrative exhaustion are present in plaintiff's case. Bringing his claim to the attention of prison authorities when he contested his termination from his job would have enabled them to investigate his allegations of retaliation, thus giving them the first opportunity to correct their own errors by reinstating him if necessary. At the least, filing an appeal to the committee's decision to terminate plaintiff might have helped to narrow the dispute or to develop the factual record. Finally, allowing the complaint system to work without judicial intervention would encourage development of an effective system. See Perez, 182 F.3d at 537-38 (7th Cir. 1999); see also Nyhuis, 204 F.3d at 75. It is unclear whether plaintiff challenged the decision of the program review committee in an appeal pursuant to § DOC 302.19(9).

Although plaintiff filed two offender complaints in which he complained about his termination from the Nexus drug and alcohol treatment program, see offender complaints KMCI-2000-15021 and KMCI-2000-16077, he did not include allegations in either complaint that defendant Aldrich had terminated him from the program in retaliation for his legal activity. Regardless what plaintiff complained about in his offender complaints, he needed to raise defendant Aldrich's alleged retaliation pursuant to § DOC 302.19(9) in an appeal of the program review committee's termination of him from the Nexus program.

Plaintiff's statement in offender complaint KMCI-1999-65919 that he was "kicked

out of AA due to [his fight with Flores]” does not establish that he complained in an offender complaint that defendant Guse had terminated him from the Alcoholics Anonymous program because he had exercised his right to a due process hearing following the fight. For the reasons already discussed, plaintiff should have raised defendant Guse’s alleged retaliation in an appeal of his termination from Alcoholics Anonymous pursuant to § DOC 302.19(9) rather than in an offender complaint. Even if plaintiff had complained of retaliation in complaint KMCI-1999-65919, he would still be unable to show that he exhausted his administrative remedies on his claim against Guse because he did not exhaust the grievance properly through the inmate complaint system pursuant to Wis. Admin. Code § DOC 310.04.

Because it is not clear whether plaintiff pursued his available administrative remedies pursuant to § DOC 302.19(9) on any of his retaliation claims, I will allow him two weeks to submit to the court proof that he appealed the decisions of the program review committee to terminate him from his job, Alcoholics Anonymous and the Nexus drug and alcohol treatment program.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Mr. Thurmer, Mr. Picard, Ms. Guse and Mr. Aldrich is STAYED until May 17, 2001, by which time plaintiff

must submit proof that he exhausted his administrative remedies pursuant to Wis. Admin. Code § DOC 302.19(9). If, by May 17, 2001, plaintiff fails to submit such proof, defendants' motion to dismiss will be granted on the ground that plaintiff failed to exhaust his administrative remedies before filing suit.

Entered this 3rd day of May, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge