

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

RONALD ROBINSON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

00-C-379-C

In an order entered September 19, 2000, I granted plaintiff leave to proceed in forma pauperis against defendant United States of America on his claim that some of his personal property was never returned to him after he was moved into a different unit and transferred to other prisons in violation of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680. I denied plaintiff leave to proceed on his claim that respondents Warden J.T. O'Brien, Counselor M. Klawitter, Counselor K. Zook, Case Manager M. Ciske and Unit Manager S. Robinson failed to protect him from harm from a dangerous cellmate for plaintiff's failure to state a claim upon which relief may be granted and I denied plaintiff's claim of retaliation against respondent Klawitter for plaintiff's failure to exhaust available administrative remedies. Plaintiff has filed

a motion for reconsideration, asking this court to reconsider its dismissal of his retaliation claims. (In addition to the claim against respondent Klawitter, plaintiff alleged that respondents retaliated against him for filing lawsuits against city police in Peoria, Illinois.) In support of his motion, plaintiff alleges that he asked for administrative remedy forms BP-9, BP-10 and BP-11 from Ciske and Robinson and that they both refused to give him the forms.

I am persuaded that vacation of a portion of the September 19, 2000, order is warranted because evolving case law in the Seventh Circuit on application of 42 U.S.C. § 1997e suggests that it may be error to dismiss unexhausted claims at the initial screening stage. 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). Rather, it appears that the correct procedure in this circuit is for respondents to allege lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) if they can prove that plaintiff has not exhausted the remedies available to him. Therefore, I will not address plaintiff's allegation that he was unable to obtain administrative remedy forms at this time.

As discussed in the September 19, 2000, order, plaintiff's allegation that he filed lawsuits against the police department in Peoria, Illinois does not support an inference that respondents' subsequent adverse actions against plaintiff were retaliatory. However, in that order, I noted also that plaintiff might have alleged a cognizable retaliation claim against

respondent Klawitter where plaintiff alleged that respondent Klawitter transferred plaintiff to another institution and took away his sweatshirt and commissary privileges in retaliation for grievances plaintiff had filed against Klawitter. I will allow plaintiff to proceed in forma pauperis on his retaliation claim that Klawitter retaliated against plaintiff for filing grievances against him. Plaintiff will not be allowed to proceed on his claim that respondents retaliated against him for filing lawsuits against the city police in Peoria, Illinois.

In a letter received October 10, 2000, plaintiff asks for help in serving the United States Attorney for the Western District of Wisconsin because he does not know her name. Her name and address is Peggy A. Lautenschlager, 660 West Washington Avenue, Madison, WI 53703. Normally, this court will not consider submissions for a party where the court's copy does not show that a copy has gone to the counsel for the opposing party. However, to expedite this case, copies of plaintiff's October 6 and October 10, 2000, submissions to this court will be mailed to Ms. Lautenschlager with a copy of this order. From this point on, this court will not consider any submission from plaintiff that does not indicate that a copy has been sent to opposing counsel.

ORDER

IT IS ORDERED that

1. Plaintiff Ronald Robinson's motion for reconsideration of the order entered September 19, 2000 is GRANTED;

2. The portion of the order entered on September 19, 2000, dismissing plaintiff's retaliation claim for failure to exhaust administrative remedies and dismissing the complaint against respondent M. Klawitter is VACATED; in all other respects, the order remains the same;

3. Plaintiff's request for leave to proceed in forma pauperis on his retaliation claim against respondent M. Klawitter is GRANTED;

4. Service of plaintiff's complaint will be made promptly after plaintiff submits to the clerk of court one (1) completed marshals service form and two (2) completed summonses, one for respondent Klawitter and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If plaintiff fails to submit the completed marshals service and summons forms before December 5, 2000, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute;

Entered this 20th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge