IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BERRELL FREEMAN,

Petitioner, ORDER

v. 02-C-348-C

CLYDE MAXWELL;
GERALD BERGE;
TIM HAINES; ELLEN RAY;
and RANDALL HEPP,

Respondents.

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In an order dated July 29, 2002, I denied petitioner Berrell Freeman leave to proceed in forma pauperis with respect to his claims that respondents violated his rights to due process and equal protection, conspired to deprive him of those constitutional rights and subjected him to cruel and unusual punishment. However, I stayed petitioner's request for leave to proceed on his retaliation claim against respondents Randall Hepp, Clyde Maxwell, Tim Haines, Gerald Berge and Ellen Ray so that petitioner could inform the court whether he was a plaintiff in State ex rel. Curtis v. Litscher, No. 00-CV-1604. I informed petitioner: "[I]f petitioner was not a plaintiff in Curtis, he does not have standing to assert this claim

because he himself was not exercising a constitutional right." In addition, I wrote: "Petitioner will not be allowed to proceed on this claim against any other individual respondents unless he adds additional allegations showing precisely what these respondents knew about the allegation."

Petitioner has responded in a document titled "Plaintiff's Clarification of His Retaliation Claim," informing the court that he was not a plaintiff in Curtis. Nevertheless, petitioner contends that he should be allowed to proceed because, regardless whether he was a party in Curtis, respondents retaliated against him for exercising a constitutional right. Specifically, he alleges that he had a constitutional right to challenge his disciplinary infractions administratively, and that respondents retaliated against him for doing so by renaming his disciplinary report as a "disturbance review" and keeping him in administrative confinement.

I agree with petitioner that his constitutional right to redress of grievances and access to courts includes the right to pursue administrative remedies that must be exhausted before he can seek relief in court. DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). However, there are no allegations in petitioner's complaint that would permit me to infer that respondents retaliated against petitioner for exercising that right.

Although in his complaint petitioner does identify as a cause of action that "[t]he defendants conspired to retaliate against plaintiff for successfully challenging the disciplinary

infractions," the factual allegations in his complaint are inconsistent with this assertion.

Petitioner does not allege in his complaint that respondents re-labeled his disciplinary infractions as a "disturbance review" after he sought administrative review of his infractions. Rather, he alleges that respondents retaliated against him after his infractions were expunged, apparently as the result of the state court's decision in Curtis. If petitioner was not a plaintiff in Curtis, then he cannot successfully argue that respondents re-labeled his infractions in reaction to the exercise of *his* constitutional rights. At most, I could infer from petitioner's proposed complaint that respondents re-labeled his infractions as a result of the success of the plaintiffs in Curtis. If respondents' actions were the result of Curtis, as petitioner alleges they were, then respondents would have taken the same action regardless whether petitioner had challenged his disciplinary infractions. Therefore, even assuming that all the allegations in petitioner's complaint are true, he has not stated a claim for retaliation. Although petitioner is not required to plead all the facts that if true would prove his claim, Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), or allege a chronology of events, Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002), if the facts he does allege would defeat his claim if proven, then he cannot survive a motion to dismiss, see Massey v. Helman, 259 F.3d 641, 645 (7th Cir. 2001).

The essence of petitioner's complaint is that he believes that respondents should have transferred him out of administrative confinement as a result of Curtis, but they have not.

Perhaps petitioner is correct, but even if he is, this does not give rise to a claim under 42 U.S.C. § 1983. Whether Curtis should apply to petitioner and, if so, whether Curtis would prohibit respondents from re-labeling his disciplinary infractions (or whether how they are labeled affects petitioner's administrative confinement) are matters of Wisconsin, not federal, law and thus cannot be the basis for a § 1983 claim. Accordingly, I will deny petitioner leave to proceed on his retaliation claim.

Petitioner has also filed a motion for reconsideration of my decision dismissing several respondents from the case because petitioner had not alleged their personal involvement in violating his constitutional rights. Because I have concluded that petitioner will not be granted leave to proceed with respect to any of the respondents, this motion will be denied as moot.

ORDER

IT IS ORDERED that

1. Petitioner Berrell Freeman's request for leave to proceed in forma pauperis is DENIED with respect to his claim that respondents retaliated against him.

2. Petitioner's state law claim is DISMISSED without prejudice.

3. Petitioner's motion for reconsideration is DENIED as moot.

4. Because I denied petitioner leave to proceed on all his other claims in this case in the July 29 order, the clerk of court is directed to enter judgment for the respondents and

close this case.

Entered this 21st day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge