IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER, individually and
behalf of all others similarly situated,

Petitioner,

v.

TOMMY G. THOMPSON,
DEPARTMENT OF CORRECTIONS,
JON E. LITSCHER,
CINDY O'DONNELL,
RICHARD J. VERHAGEN,
JOHN RAY,
DANIEL R. BERTRAND,
JEFFREY JAEGER,
MICHAEL DELVAUX,
ANDREW VAN GHEEM,
LAURIE WEIER,
LORA HALLET,
WENDY BURNS and
JENNIFER VOELKEL,

Respondents.

ORDER

00-C-0350-C

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Judgment was entered in this case on August 8, 2000, dismissing petitioner's complaint with prejudice as to certain claims that failed to state a claim upon which relief may be granted

and without prejudice as to the remaining claims for which petitioner had failed to exhaust his administrative remedies. On October 4, 2000, petitioner filed a document titled "Motion to Reconsider Court's August 7th 2000 Order and to Add Ten New Defendants to This Action." I construe petitioner's submission as a request to reopen the case to prove exhaustion of administrative remedies on the claims dismissed without prejudice and a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 with respect to those claims that were dismissed with prejudice for petitioner's failure to state a claim upon which relief may be granted.

Petitioner's motion pursuant to Fed. R. Civ. P. 59 will be DENIED. Such motions must be made within ten days of the date of entry of the judgment in a case, and Fed. R. Civ. P. 6(b) explicitly precludes enlarging the time for filing Rule 59(e) motions. Ten days from the August 8, 2000 date of entry of the judgment in this case (calculated in accordance with Fed. R. Civ. P. 6(a)) was August 27, 2000. Petitioner's motion is dated September 26, 2000, well after the deadline. Therefore, he is precluded from filing such a motion at this or any other future time.

The following claims raised in petitioner's complaint were dismissed for his failure to exhaust his administrative remedies as required by 28 U.S.C. § 1997e(a):

1) petitioner's claim that he was twice retaliated against for filing complaints in the

inmate complaint system; and

2) petitioner's claim that he was not under the advice and care of a physician as required by Wis. Stat. § 302.10 when he was placed in solitary confinement;

In addition, I dismissed petitioner's claim that he had been denied the opportunity to exercise outdoors from January 12, 2000 to March 10, 2000 both because it failed to state a claim upon which relief may be granted and because, in any event, petitioner failed to exhaust his administrative remedies with respect to this claim. Because plaintiff's outdoor exercise claim was dismissed on its merits, I need not review the documentation petitioner has submitted to contest this court's alternative holding that he failed to fully exhaust his administrative remedies with respect to this claim.

I turn then to petitioner's contention that he now has satisfied the exhaustion requirements of 28 U.S.C. § 1997 on his two claims of retaliatory conduct. In his complaint, petitioner alleged that once in September 1999 and again in January 2000, he was given conduct reports in retaliation for filing inmate complaints against prison officials through the inmate complaint system. As proof of exhaustion of his retaliation claim for the September 1999 conduct report, petitioner submitted an inmate complaint in which he stated,

> Between the years of 1994 to present, Waupun Correctional Institution and Green Bay Correctional Institution has conducted disciplinary hearings against me and found me guilty, imposing punishment when they do not have jurisdiction to do so. § 302.02(1) and (2) Wis. Stats. gives the courts

> jurisdiction over discipline and judicial proceedings in Dodge and Brown Counties, thus, all disciplinary convictions against me are void.

On May 1, 2000, the inmate complaint review examiner rejected petitioner's complaint as "frivolous." On May 2, 2000, petitioner requested review of the rejection from the Corrections Complaint Examiner, who denied the request on May 9, 2000, stating,

> This complaint was rejected as frivolous by the ICE at GBCI. In accordance with DOC 310.13(4), the CCE may not review a complaint rejected under DOC 310.11(4).

With respect to petitioner's January 2000 retaliation claim, petitioner submitted an offender complaint he wrote on January 24, 2000 that reads:

> On 1/1/00 I wrote a complaint to the security director about Officer Voekel's actions and attitude. She, in return, wrote a conduct report alleging that I threatened and disrespected her in the complaint. This is clearly an act in retaliation for my written complaint about her. The back of this form says that I should try to talk to appropriate staff in an effort to resolve the problem before filling out this form. I tried to talk to her, but she wanted to play games, so the only other appropriate staff member would be the chief of security, the security director. I was following the directions on this form when I wrote my complaint to the security director, and the note at the bottom states that I will not be disciplined for using the complaint system UNLESS I lie about a staff member and make the lie known outside the complaint system. I never lied about any staff member. Thus, she could not write me any type of conduct report. This is a clear case of retaliation and I want something done about this.
>
> I waited to file this because when I was in WCI, I filed a retaliation complaint regarding a similar issue and the complaint investigator name Todd Johnson rejected the complaint stating that my issue was outside the scope of the ICRS. I don't see anything in the 310 that says you can't handle this type of issue though, so let me know if your department does handle these issues.

On January 26, 2000, the Institution Complaint Examiner rejected petitioner's complaint as "beyond 14 calendar day limit."

In my order of August 7, 2000, denying petitioner leave to proceed in forma pauperis on his retaliation claims, I found that plaintiff's inmate complaint contesting every conduct report he had received since 1994 in two different institutions on the ground that the institutions lacked jurisdiction to conduct the hearings did not constitute proof of exhaustion of his specific allegations of retaliatory conduct occurring in September 1999. Regarding petitioner's second claim of retaliation in January 2000, I concluded that because petitioner's inmate complaint on the subject was rejected as having been untimely filed rather than reviewed on its merits, petitioner had failed to exhaust the administrative remedies that had been available to him, and thus could not raise his claim in this court.

Petitioner's "new" proof of exhaustion with respect to these claims is an inmate complaint he filed in 1996 at a different institution alleging that Correctional Office York and Sergeant Otto (neither of whom is named as a respondent in this lawsuit) were issuing conduct reports against him in retaliation for petitioner's verbal spars with a guard. The 1996 complaint was dismissed on the ground that it was not within the scope of the inmate complaint review system because conduct reports had been issued and a disciplinary process

implemented. Presumably, the idea was that petitioner would have the opportunity to contest the validity of the conduct reports in the context of his disciplinary proceedings.

The 1996 documents do nothing to prove that petitioner exhausted his administrative remedies on his September 1999 and January 2000 claims of retaliation. Petitioner argues that the denial of his 1996 complaint on the ground that it is outside the scope of the inmate complaint review systems proves that any inmate complaint he would have filed in September 1999 and January 2000 claiming retaliation in the issuance of conduct reports would have been rejected for the same reason. Even if this were true, I am not persuaded that petitioner's speculation about a "probable" rejection of his complaints is sufficient to show that he has no administrative remedies available to him. At the least, petitioner should have provided proof that he raised his retaliation claim as a defense to the conduct report at the time of his disciplinary hearing, and that an appeal from any finding of guilt included petitioner's claim that the conduct report was issued in retaliation for his exercise of a constitutional right. Because petitioner has not submitted proof of exhaustion of his administrative remedies with respect to his retaliation claims, his motion to reopen this case to permit him to proceed in forma pauperis on these claims will be denied.

Petitioner's claim that he was not under the advice and care of a physician when he was placed in solitary confinement as required by Wis. Stat. § 302.10 is a state law claim, and not

one that involves a question of constitutional proportion or a violation of federal law. Because petitioner was denied leave to proceed in forma pauperis on all of his federal law claims, his state law claim should have been dismissed without regard to the question whether he had exhausted his administrative remedies with respect to it. See Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993) (only in "extraordinary circumstances" should trial court exercise pendent [now supplemental] jurisdiction over state law claim when federal claims are dismissed before trial). No extraordinary circumstances warranted retention of supplemental jurisdiction over petitioner's state law claim. Therefore, petitioner's request to reopen this case to consider his state law claim will be denied.

ORDER

IT IS ORDERED that petitioner's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 on those claims that were dismissed with prejudice for petitioner's failure to state a claim is DENIED as untimely.

FURTHER, IT IS ORDERED that petitioner's motion to reopen this case with respect to those claims that were dismissed without prejudice for his failure to submit proof of exhaustion of his administrative remedies is DENIED.

Entered this 13th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge