IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ABRAHAM McCORMICK,

Petitioner,

v.

JON E. LITSCHER, MIKE WILSON,
FRED E. FIGUEROA and KEENAN,

Respondent.

ORDER

00-C-565-C

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This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Whiteville Correctional Facility in Whiteville, Tennessee, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a

prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). 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).

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

I. PARTIES

Respondent Jon E. Litscher is Secretary of the Wisconsin Department of Corrections. Respondent Mike Wilson is a social worker for Racine Correctional Institution in Wisconsin. Respondent Keenan is a member of the program review committee at Racine Correctional

Institution. Respondent Fred E. Figueroa is Warden at Correctional Corporation of America's Whiteville Correctional Facility.

II. RAPE

At approximately 8 p.m. on February 26, 2000, petitioner was in his room at Whiteville Correctional Facility. Three large, muscular men came into petitioner's room, locked his door and put up a curtain. The men were serving life sentences without parole. One of the men knocked petitioner down, making him dazed and dizzy. The other two men stripped off petitioner's pants and raped him. They "bust" petitioner's head and scraped skin off his arms, knees and back. After the men finished raping petitioner, they told him that they would kill him if he told anyone. Since the rape, petitioner has been afraid for his life and will not tell anyone in authority. Petitioner does not know what his family would think of him if they ever found out. Petitioner has horrible nightmares in which he is raped over and over again. Petitioner is twenty-two years old and must shave his head because he has gray hair from being worried.

Petitioner begged respondents Mike Wilson and Keenan not to transfer him from Racine Correctional Institution to Correction Corporation of America's Whiteville Correctional Facility because he did not want to be so far away from his family.

Respondent Figueroa houses medium security prisoners with maximum security prisoners who are serving life sentences. Wherever petitioner is housed while at Whiteville Correctional Facility, he will be around hardened criminals with life sentences and nothing to lose.

DISCUSSION

I. STATE ACTOR REQUIREMENT

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such right. See Gomez v. Toledo, 446 U.S. 635, 640 (1980). All of the respondents in this action qualify as persons acting under color of state law, including respondent Fred Figueroa, who is an employee of Corrections Corporation of America, a private enterprise. See, e.g., Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (firm operating prison is state actor because firm performed "traditional state function" of operating a prison); Giron v. Corrections Corp. of America, 14 F. Supp.2d 1245, 1249 (D.N.M. 1998) (privately employed correction officer is state actor because he performed state function of incarcerating citizen).

II. VENUE AND JURISDICTION

According to petitioner's allegations, many or all of the acts giving rise to his claims took place outside this jurisdiction. Moreover, it appears from his allegations that respondent Figueroa is not a resident of the state of Wisconsin or otherwise subject to the jurisdiction of this court. Because such defects in venue and personal jurisdiction can be waived, it is appropriate to consider the substance of the claims in petitioner's proposed complaint.

III. TRANSFER OUT-OF-STATE

I understand petitioner to make two arguments related to his transfer to a Corrections Corporation of America facility in Tennessee: (1) that the transfer violates his right to be close to his family and (2) that the transfer violates his right not to be housed with maximum security prisoners who are serving life sentences.

"A prisoner has no due process right to be housed in any particular facility." Whitford v. Boglino, 63 F.3d 527, 532 (7th Cir. 1995); see also Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (prisoner has no legally protected interest "in [his] keeper's identity"). In Pischke, the court of appeals concluded that the housing of Wisconsin prisoners with private prisons in other states did not violate the Thirteenth Amendment. See Pischke, 178 F.3d at 500. In addition, the court stated that it could not "think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner

in a prison owned by a private firm rather than by a government." Id. The court's conclusion in Pischke that Wisconsin prisoners could be housed in other states defeats any claim petitioner may be trying to be make that his placement far from his family violates any constitutional provision.

Before addressing petitioner's second claim related to his transfer, I note that the web page for Corrections Corporation of America indicates that Whiteville Correctional Facility is a medium security facility. See http://www.correctionscorp.com/locations.html (last visited Nov. 17, 2000). Even assuming that the prison is housing maximum-security inmates, petitioner has no right to be housed only with other medium-security inmates. See, e.g., Whitford, 63 F.3d at 532 ("a transfer to another prison, even to one with a more restrictive environment, is not a further deprivation of an inmate's liberty under the Due Process Clause itself because the prisoner could have been initially placed in a more restrictive institution"). I conclude that petitioner's claim that his transfer to Whiteville Constitutional Facility violated the Constitution is legally frivolous.

IV. FAILURE TO PROTECT

I understand petitioner to be alleging that respondents Litscher, Wilson, Figueroa and Keenan have failed to protect him from being harmed by other inmates. The Eighth and

Fourteenth Amendments give prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a case alleging a defendant's failure to protect a prisoner from harm, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate also must prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996) (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). 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, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and 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. 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." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

Petitioner has made no allegation that any of respondents knew that he was likely to be raped or otherwise attacked by inmates at Whiteveille Correctional Facility. Indeed, petitioner alleges specifically that he "will not tell anyone in authority" what happened. The fact that petitioner was housed at Whiteville Correctional Facility with prisoners serving life sentences does not support an inference that respondents knew there was a substantial risk that petitioner would be raped. Petitioner's claim that respondents failed to protect him in violation of the Eighth Amendment will be dismissed for failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that:

1. Petitioner Abraham McCormick's request for leave to proceed in forma pauperis on

his claim that respondents transferred him to an out-of-state prison in violation of the Constitution is DENIED because the claim is legally frivolous;

2. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents failed to protect him from harm in violation of the Eighth Amendment is DENIED for petitioner's failure to state a claim upon which relief may be granted;

3. The unpaid balance of petitioner's filing fee is $139.47; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will be recorded against petitioner pursuant to § 1915(g); and

5. Ths case is DISMISSED and the clerk of court is directed to enter judgment and close the file.

Entered this 20th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge