IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CEDRIC JOHNSON,

Plaintiff,

v.

PHIL KINGSTON,
TIM DOUMA, JACK KESTIN and
BILL PUCKETT,[1]

Defendants.

ORDER

03-C-0143-C

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Defendants have filed a motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), contending that plaintiff's claim that he was transferred to Waupun Correctional Institution in retaliation for his protected legal activities fails to state a claim upon which relief may be granted. In support of the motion, defendants have submitted the administrative record of the proceedings of two separate program review committees that have decided the question of plaintiff's housing placement. Defendants suggest that the

[1] In his complaint, plaintiff misspelled defendant Tim Douma's last name. Defendants have called this error to the court's attention and I have corrected the spelling in the caption of this order.

pleadings and record enhanced with the administrative records shows that the decision to transfer plaintiff was not based on retaliatory motives and that, in any event, plaintiff's claim for injunctive relief is moot and his request for money damages should be limited because the second program review committee was made up of individuals who are not alleged to have had a retaliatory motive to act and who have determined that plaintiff's placement at Waupun is proper.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997). Moreover, in a Rule 12(b)(6) motion to dismiss, all plaintiff's well-pleaded facts are taken as true, all inferences are drawn in favor of plaintiff and all ambiguities are resolved in favor of plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992).

Generally in a 12(b)(6) motion, the court examines only the allegations in the complaint to determine whether they are sufficient to state a cause of action. General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). If a district court considers matters outside the pleadings, Rule 12(b) requires that "the motion shall be treated as one for summary judgment" under Fed. R. Civ. P. 56. Under this

converted motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id. The consideration of outside matters without converting the motion may result in reversible error. See Carter v. Stanton, 405 U.S. 669, 671 (1972); see also Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 684 n.8 (7th Cir. 1994) (noting that reversal may be necessary if district court did not provide adversely affected party with notice and opportunity to respond); see also Malak v. Associated Physicians, Inc., 784 F.2d 277, 280-81 (7th Cir. 1986). "The courts, however, have crafted a narrow exception to this rule to permit a district court to take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment." General Electric, 128 F.3d at 1080-81 (citations omitted); see also 5A Wright & Miller, Federal Practice and Procedure § 1357 (2d ed. 1990) (noting that exception applies to "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). "This exception has allowed courts to avoid unnecessary proceedings when an undisputed fact in the public record establishes that plaintiff cannot satisfy the 12(b)(6) standard." General Electric, 128 F.3d at 1081.

Defendants suggest that this court should take judicial notice of the record of the program review committee proceedings rather than convert their motion to dismiss into a motion for summary judgment. They state that under Mass. v. Westcott, 431 U.S. 322, 323 n.2 (1977) and Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983), it

is proper for this court to take judicial notice of these records because the records are documents filed in a public office "whose accuracy cannot reasonably be questioned."

It may well be that the administrative record of the program review committee proceedings accurately reflect what occurred during or as a result of the proceedings. However, if the motion is not converted to a motion for summary judgment, plaintiff will have no opportunity to respond with evidence of defendants' alleged retaliatory motive that might exist outside the official record of the proceedings. Therefore, I will convert defendants' motion to dismiss into a motion for summary judgment.

Ordinarily, I will not require a plaintiff to respond to a motion for summary judgment without affording him an opportunity to conduct discovery to obtain evidence he might need to defend against the motion. A preliminary pretrial conference is scheduled to be held before the magistrate judge on July 15, 2003. At that time, he can work with the parties to schedule discovery deadlines and set the dates by which defendants are to file proposed findings of fact in support of their motion for summary judgment and plaintiff is to serve and file his response.

ORDER

IT IS ORDERED that defendants' motion to dismiss pursuant to Fed. R. Civ. P. 6 is converted to a motion for summary judgment. Briefing on the motion is STAYED

pending the preliminary pretrial conference to be held before the magistrate judge on July 15, 2003.

Entered this 30th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge