IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STACEY MILLER,

ORDER

Plaintiff,

04-C-255-C

v.

BRIAN BLANCHARD, JAC HEITZ, TIM HAMMOND and STATE OF WISCONSIN,

Defendants.

- -

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Plaintiff is presently confined at the Federal Correctional Institution in Ray Brook, New York.

Although he has paid the filing fee in full, because he is a prisoner, plaintiff's complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money

damages. This court will not dismiss plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Stacey Miller is a resident of Wisconsin confined at the Federal Correctional Institution in Ray Brook, New York. Defendant Brian Blanchard is District Attorney for Dane County, Wisconsin. Defendant Jac Heitz is an assistant district attorney for Dane County, Wisconsin. Defendant Tim Hammond is a homicide detective for the Madison Police Department in Madison, Wisconsin. Each of these defendants represent defendant "the State of Wisconsin."

On January 29, 2002, plaintiff was convicted in this court in a criminal case. United States v. Miller, 01-CR-071-C-02. From January 2002 until April 2002, plaintiff was housed in the Dane County jail in Madison, Wisconsin, while awaiting sentencing.

In February 2002, Ernest Miller was located in the same cell block in the jail as

plaintiff. Miller was charged with first degree murder along with co-perpetrators Joey Fange and Persie Teague. All three men belonged to the "Gangster Disciples." The murder involved the killing of Dennis Richmond and had been unsolved for approximately four years. During February and March 2002, plaintiff and Miller became close. Miller eventually divulged to plaintiff the information that Fange had shot and killed Richmond. Miller told plaintiff about the role Teague played.

Plaintiff contacted defendant Hammond with the information he had about the Richmond murder case. Defendant Hammond met with plaintiff and his attorney, Krista Ralston, during March 2002. At the meeting Ralston and Hammond agreed orally that the district attorney's office would request the United States Attorney's office to petition this court to reduce plaintiff's sentence if plaintiff's information helped in the investigation or prosecution of the Richmond murder defendants or helped turn the defendants against each other and led to plea agreements. Hammond stated that he could not promise how much plaintiff's sentence would be reduced. However, Hammond had conferred with defendant Heitz, who told Hammond that if plaintiff's information was helpful to the district attorney's office in any way then the State of Wisconsin would seek a sentence reduction. Hammond stated that he would personally "go to bat" for plaintiff by contacting the United States Attorney's office himself in addition to pushing defendants Blanchard and Heitz to do the same.

Ralston informed plaintiff that it was common practice for sentence reduction agreements to be made informally and that there was no reason to distrust defendant Hammond's representations that he was speaking on behalf of defendants Blanchard, Heitz and the State of Wisconsin. Hammond agreed with Ralston's statement, assuring plaintiff that if the information plaintiff provided was used in any way, he and the district attorney's office would support him in federal court.

Plaintiff gave defendant Hammond a very detailed account of the Richmond murder and the events leading up to the murder. Hammond took extensive notes and stated the information sounded "very solid and will most likely be helpful." Hammond informed plaintiff and Ralston that he would type up his report and present it to defendant Heitz, who would determine how the information would fit into the state's case. About one week later, Ralston informed plaintiff that defendants Blanchard, Heitz and Hammond had accepted his information, made it officially part of the state's case and reaffirmed the agreement to seek a sentence reduction. Plaintiff called Hammond from the Dane County Jail and defendant Hammond told him, "We have a deal." Hammond told plaintiff that the prosecution would be using him as a witness for trial, that he was part of the state's case and that Hammond and Heitz agreed to contact the United States Attorney's office personally to ask it to reduce plaintiff's sentence "as much as possible." Plaintiff told Hammond of his concern that he was going to prison where his life could be in danger if other prisoners ever

discovered his assistance to the state. Hammond responded that he understood fully the nature of prison and that he and defendant Heitz would live up to their agreement, but that nothing could be done until after the prosecution of the murder case.

From March 2002 until February 2003, defendants Hammond, Heitz, Blanchard and other state agents used plaintiff's statement to confront Ernest, Fange and Teague about their respective roles in the murder as well as to pressure them to testify for the state. Defendant State of Wisconsin, through defendants Blanchard, Heitz and Hammond, gave Ernest, Fange and Teague a copy of plaintiff's statement in the form of a police report and listed plaintiff as a state witness.

Plaintiff was sentenced in federal court on April 12, 2002 and sent to the United States Prison in Beaumont, Texas. Plaintiff called Hammond from Beaumont to update him as to his new location. Plaintiff informed Hammond that Beaumont housed some Gangster Disciples and that he was concerned about their learning of his assistance to the state in prosecuting their fellow gang members. Hammond told plaintiff not to be concerned, that he would call the United States Attorney's office to find out whether plaintiff could change his location immediately or when the state's case was complete. Hammond stated he would not only ask for a sentence reduction, but ask that plaintiff be relocated to a prison that did not house Gangster Disciples.

Plaintiff's appellate attorney, Pat Urda, contacted defendant Heitz to find out

whether plaintiff was needed for the state's prosecution. Heitz affirmed his need for plaintiff and his intent to contact the United States Attorney's office to seek a sentence reduction and a relocation to a place that did not house Gangster Disciples. Defendant Heitz sent Urda a letter concerning his need for plaintiff's testimony in the state's case.

On February 9, 2003, defendants Blanchard, Heitz and Hammond, on behalf of defendant State of Wisconsin, dispatched sheriff deputies to Beaumont, Texas, to bring plaintiff to Wisconsin on a writ of habeas corpus ad testificandum. The sheriff deputies transported plaintiff to Wisconsin on February 11, 2003.

Upon seeing plaintiff as a witness against them, Ernest, Fange and Teague felt threatened. Confronted with plaintiff's evidence, Ernest and Teague decided to turn state's evidence and testify against Fange. Fange reacted to plaintiff's evidence by altering his defense from not guilty to self-defense. Defendants Blanchard and Hammond did not call plaintiff to testify at trial because they were able to use him to compel Ernest to testify for them against Fange who was convicted of first degree murder. However, Hammond stated that he would be speaking to Heitz about following up on his agreement with plaintiff because plaintiff was "very helpful" in the investigation and helped influence Fange's codefendants to testify against Fange.

Plaintiff's uncle, who was also a witness in the murder case, talked to defendant Hammond about contacting the United States Attorney's office on plaintiff's behalf for a

sentence reduction. Hammond told plaintiff's uncle that he was planning to contact the United States Attorney's office to "get the ball rolling" as well as contact Heitz to do the same for plaintiff.

During March and April, 2003, Fange and other Gangster Disciple members distributed the list of witnesses in his case to Gangster Disciples doing time in state and federal prisons. Upon returning to Beaumont on March 18, 2003, inmates confronted plaintiff about testifying against Gangster Disciples. Within federal prisons, inmates attempt to identify and eradicate other inmates who have informed or testified against others. This is especially true among gang members. This inmate policy is known as the "Convict Code" and contributes to the climate of violence that exists in most United States prisons. In maximum security prisons, over half of the inmates are convicted as a result of another inmate's testimony against them.

In separate letters, plaintiff wrote defendants Blanchard, Heitz and Hammond pleading for them to live up to the agreement and apprising them of the danger he faced at Beaumont. On or about March 26, 2003, defendant Blanchard met with Heitz and asked about plaintiff's communication. Heitz told Blanchard about plaintiff's assistance with the Richmond murder case, that he had authorized Hammond to represent the district attorney's office and the State of Wisconsin in agreeing to seek a sentence reduction if plaintiff's information was used in the case, that he had used plaintiff's information

successfully to coerce Ernest and Teague to help the prosecution and that he had reaffirmed the agreement with plaintiff several times through talks with plaintiff and his attorneys. Defendant Blanchard supported Heitz's agreement with plaintiff and told Heitz to move forward at his discretion to fulfill the state's obligation under the agreement.

Between March 28, 2003 and April 10, 2003, neither Blanchard, Heitz nor Hammond contacted the United States Attorney's office to seek a reduction in plaintiff's sentence or to inform it of the danger plaintiff faced for being a state witness and informant. Defendants were aware of the "Convict Code" that placed plaintiff in danger and were aware that plaintiff was being housed with Gangster Disciple gang members at Beaumont.

On April 3, 2003, Gangster Disciples at Beaumont made plans to kill plaintiff. On April 4, 2003, two or more Gangster Disciples tried to kill plaintiff by severing his right jugular vein, cutting from the right corner of his mouth to his ear and from his ear around to the nape of his neck. Plaintiff was rushed to the clinic, given medications, 40 stitches and placed in 23-24 hour per day cell lock down until February 2004.

On April 10, 2003, defendant Heitz contacted Assistant United States Attorney Vaudreuil about petitioning the court to reduce plaintiff's sentence. Heitz failed to notify Vaudreuil of the imminent danger plaintiff faced. Vaudreuil filed a motion for sentence reduction in this court on April 14, 2003.

On April 27, 2003, plaintiff wrote defendants Heitz and Blanchard, complaining that

they had set him up to be killed by failing to petition the United States Attorney's office for a sentence reduction, failing to place him in a safe prison, giving the Gangster Disciples his name as a witness and failing to inform the federal government about the danger in which it had placed him. He asked for $1,000,000 in compensation for their refusal to live up to the agreement and said that if they didn't agree, he would sue them for trying to get him killed. In addition, plaintiff requested copies of defendants' grievance forms so that he could file complaints about Hammond and Heitz.

On April 30, 2003, defendant Blanchard met with defendant Heitz about plaintiff's letter. Blanchard expressed outrage over plaintiff's threat to file complaints and sue defendants for compensation. Blanchard told Heitz that they should not tolerate such a complaint and asked Heitz whether he was opposed to punishing plaintiff by withdrawing their request for sentence reduction. Heitz responded that he had no objection to withdrawing the request particularly because plaintiff was an African-American prisoner who would not cause any real problem if they broke the agreement. Blanchard instructed Heitz to contact the United States Attorney's office and withdraw the state's support of the sentence reduction request and to not respond to plaintiff's request for complaint forms.

Heitz contacted the United States Attorney's office and withdrew the state's support of sentence reduction. On May 1, 2003, defendant Heitz contacted defendant Hammond and asked him whether he supported breaking the agreement with plaintiff. Hammond

asked Heitz why he was breaking the agreement, to which Heitz replied that plaintiff had sent a complaint to them about being attacked, that plaintiff was holding defendants responsible for the attack and that plaintiff wanted compensation under the threat of a lawsuit. Hammond responded by stating that because the agreement was verbal, defendants could simply pretend the agreement did not exist. As a result, Hammond agreed to support efforts to punish plaintiff by withdrawing state support for a sentence reduction. Hammond contacted the United States Attorney's office and withdrew his support of the sentence reduction.

On May 12, 2003, Assistant United States Attorney John Vaudreuil asked defendants Blanchard and Heitz whether they were withdrawing their support for reducing plaintiff's sentence. Defendants Blanchard and Heitz informed him that they were withdrawing their support. On May 13, 2003, the government withdrew its motion to reduce plaintiff's sentence.

Because of defendants' actions, plaintiff has suffered several permanent injuries to his skin, causing him to look horrific. In addition, he suffers from constant nightmares about being attacked with knives and has headaches, insomnia, excessive urination, uncontrollable bowel movements, emotional distress, paranoia, and post-traumatic stress syndrome.

From at least January 2002 to February 2004, defendants Blanchard, Heitz and Hammond entered into oral and written agreements with over fifty Caucasian inmates to

reduce or obtain lower sentences in exchange for assisting with state cases. Defendants Blanchard, Heitz and Hammond consistently fulfilled the terms of those agreements.

DISCUSSION

Plaintiff alleges that defendants 1) retaliated against him in violation of the First Amendment when they withdrew their support for reducing his sentence after he threatened to sue them; 2) failed to protect him from Gangster Disciples who tried to kill him at Beaumont; 3) violated his equal protection rights by treating his agreement with them differently than they treat agreements made with Caucasian inmates; 4) breached the oral agreement in violation of Wisconsin state law.

I note that defendants Blanchard and Heitz are prosecutors. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), and Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court held that prosecutors are entitled to absolute immunity when they act as advocates for the state in preparing for and initiating a prosecution but are protected only by qualified immunity when engaged in investigatory conduct such as evidence gathering. Buckley, 509 U.S. at 272-73; see also Newsome v. McCabe, 256 F.3d 747, 749 (7th Cir. 2001) (absolute immunity forecloses action against prosecutor in case where prosecutor declined to put plaintiff on trial a second time after court vacated his conviction). Plaintiff's allegations do not relate to actions that Blanchard and Heitz would have taken in preparing

for and initiating a prosecution. Therefore, defendants Blanchard and Heitz are not entitled to absolute immunity in this case.

In addition, plaintiff attempts to sue the State of Wisconsin for money damages. However, states are not liable for damages under § 1981 or § 1983. Williams v. Wisconsin, 336 F.3d 576, 580 (7th Cir. 2003) ("a state is not a 'person' subject to a damages action under § 1983"); Rucker v. Higher Educational Aids Board, 669 F.2d 1179, 1184 (7th Cir. 1982) (holding that states are entitled to sovereign immunity for § 1981 claims). Therefore, plaintiff will not be allowed leave to proceed on any of his claims against the State of Wisconsin.

A. Retaliation

Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). See also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons."). State officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. Although it is insufficient for an inmate simply to allege the ultimate fact of retaliation, Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), an

inmate need not allege a chronology of events from which retaliation may be inferred. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). To state a claim that officials retaliated against an inmate for filing a grievance, the plaintiff need only identify the act of retaliation and the grievance that sparked the retaliatory act. Higgs, 286 F.3d at 439.

Plaintiff alleges that after he sent the April 27, 2003 letter threatening to sue defendants for their inaction in reducing his sentence and moving him to a safer prison, defendants agreed to punish plaintiff by withdrawing their support for reducing his sentence.

A state official who takes action against an inmate to retaliate against him for exercising a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conducted was one of the reasons a defendant took adverse action against him. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. Nov. 20, 2003); see Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

Plaintiff's retaliation claims fail because he has no evidence that any of the defendants were retaliating against him for exercising a constitutional right. Plaintiff alleges that defendants retaliated against him after he threatened to file a lawsuit against them. Inmates do not have a First Amendment right to make threats. Ustrak v. Fairman, 781 F.2d 573,

580 (7th Cir. 1986). Therefore, even if defendants withdrew their support for reducing plaintiff's sentence because of plaintiff's threat, their action would not support a claim for retaliation.

B. Failure to Protect

Plaintiff alleges that defendants knew about the danger plaintiff faced as a state witness against Gangster Disciples and despite this knowledge, they failed to take steps to insure his safety, in violation of plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment. Although the Eighth Amendment affords inmates protection from assault by other inmates if the state officials acted with reckless disregard or with deliberate indifference to the prisoner's safety, Farmer v. Brennan, 511 U.S. 825 (1994); Jelinek v. Greer, 90 F.3d 242, 244 (7th Cir. 1996), there is nothing in plaintiff's allegations that suggests that defendants Blanchard, Heitz or Hammond had a duty to protect plaintiff while he was housed in federal prison in Beaumont, Texas. It is the responsibility of prison officials to protect inmates from harm, not that of state prosecutors or investigators. Even if I accept as true plaintiff's allegations that defendants Blanchard, Heitz and Hammond knew about the danger plaintiff faced and that they had agreed to request that plaintiff be relocated to a safer prison, defendants simply did not have the authority to take reasonable protective measures within the federal prison system. Farmer,

511 U.S. at 847 (a prison official may be liable for knowing of substantial likelihood that prisoner would be assaulted and failing to take reasonable protective measures). Thus, I will deny plaintiff leave to proceed in forma pauperis on his Eighth Amendment failure to protect claim.

C. Equal Protection

The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The equal protection clause prohibits state and local public officials from treating someone differently because of his or her membership in a particular group, unless the differential treatment is sufficiently justified by a government interest. Schroeder v. Hamilton School District, 282 F.3d 946, 950-51 (7th Cir. 2002). To state an arguable basis in fact or law for an equal protection claim, a plaintiff must show that the defendants acted with a discriminatory purpose or intent. Minority Police Officers Ass'n v. City of South Bend, 801 F.2d 964 (7th Cir. 1986)(citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65)). This discriminatory purpose or intent may be alleged by showing a systematic exclusion of persons because of their race or the unequal application of a law, policy, or system. Id. at 966-67.

Plaintiff alleges that defendants Blanchard, Heitz and Hammond violated his rights

to equal protection under the Fourteenth Amendment when they backed out on the agreement to reduce his sentence because of his race. Plaintiff alleges that Hammond stated that he had no objection to withdrawing the request to reduce plaintiff's sentence particularly because plaintiff was an African-American prisoner who would not cause any real problem if they broke the agreement. According to plaintiff, from January 2002 to February 2004, defendants entered into oral and written agreements with over fifty Caucasian inmates to reduce or obtain lower sentences in exchange for assisting with state cases and fulfilled their obligations under those agreements. These allegations are sufficient to raise an equal protection claim against defendants. Therefore, I will allow plaintiff leave to proceed on this claim.

D. Breach of Oral Contract

Plaintiff asks the court to exercise supplemental jurisdiction over his breach of contract claim against defendants. 28 U.S.C. § 1367(a) provides in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

The existence of supplemental jurisdiction is predicated on 1) the existence of a substantial federal claim and 2) a common nucleus of operative fact as to state and federal claims such

that the claims would ordinarily be tried in one proceeding. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Plaintiff is being granted leave to proceed in forma pauperis on one issue: whether defendants violated his right to equal protection under the Fourteenth Amendment. The evidence required to prove or disprove the elements of this federal claim is different from the evidence required to address plaintiff's state law claim. Therefore, I decline to exercise supplemental jurisdiction over plaintiff's breach of oral contract claim.

ORDER

IT IS ORDERED that

1. Plaintiff Stacey Miller's First Amendment retaliation, Eighth Amendment and state law breach of oral contract claims against defendants Brian Blanchard, Jac Heitz and Tim Hammond are DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) for plaintiff's failure to state a claim upon which relief may be granted ;

2. Plaintiff's may proceed against defendants Brian Blanchard, Jac Heitz and Tim Hammond on his claim that they violated his equal protection rights under the Fourteenth Amendment when they backed out of the agreement to reduce his sentence;

3. Defendant State of Wisconsin is DISMISSED from this case; and

4. Plaintiff is responsible for serving his complaint upon the defendants. A memorandum describing the procedure to be followed in serving a complaint on state

officials is attached to this order, along with 3 copies of plaintiff's complaint and blank waiver of service of summons forms.

5. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 14th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge