

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

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JERRY CHARLES,

Petitioner,

ORDER

01-C-276-C

v.

SGT. REICHEL and  
LT. PONTO,

Respondents.

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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 Oshkosh Correctional Institution in Oshkosh, Wisconsin, 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).

Petitioner contends that respondents Reichel and Ponto retaliated against him for filing an inmate complaint accusing Reichel of staff misconduct. Petitioner will be granted leave to proceed in forma pauperis on this claim.

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

#### ALLEGATIONS OF FACT

On March 1, 2001 at approximately 5:20 p.m., respondent Sgt. Reichel saw petitioner placing complaints in the Institution Complaint box. Approximately twenty

minutes later, respondent Reichel came to petitioner's cell and conducted a room search. Reichel searched only petitioner's legal papers; when Reichel came across a copy of a complaint petitioner had filed, he read the complaint, put it back and returned to the officer station. Many inmates saw respondent Reichel perform this search.

At approximately 6:00 p.m., respondent Lt. Ponto came to the unit to hold hearings on minor ticket infractions. Petitioner had a minor ticket that had been written by respondent Reichel and officer Gacne; the ticket prompted petitioner to file complaints that Reichel and Gacne had engaged in "staff misconduct." Approximately fifteen minutes before petitioner's minor infraction hearing, respondent Reichel went into the office and talked to respondent Ponto. After respondent Ponto found petitioner guilty of the minor infraction, Ponto told petitioner he would be placed on temporary lock-up for an investigation of a claim that petitioner had lied about staff.

Later, while petitioner was still on temporary lock-up, hearing complaint examiner Jenny Selvaws spoke to petitioner as part of her investigation of his complaints of staff misconduct. Petitioner told Selvaws what had happened, the reason he was in temporary lock-up and that petitioner was afraid to pursue the complaints any further.

When petitioner was released from temporary lock-up, he was moved to another unit on respondent Ponto's order. The move caused petitioner to lose the unit job that he had held for two and a half years. Petitioner did not receive any ticket for misconduct while he

was on temporary lock-up. According to the Department of Corrections definition, temporary lock-up is a nonpunitive status and upon release from that status, inmates are to return to their regular status. When an inmate is placed on temporary lock-up, the inmate's cell and job is held for him and he may return to them if the investigation does not result in disciplinary proceedings.

Petitioner filed a complaint about respondent Reichel's reading his complaint and taking retaliatory action against him; the complaint was denied.

## DISCUSSION

Petitioner contends that respondents Ponto and Reichel placed him in temporary lock-up and began an investigation on the charge that petitioner had lied about staff in retaliation for petitioner's having filed complaints against respondent Reichel and officer Gacne for staff misconduct.

Although petitioner has no constitutional right not to be placed in temporary lock-up, that restriction cannot be imposed in retaliation for the exercise of a constitutional right. 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, petitioner 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 to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. In addition, the facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275.

[T]he retaliation inquiry should be undertaken in light of the “general tenor” of Sandin, which “specifically expressed its disapproval of excessive judicial involvement in day-to-day prison management.” Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “[W]e should ‘afford appropriate deference and flexibility’ to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory.” Id. (citing Sandin v. Conner, 515 U.S. 472, 482 (1995)).

Id.

Petitioner alleges that respondent Reichel saw him file internal complaints at 5:20 p.m., that Reichel searched his cell and read a copy of a complaint at 5:40 p.m. and that Reichel spoke to respondent Ponto a little after 6:00 p.m. Fifteen minutes later, respondent Ponto found petitioner guilty of a minor infraction and placed him on temporary lock-up pending an investigation whether petitioner had lied about staff. Petitioner alleges also that he lost his unit job and cell after he was released from temporary lock-up, even though the investigation did not result in petitioner’s being written a ticket. Because petitioner has not alleged facts indicating the minor infraction of which respondent Ponto found him guilty, it is impossible to know whether his placement on temporary lock-up and the start of the investigation were likely a result of wrongful conduct by petitioner or the result of

retaliation. However, petitioner has alleged a chronology of events from which it can be inferred that respondents may have placed him in temporary lock-up and begun an investigation against him in retaliation for his filing a complaint alleging that respondent Reichel and another officer engaged in misconduct. Petitioner will be granted leave to proceed in forma pauperis on his retaliation claim.

## ORDER

IT IS ORDERED that

1. Petitioner Jerry Charles's request for leave to proceed in forma pauperis on his claim that respondents Sgt. Reichel and Lt. Ponto retaliated against him for filing an inmate complaint is GRANTED;
2. The unpaid balance of petitioner's filing fee is \$138.47; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and
3. 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 respondents or to respondents' attorney.

Entered this 11th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge