IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN A. CONWAY,

Petitioner,

v.

ORDER
00-C-383-C

JANE GAMBLE, HALEY HERMAN,
JOHN LITSCHER, JAMES DOYLE,
ROBERT WELLS, CPT. HELWIG,
MR. THURMAN, MR. PICARD,
UNKNOWN KMCI STAFF/OFFICERS,

Respondents.

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Judgment was entered in this case on August 24, 2000, denying petitioner Steven Conway's request for leave to proceed in forma pauperis on his claims of retaliation and failure-to-protect for his failure to exhaust his administrative remedies and on his claims of double jeopardy, conspiracy, denial of access to the courts, inadequate medical treatment and failure to prosecute for his failure to state a claim upon which relief may be granted. Now petitioner has filed two "motions for reconsideration," which I construe together as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

Motions to alter or amend a judgment pursuant to Rule 59(e) may be granted to (1)

take account of an intervening change in controlling law; (2) take account of newly discovered evidence; (3) correct clear legal error; or (4) prevent manifest injustice. See 12 Moore's Federal Practice, § 59.30[5][a][i] (Matthew Bender 3d ed.). Because none of these circumstances is present, petitioner's motion will be denied.

Petitioner contends that the court failed to address his allegations that the water was shut off in his cell for three days and that the inmate complaint examiner deprived him of his rights by misconstruing his complaint. Petitioner's allegation in his original complaint that his water was turned off for three days fails to establish a violation of the Eighth Amendment. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon jail officials the duty to "provide humane conditions of confinement" for prisoners. Farmer v. Brennan 511 U.S. 825, 832 (1994). This duty includes the obligation to "ensure that inmates receive adequate food, clothing, shelter, protection, and medical care." Oliver v. Deen, 77 F.3d 156, 159 (7th Cir. 1996). The conditions of a prisoner's confinement are actionable only if the plaintiff shows that the conduct of the prison officials satisfies a test that involves both an objective and subjective analysis. See Farmer, 511 U.S. at 834. The objective component focuses on whether the conditions "exceeded contemporary bounds of decency of a mature, civilized society." Lunsford v. Bennett, 17 F.3d 1574, 1579 (7th Cir. 1994) (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)). Not all restrictive or even harsh prison

conditions are actionable under the Eighth Amendment. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Deprivations must be "unquestioned and serious" and contrary to "the minimal civilized measure of life's necessities." Rhodes, 452 U.S. at 347.

The subjective component focuses on intent: "whether the prison officials acted wantonly and with a sufficiently culpable state of mind." Lunsford, 17 F.3d at 1579. In prison conditions cases, the requisite "state of mind is one of 'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834. Deliberate indifference "'implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'" Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985)). Even if a lack of water in petitioner's cell for three days meets the objective component of the Eighth Amendment, he has failed to allege that he complained to any prison officials about the situation or that any of the respondents acted with deliberate indifference to petitioner's health or safety. Furthermore, petitioner has failed to submit the necessary proof of administrative exhaustion on this claim. Although this claim should have been considered in the August 24, 2000 opinion and order, it is of no consequence because petitioner would have been denied leave to proceed in forma pauperis on this claim. Similarly, petitioner failed to state a claim against respondent Herman because she failed to investigate and misconstrued

his complaint. I am aware of no provision in the Constitution that gives a person a right to certain procedures under an inmate grievance system.

In addition, petitioner contends that he did not know that he had to submit a copy of his original inmate complaint in addition to the institution's dismissal and the subsequent appeal in order to demonstrate administrative exhaustion. Petitioner's submission of two inmate complaints does not satisfy the gaps in his proof of administrative exhaustion on his retaliation and failure to protect claim as required by 42 U.S.C. § 1997e(a). 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."

The documentation petitioner submitted to prove that he exhausted his retaliation claim shows just the opposite by calling into question petitioner's claim that he was fired from his job in retaliation for the exercise of his constitutional right to file inmate grievances. Specifically, petitioner has submitted a copy of an inmate complaint he filed in which he complained that he was fired from his prison job because he was the victim of an assault and because his sister called to discuss her concerns for petitioner's safety. This does not demonstrate that petitioner was retaliated against for the exercise of his *constitutional right*, see

Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996), or that petitioner exhausted his administrative remedies on such a claim. If petitioner is alleging that he was fired because he was assaulted and because of his sister's phone call, he fails to satisfy the prerequisite to bringing a retaliation claim; that is, that because of his legitimate filing of grievances, a protected constitutional right, he was fired from his job. If, however, petitioner wishes to persist in his claim that he was relieved of his job in retaliation for the exercise of his constitutional right to file grievances, then the documentation he submitted is inadequate. To satisfy the exhaustion requirement with respect to that claim, petitioner would have to show that he notified prison authorities through the inmate grievance procedure that he believed one or more prison officials were retaliating against him for *filing inmate grievances* and not because he had been assaulted or because his sister had made a phone call on his behalf.

Petitioner's contention that administrative exhaustion is not required in cases where the harm is already done is without merit. The Seventh Circuit has adopted an expansive reading of the applicability of § 1997e(a), stating "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 v. Helman, 196 F.3d 727, 733 (7th

Cir. 1999). 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 v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537 (7th Cir. 1999); 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 Nyhuis v. Reno, 204 F.3d 65, 70 (3d Cir. 2000) (discussing circuit split on whether prisoner needs to exhaust when seeking money damages not available through prison grievance procedure).

Petitioner attempts to bolster his factual allegations about an alleged conspiracy between respondents Picard and Thurmer. Additional factual allegations are inappropriate on a Rule 59 motion and therefore will not be considered. Petitioner raises a number of other vague objections to the dismissal of claims he attempted to bring in his original complaint. Nothing in petitioner persuades that I erred in denying him leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that petitioner Steven Conway's motion to alter or amend the

judgment pursuant to Fed. R. Civ. P. 59 is DENIED.

Entered this 7th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge