

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

AUSTIN C. SZYMANKIEWICZ,

Petitioner,

v.

DAVID PICARD, CONRAD REEDY,
HAYLEY HERMANN, DAVID TARR,
MIKE DITTMAN and DENICE DOYING,

Respondents.

ORDER

04-C-186-C

This is a proposed civil action for declaratory and monetary relief, brought under 42 U.S.C. § 1983 for violations of petitioner's rights under the First and Fourteenth Amendments. In addition, I understand petitioner to bring state law claims under Wis. Admin. Code §§ DOC 310.16(1), 309.155(5), 309.20(3)(f) and ch. 302. Petitioner, who is presently confined at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). 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).

Because petitioner has alleged sufficient facts to show that each respondent retaliated against him for exercising his right to file inmate complaints, petitioner may proceed in forma pauperis on his retaliation claim. I will exercise supplemental jurisdiction over petitioner's state law claims because they are closely related to his retaliation claim. Therefore, I will grant petitioner leave to proceed in forma pauperis on his state law claims against respondents.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. The Parties

Petitioner Austin Szymankiewicz is an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. As of January 2001, staff at the Kettle Moraine Correctional Institution assigned petitioner to work in the library and petitioner has served as the law clerk within the library. As part of his law clerk duties, petitioner assists other inmates at the institution in preparing and filing legal documents.

At all times relevant to petitioner's complaint, respondents occupied the following positions at the Kettle Moraine Correctional Institution: David Picard, Educational Director; Conrad Reedy, Librarian; Hayley Hermann, Inmate Complaint Examiner; David Tarr, Administrative Captain; Mike Dittman, Security Director; and Denice Doying, Correctional Officer Sergeant. Respondents Reedy and Picard are friends and commute to work together. Picard is Reedy's supervisor.

B. Initial Complaint

On April 29, 2003, petitioner submitted an inmate complaint about staff noncompliance with procedures regarding inmate law library use at night. Petitioner accused

library staff of placing select inmates who have no verifiable court deadlines on the evening law library call out list. On May 29, 2003, the inmate complaint examiner, respondent Hermann, contacted petitioner's supervisor at the library, respondent Reedy, about the complaint. Despite Wis. Admin. Code § DOC 310.16(1), which requires inmate complaints to remain confidential, respondent Hermann revealed petitioner's identity to respondent Reedy. Respondent Hermann dismissed petitioner's complaint, stating that petitioner must leave his personal feelings out of such matters, contact his work supervisor should problems arise and act professional in his position as law clerk if he wishes to maintain the position.

C. Conduct Report #1384672

On June 20, 2003, respondent Picard issued conduct report #1384672 against petitioner for allegedly violating Wis. Admin. Code § DOC 303.62 ("Inadequate Work Performance") and § DOC 303.63 ("Violations of Institution Policies and Procedures"). In the conduct report, Picard wrote: "During the lockdown the attached documents were found in the library. This is the second time in two months that inmate Szymankiewicz has received requests direct from inmates asking him to do legal work for them." Wis. Admin. Code § DOC 309.155(5) permits inmates to provide legal services to other inmates. Furthermore, Wis. Admin. Code § DOC 309.20(3)(f) requires prison staff to allow inmates to possess legal materials necessary for that inmate's actions or the actions of another whom

the inmate is assisting. In response to the conduct report, respondents Picard and Reedy refused to allow petitioner to go to his work assignment, receive his scheduled haircut and utilize the gym until petitioner saw the adjustment committee on July 3, 2003. Respondent Dittman reviewed and approved the conduct report issued by respondent Picard. Dittman knew that respondents Picard and Reedy were conspiring to retaliate against petitioner for submitting the April 29, 2003 complaint and failed to use his power to stop the retaliatory actions.

D. Offender Performance Evaluation

On June 23, 2003, respondent Reedy conducted an offender performance evaluation of petitioner. This was petitioner's first evaluation after working in the library for over two years and the first negative evaluation that petitioner had ever received. An assignment or job supervisor at a prison must complete and submit an offender performance evaluation on an inmate every six months. Reedy noted on the evaluation that petitioner had been issued two minor work-related conduct reports, gave petitioner's performance at the library a low score and recommended petitioner's reassignment to another job. Petitioner has never been issued any work-related conduct reports. According to the Kettle Moraine Correctional Institution inmate handbook, an inmate may be removed from his job assignment after

receiving two consecutive negative offender performance evaluations. Reedy never gave petitioner the opportunity to sign the evaluation or provide comments.

E. Complaint to Respondent Tarr

On July 3, 2003, the adjustment committee dismissed conduct report #1384672. Petitioner attempted to return to work in the library that afternoon, but respondent Reedy would not allow him to do so. That same day, petitioner wrote respondent Tarr, stating that petitioner should be allowed to return to his job assignment in the law library because: 1) pursuant to the administrative code, offender performance evaluations should be conducted every six months and that the June 23, 2003 evaluation was the first evaluation respondent Reedy had conducted on him; 2) the adjustment committee dismissed conduct report #1384672 against him; 3) the inmate handbook permits removal from a job assignment after two consecutive negative offender performance evaluations and respondent Reedy's evaluation was the first negative evaluation issued against him; 4) respondent Reedy's evaluation contained knowingly false information; and 5) respondent Reedy never told petitioner that he had given him a negative evaluation. Four days later, on July 7, 2003, Tarr responded to petitioner's letter, stating that a dismissed conduct report can be used against petitioner in terminating his assignment in the library and that respondent Reedy had issued petitioner a second negative offender performance evaluation on July 3, 2003.

It made no sense that respondent Reedy could issue a second offender performance evaluation against petitioner on July 3, 2003, because petitioner had not worked in the library since June 20, 2003. Respondent Tarr informed petitioner that he was being removed from his job assignment at the library. Respondent Tarr knew that respondents Picard and Reedy were retaliating against petitioner for submitting an inmate complaint about law library use and Tarr failed to use his power to stop the retaliatory actions.

F. Conduct by Respondent Doying

On July 1, 2003, respondent Doying came to petitioner's assigned room at 6:15 a.m. and informed him that he would be mowing lawns at the institution that day. Mowing lawns is considered the worst job at the Kettle Moraine Correctional Institution. Petitioner stated that he was not voluntarily or involuntarily unassigned to a job, to which respondent Doying responded that she was forcing all involuntarily unassigned inmates to mow lawns, except inmate Mike Kennedy. Petitioner informed Doying that he was waiting for a due process adjustment committee hearing concerning the future of his job assignment at the law library and that until the committee decides, she should consider him to be officially assigned to the library. Doying stated that she had spoken with respondent Reedy personally and that he had stated petitioner was terminated from his job at the library. Doying told petitioner that if he refused to mow lawns, he would be taken to segregation.

On July 2, 2003, respondent Doying came to petitioner's room again to inform him that he would mow lawns that day. Petitioner informed Doying that his social worker had confirmed that petitioner was still assigned to the library. Doying again gave petitioner the choice between mowing lawns or being placed in segregation. Petitioner asked Doying for a "lay-in" that day because he was feeling ill and nauseated from mowing lawns the previous day in the extreme heat. Respondent Doying denied petitioner's request. Petitioner was the only inmate who mowed lawns while still assigned to another job. Petitioner was not terminated from his job assignment at the library until July 3, 2003.

Because petitioner mowed lawns on July 1 and 2, 2003, petitioner injured his back and was placed on no-work status for two weeks.

Petitioner submitted complaint #KMCI-2003-23158 concerning, among other things, respondent Doying's treatment of him. In response to the complaint, on July 23, 2003, respondent Doying entered petitioner's room while he was away and removed all of his legal documents and took them to the guards' station. Doying went through all of petitioner's legal documents and confiscated various legal pleadings that petitioner had pending in the U.S. District Court for the Eastern District of Wisconsin, Case No. 00-C-0418. In addition, Doying confiscated legal documents of two other inmates that petitioner had in his possession. When petitioner returned to his room, he found many of his legal documents in disarray and noted that some documents for Case No. 00-C-0418 were missing.

Petitioner filed inmate grievance, #KMCI-2003-25097 about Doying's behavior on July 23, 2003. Respondent Hermann rejected petitioner's complaint despite her knowledge that confiscation and destruction of petitioner's legal documents violated institution rules and petitioner's rights under the Constitution.

On September 4, 2003, after petitioner went to his assignment at the library, respondent Doying entered petitioner's room and conducted a room search, confiscating and destroying petitioner's legal documents in Case No. 00-C-418. These documents were documents that the U.S. District Court for the Eastern District of Wisconsin had just replaced in that case.

On September 9, 2003, petitioner filed complaint #KMCI-2003-30271 concerning respondent Doying's destruction of his replaced legal documents. Respondent Hermann dismissed the complaint, stating that respondent Doying took highlighters from petitioner's room and had not taken any legal materials from petitioner's room for over a month and that was because those materials belonged to other inmates.

G. Other Complaints

Petitioner submitted numerous complaints regarding the actions of the respondents. These complaints include #KMCI-2003-22606 regarding the offender performance evaluation by respondent Reedy, #KMCI-2003-23115 regarding respondent Picard's

conduct report, #KMCI-2003-23621 regarding respondent Hermann's breach of confidentiality of the inmate complaint review process, #KMCI-2003-24362 regarding respondents Reedy and Tarr's termination of petitioner's job assignment in the library, #KMCI-2003-23158 regarding respondents Reedy and Doying's punishment of petitioner for filing a complaint against respondent Reedy. Each complaint was dismissed. Respondent Hermann dismissed all but two of those complaints. Petitioner's complaints demonstrated that respondents Reedy and Doying were retaliating against him and respondent Hermann knew about the retaliatory actions. However, respondent Hermann knowingly and intentionally facilitated, approved and condoned the retaliatory actions against petitioner by dismissing his complaints.

DISCUSSION

A. Retaliation

Petitioner alleges that each of the respondents was involved in a conspiracy to retaliate against him for filing inmate complaints. Respondents Reedy and Picard, who petitioner alleges are friends, issued a false conduct report and offender performance evaluation after they discovered from respondent Hermann that petitioner had filed an inmate complaint about staff noncompliance with library use procedures. Petitioner notes that up until that time, respondent Reedy had never conducted an offender performance

evaluation of him. Furthermore, Reedy conducted a second offender performance evaluation a couple of weeks later even though petitioner was not permitted to work in the library at the time. Respondent Dittman reviewed and approved Picard's conduct report knowing its contents were falsified in retaliation for petitioner's April 29, 2003 complaint. Petitioner claims that respondent Tarr knew that he had filed an inmate complaint about respondent Reedy and failed to stop the removal of petitioner from his library job in retaliation for that complaint. Respondent Hermann dismissed several complaints about petitioner's alleged mistreatment, despite her knowledge that the treatment was in retaliation for petitioner filing inmate complaints. Finally, respondent Doying forced petitioner to mow lawns after speaking with respondent Reedy about petitioner's law library job status and confiscated petitioner's legal documents after petitioner had filed complaints against her. Petitioner claims that these retaliatory acts violated his rights under the First and Fourteenth Amendments as well as Wisconsin law.

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. See id. 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.

To state a claim for retaliation, a petitioner need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. A petitioner satisfies this minimal requirement when he specifies the suit or complaint he filed and the act of retaliation. Id. Because petitioner has specified the complaints that sparked the retaliatory acts by each respondent, he will be allowed to proceed on his retaliation claim against all respondents.

B. State Law Claims

Petitioner asks the court to exercise supplemental jurisdiction over his state law claims. Although petitioner does not specify any state law claims, I understand petitioner to argue that respondent Hermann violated Wis. Admin. Code § DOC 310.16(1) (which requires complaints within the inmate complaint review system to remain confidential), that respondents Picard, Doying, Dittman and Hermann violated Wis. Admin. Code §§ DOC 309.155(5) (which permits inmates to provide legal services to other inmates) and

309.20(3)(f) (which requires Department of Corrections staff to allow inmates legal materials that are necessary for their own legal actions or the actions of another inmate whom the first inmate is assisting) and respondents Tarr and Reedy violated Wis. Admin. Code ch. DOC 302 by writing and approving false offender performance evaluations that effectively terminated petitioner from his library position.

Supplemental jurisdiction is to be exercised “over all other claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). By violating Wis. Admin. Code §§ DOC 310.16(1), 309.155(5), 309.20(3)(f) and ch. 302, respondents were able to take retaliatory actions against petitioner. In order to establish a prima facie case of First Amendment retaliation, a plaintiff must demonstrate that (1) his speech was protected under the First Amendment; (2) the defendants took adverse action against him; and (3) his conduct was a substantial or motivating factor in the defendants’ actions. Williams v. Seniff, 342 F.3d 774, 782 (7th Cir. 2003); Abrams v. Walker, 307 F.3d 650, 654 (7th Cir. 2002). Because petitioner’s state law claims are closely related to the alleged adverse actions taken by respondents in retaliation for petitioner’s exercise of his First Amendment rights, I will exercise supplemental jurisdiction over those claims. Petitioner will be allowed leave to proceed in forma pauperis on his state law claims against respondents.

ORDER

IT IS ORDERED that petitioner Austin C. Szymankiewicz's request for leave to proceed in forma pauperis is GRANTED on his retaliation and state law claims against respondents David Picard, Conrad Reedy, Hayley Hermann, David Tarr, Mike Dittman and Denice Doying.

- For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.
- Petitioner should keep 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 unpaid balance of petitioner's filing fee is \$140.52; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

- Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

Entered this 3rd day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge