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 and
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. In an order entered on September 8, 2000, I denied petitioner's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. Now petitioner has filed a motion for relief from the judgment pursuant to Fed. R. Civ. P. 60. Petitioner contends that the court ignored his First Amendment

claim and that his lack of administrative exhaustion should not bar his complaint. Nothing in petitioner's motion convinces me that I overlooked a viable First Amendment claim in his original complaint. However, I conclude that the August 24, 2000 order must be vacated to the extent that it denied petitioner leave to proceed on his claims of retaliation and failure to protect from harm for his failure to exhaust his administrative remedies. Petitioner will be allowed to proceed in forma pauperis on his retaliation claim but he will be denied leave to proceed on his failure to protect claim for his failure to state a claim upon which relief may be granted.

OPINION

I. MOTION FOR RECONSIDERATION

Rule 60(b)(6) permits relief from a judgment for "any . . . reason justifying relief from the operation of the judgment." Pursuant to Fed. R. Civ. P. 60(b)(6), I am persuaded that vacation of a portion of the August 24, 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 petitioner has not exhausted the remedies available to him. Therefore, I will grant petitioner's motion pursuant to Fed. R. Civ. P. 60 and vacate the judgment to allow consideration of petitioner's claims of retaliation and failure to protect.

II. LEAVE TO PROCEED

Because petitioner is a prisoner, I must screen his claims of retaliation and failure to protect and dismiss them if they are "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c). The facts as alleged by petitioner are included in the August 24, 2000 order denying petitioner leave to proceed and will not be repeated here.

A. Retaliation

I understand petitioner to be alleging that respondents Thurman, Picard and other unknown staff retaliated against him for complaining about the attack by another prisoner, Flores by assigning him and Flores to the same job following the altercation, by firing him from his job and by terminating him from an alcohol treatment program. A prison official who takes action against a prisoner to retaliate against the prisoner's exercise of a constitutional right may

be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, a plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient simply to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. Reading petitioner's complaint liberally as I am required to do at this stage, see Haines, 404 U.S. at 520-21, I find his allegations sufficient to state a claim upon which relief may be granted. Petitioner will be granted leave to proceed in forma pauperis against respondents Thurman and Picard for their involvement in firing petitioner from his job. Although petitioner has not identified which prison officials assigned him to the same job as Flores after the altercation or terminated his participation in the alcohol treatment program, he will have to conduct formal discovery promptly to uncover the names of the persons he alleges are directly responsible for these acts, see Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981), and amend his complaint to include these individuals as defendants. If petitioner fails to discover the names of the unknown staff at Kettle Moraine Correctional Institution, he will be unable to serve them with his complaint and thus will be unable to recover against them, if recovery is warranted.

B. Failure to Protect

I understand petitioner to be alleging that respondents violated his Eighth Amendment rights by failing to take adequate measures to prevent him from an assault by another inmate. The Eighth Amendment, as applied against state officials through the Fourteenth Amendment, gives prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). To state such a claim, a plaintiff must establish that prison officials were deliberately indifferent to the possibility of an attack, effectively condoning an attack. See id. See also Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996) ("In failure to protect cases, '[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety.'") (quoting McGill v. Duckworth, 944 F.2d 344, 349 (7th Cir. 1991)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. See Farmer v. Brennan, 511 U.S. 825, 847 (1994). The prison official must 1) be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; and 2) the official must draw that inference. See Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. See id. at 208.

Petitioner alleges that in October 1999, he told his supervisor Conrad Reedy that Flores had a problem and asked his supervisor to keep Flores away from him; on November 6, 1999, petitioner told his supervisor that he was concerned for his safety; at some point, petitioner spoke to his supervisor's assistant Kathy Shea about his conflict with Flores; and on November 9, 1999, petitioner was assaulted by Flores. Petitioner has failed to name Conrad Reedy or Kathy Shea as respondents. Because petitioner has not alleged that he informed any of the respondents about his concerns for his safety or that Reedy or Shea informed any of the respondents about his concerns, he has failed to allege facts sufficient to establish that any of the respondents knew that there was a substantial likelihood that petitioner would be assaulted and failed to take reasonable protective measures. Petitioner will be denied leave to proceed in forma pauperis on his failure to protect claim.

ORDER

IT IS ORDERED that

1. Petitioner Steven Conway's motion for relief from the judgment in this case pursuant to Fed. R. Civ. P. 60 is GRANTED;

2. The judgment entered on August 24, 2000 is VACATED. Further, the portion of the order entered on August 24, 2000, dismissing petitioner's retaliation and failure to protect

claims for failure to exhaust administrative remedies is VACATED; in all other respects, the order remains the same;

3. Petitioner's request for leave to proceed in forma pauperis on his retaliation claim against respondents Mr. Thurman, Mr. Picard and unknown KMCI staff is GRANTED;

4. Petitioner's request for leave to proceed in forma pauperis on his failure to protect claim is DENIED without prejudice because of his failure to allege personal involvement of any of the named respondents;

5. Service of this complaint will be made promptly after petitioner submits to the clerk of court two (2) completed marshals service forms and three (3) completed summonses, one for each respondent and one for the court. Enclosed with a copy of this order are sets of the necessary forms. If petitioner fails to submit the completed marshals service and summons forms before November 10, 2000, or explain why he cannot do so, his complaint will be subject to dismissal for failure to prosecute.

6. In addition, petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten

or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondent or to respondent's attorney.

7. The unpaid balance of petitioner's filing fee is $57.57; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 26th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge