IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAURICE D. RODGERS,

ORDER

Petitioner,

04-C-0798-C

v.

MATTHEW J. FRANK, RICHARD RAEMISCH, JOHN RAY, THOMAS G. BORGEN, LARRY JENKINS, MEL PULVER and PATRICIA GARRO,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Redgranite Correctional Institution in Redgranite, 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). 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).

Along with his complaint, petitioner submitted a letter and copies of the paperwork generated in connection with the inmate complaints and appeals in this case which are necessary to understand his claims. I will consider these submissions as part of his pleading. Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002). From these materials, I understand petitioner to be alleging the following facts.

## ALLEGATIONS OF FACT

### A. Parties

At the time of the events giving rise to this lawsuit, petitioner was confined at the Fox

Lake Correctional Institution in Fox Lake, Wisconsin. Respondent Frank is the secretary of the Wisconsin Department of Corrections. Respondent Raemisch is employed at the Department of Corrections. Respondent Ray works as a corrections complaint examiner. Respondent Borgen is the warden at Fox Lake Correctional Institution and respondent Jenkins is the deputy warden. Respondents Pulver and Garro are captains at Fox Lake.

B. Petitioner's Letter and Conduct Report

On July 12, 2004, a letter petitioner wrote to an inmate at another correctional institution was returned to him with a note stating that some of the language in the letter needed to be "cleaned up before it will be sent out per Cpt. Dommisse, signed by Sgt. Shrader." Petitioner did not believe any changes were necessary and filed an inmate complaint. Inmate complaint examiner Tom Gozinske recommended dismissal of petitioner's complaint on July 22, 2004. In concluding that the letter was properly returned to petitioner, Gozinske stated

> The letter in question was being sent to an inmate at another correctional institution and is subject to inspection by staff at both the sending and receiving institutions. Sergeant Shrader read the outgoing letter and returned it to inmate Rodgers with the instruction to remove offensive language.
>
> In the letter, inmate Rodgers states 'This joint is f_ up and they be on some major oe'cake s_!...dis to dem honkeys I know dat you readin' dis, but I rebuke you...f_ wit me and you chose ta die.'

> That constitutes disrespectful language and Sergeant Shrader correctly told inmate Rodgers to remove that language.

Respondent Borgen adopted Gozinske's recommendation the same day. Also on July 22, respondent Garro placed petitioner in temporary lock up; on August 2, petitioner received conduct report #1298937 charging him with "Disrespect" and "Threats" for his comments in the July 12 letter. Meanwhile, on July 27, petitioner appealed respondent Borgen's dismissal of his inmate complaint. In the appeal, petitioner challenged the correctness of the decision to require him to remove language from his outgoing letter. In addition, he asserted that his placement in temporary lock up was a retaliatory act. Respondent John Ray affirmed respondent Borgen's decision "with modification" that same day. Although respondent Ray agreed that the language highlighted by Gozinske was "inappropriate," respondent Ray concluded that

> returning the letter to the inmate with instruction to remove the offensive language was inconsistent with the rule. [Wis. Admin. Code § DOC] 309.04(4)(c) states that the institution may not deliver incoming or outgoing mail if it does any of the following, and then lists 12 specific reasons. . . . Correctional staff shall dispose of the letter consistent with § DOC 303.10. Accordingly, it is recommended this complaint be affirmed on appeal to acknowledge proper procedure was not followed at FLCI in this instance. The noted modification is that staff be advised of the provisions of 309.04 and that they should be followed verbatim in the future. Since the letter would have been disposed of under the above procedure, I fail to see how the complainant was harmed by having it returned instead.

Respondent Raemisch affirmed respondent Ray's decision on behalf of respondent Frank on August 3.

On August 5, a hearing was held regarding petitioner's conduct report. At the hearing, respondent Pulver found petitioner guilty of the conduct charged in the conduct report. Petitioner appealed respondent Pulver's decision directly to respondent Borgen who denied the appeal on August 24. This caused petitioner to file a second inmate complaint on August 30, 2004, in which he stated, "my complaint is solely the capricious denial of my appeal [from the finding of guilt on conduct report #1298937], where my due process rights were violated and the Wisconsin Administration Code was not followed." This complaint was dismissed at successive levels by respondents Borgen, Ray and Raemisch upon adoption of the recommendation of inmate complaint examiner Gozinske that

> In accordance with DOC 310.11(3), the investigation of a complaint filed under DOC 310.08(3) is limited to review of the record. A review of that record reveals that: 1) the disciplinary hearing officer did not note the subsection of DOC 303.16 on the DOC-84; and 2) the disposition specified on the DOC-84 does not match the disposition on the DOC-9. No other errors are noted.
>
> Therefore, it is recommended this complaint be affirmed solely as it relates to the above-identified errors. It is also recommended the disciplinary packet be returned to the hearing officer for correction of those errors. Finally, it is noted that this does not entitle inmate Rodgers to a new hearing.

Later, petitioner filed a third inmate complaint, contending in part that conduct report #1298937 was issued in retaliation for his first inmate complaint. His third complaint was rejected by inmate complaint examiner Gozinske and respondent Jenkins, the appropriate reviewing authority, on the ground that petitioner's complaint had been addressed

previously.

## DISCUSSION

### A. Institution Complaint Examiners

Before turning to the substance of petitioner's complaint, I will address the potential liability of inmate complaint reviewers and examiners. Petitioner has named as potential defendants all of the complaint examiners who reviewed his complaints. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869.

In order to satisfy the personal involvement requirement, a plaintiff need not show direct participation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2002). However, he must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional

violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle v. City of Marion, Ind., 321 F.3d 658, 663 (7th Cir. 2003). Recently, the court of appeals made it clear that in order to succeed on a failure to intervene theory, a plaintiff must prove that the defendant failed to intervene with deliberate or reckless disregard for the plaintiff's constitutional right. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). If inmate complaint examiners have authority to find in favor of an inmate on the ground that they believe a regulation or practice is unconstitutional, this might be sufficient to satisfy the personal involvement requirement. However, if they have such discretion, then they are entitled to absolute immunity for their decisions. It is well settled that prison officials are entitled to immunity for acts that are functionally equivalent to those of judges. Wilson v. Kelkhoff, 86 F.3d 1438, 1443-1445 (7th Cir. 1996).

Absolute immunity immunizes government officials from liability completely and is accorded to public officials only in limited circumstances. Burns v. Reed, 500 U.S. 478, 486-87 (1991). In most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Qualified immunity protects officials from liability for the performance of discretionary functions when "their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). "Truly judicial acts" are among the few functions accorded the more all-encompassing protections of absolute immunity. Forrester v. White, 484 U.S. 219, 226-27 (1988).

In determining whether government officials are entitled to absolute immunity, courts apply a functional approach, evaluating whether the official's action is functionally comparable to that of judges. Wilson, 86 F.3d at 1445. If the acts are ministerial and unrelated to the decision making process, they are not covered. Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993) (court reporter not entitled to absolute immunity for failing to provide a transcript promptly even though task is "part of the judicial function"). In deciding whether a government official is entitled to absolute immunity, a court must look at "'the nature of the function performed, not the identity of the actor who performed it.'" Buckley, 509 U.S. at 269 (quoting Forrester, 484 U.S. at 229).

Under the inmate complaint review system described in Wis. Admin. Code Ch. DOC 310, an inmate complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the examiner makes a recommendation, the reviewing authority has the authority to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate appeals

the decision of the reviewing authority, the corrections complaint examiner is required to conduct additional investigation where appropriate and make a recommendation to the secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the secretary must accept it in whole or with modifications, reject it and make a new decision or return it for further investigation.

"[T]he 'touchstone' for [the applicability of the doctrine of judicial immunity] has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" Snyder v. Nolen, 380 F.3d 279, 286 (7th Cir. 2004) (quoting Antonie, 508 U.S. at 435-36 (additional citations omitted)). When inmate complaint review personnel reject inmate complaints for procedural deficiencies or dismiss them as unmeritorious, they perform an adjudicatory function and therefore, are entitled to absolute immunity for those acts. Cf. Imbler v. Patchman, 424 U.S. 409, 430 (1976) (absolute immunity available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process"); Walrath v. United States, 35 F.3d 277 (7th Cir. 1994) (parole board members are entitled to absolute immunity for making parole revocation decisions); Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517 (7th Cir. 2001) (members of state board of elections entitled to absolute immunity for refusing to certify political candidates; decision was product of process much like court trial). Also,

absolute immunity is accorded officials when they make recommendations to dismiss or to affirm dismissals. Tobin, 268 F.3d at 522 (officials making recommendation entitled to immunity just as magistrate judge who makes recommendation to district court would be); Wilson, 86 F.3d at 1445 (absolute immunity protects against both actual decision making and any act that is "part and parcel" of the decision making process).

Because I conclude that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity, petitioner will not be allowed to proceed against respondents Borgen, Ray, Raemisch, Frank, Pulver and Jenkins. Respondents Borgen, Ray, Raemisch, Frank and Jenkins were involved in this case only to the extent that they recommended or affirmed the dismissal of one of petitioner's inmate complaints and respondent Pulver's involvement was limited to finding petitioner guilty of the conduct charged in the conduct report. This conclusion is consistent with the purpose behind affording absolute immunity, which is to free the judicial process from harassment and intimidation. Forrester, 484 U.S. at 226 ("the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have"). The potential for harassment or intimidation is particularly high in the prison setting given the unusually litigious tendencies of inmate populations.

B. Refusal to Send Letter

I understand petitioner to allege that his First Amendment rights were violated when prison officials refused to mail his letter on July 12, 2004 unless he removed certain language from it. Petitioner will be denied leave to proceed on this claim because he failed to name as respondents the officials responsible for censoring his mail. Petitioner alleges that his letter was returned to him on July 12 along with a note indicating that the letter was not mailed because of some of its language. The note contained two names, "Cpt. Dommisse" and "Sgt. Shrader." Petitioner has not named either of these individuals as respondents in this case. Moreover, petitioner does not allege that any of the individuals named as respondents were involved in any way in the decision to censor his letter. Therefore, petitioner has not stated a claim upon which relief can be granted and will be denied leave to proceed on this claim.

I note that even if petitioner had named the appropriate individuals as respondents, his allegations would not state a claim under the First Amendment. Claims regarding censorship of outgoing mail are analyzed under the standard of Procunier v. Martinez, 416 U.S. 396 (1974), rather than Turner v. Safley, 482 U.S. 78 (1987). Generally, when an inmate contends that prison officials have violated his constitutional rights, the question is whether the officials' conduct is reasonably related to a legitimate penological interest. However, because the interest in prison security is diminished for outgoing mail, the Supreme Court has applied a heightened standard of review for censorship of outgoing mail.

See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials."). Specifically, the question is whether the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier, 416 U.S. at 413. In this case, petitioner does not dispute that his letter contained the following language: "This joint is f_ up and they be on some major oe'cake s_!...dis to dem honkeys I know dat you readin' dis, but I rebuke you...f_ wit me and you chose ta die." Clearly, a prison official screening this letter could interpret this language as a threat to prison staff. There is no question that Sergeant Shrader's decision to require petitioner to remove this language from the letter furthered the substantial governmental interest in prison security and was narrowly tailored to effectuate that interest. Therefore, even if petitioner had named Sergeant Shrader as a respondent in this case, he would not be granted leave to proceed on his First Amendment claim. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986) (affirming dismissal of complaint attacking Illinois Department of Corrections rule authorizing prison officials to censor outgoing mail presenting threat to prison security).

B. Petitioner's Retaliation Claim

Prison officials may not retaliate against inmates for the exercise of a constitutional right, such as petitioning for the redress of grievances or seeking access to the courts by using a prison's administrative complaint system. See Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002); DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). "This is so even if the [retaliatory] action does not independently violate the Constitution." DeWalt, 224 F.3d at 618. Recently, the Court of Appeals for the Seventh Circuit eliminated the requirement that a "chronology of events from which retaliation may be inferred" must be alleged to state a claim for retaliation. Walker, 288 F.3d at 1009 (ruling that chronology requirement "would again raise the specter of fact pleading now firmly interred" by decision in Higgs v. Carver, 286 F.3d 437 (7th Cir. 2002)). Rather, to state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner must specify only "the bare minimum facts necessary to put the defendant on notice of the claim so he can file an answer." Higgs, 286 F.3d at 439. To satisfy this requirement, petitioner must "reference, at a minimum, the suit or grievance spawning the retaliation and the acts constituting retaliatory conduct." Walker, 288 F.3d at 1012 (Ripple, J., concurring).

Petitioner's allegations are sufficient to state a claim under this relaxed standard. He has identified the grievance that allegedly prompted the retaliation (an inmate complaint regarding the failure to send his letter on July 12, 2004) and the allegedly retaliatory conduct

(the issuance of the conduct report and placement in temporary lock up on July 22, 2004). Petitioner alleges that respondent Garro placed him in temporary lock up but the name of the individual who issued the conduct report is illegible; thus, petitioner will be allowed to press his retaliation claim against respondent Garro and respondent John or Jane Doe, who issued the conduct report. After respondent Garro has answered petitioner's complaint, the magistrate judge will hold a preliminary pretrial conference in this case by telephone. At that time, the magistrate judge will ask defendant Garro to identify if she can the name of the Doe defendant who issued petitioner's conduct report and give petitioner a deadline within which to amend his complaint to name the defendant identified so that he or she can be served with petitioner's complaint.

ORDER

1. IT IS ORDERED that petitioner Maurice Rodgers's request for leave to proceed in forma pauperis is GRANTED on his claim that respondent Patricia Garro and a John or Jane Doe retaliated against him for filing an inmate complaint in violation of his First Amendment rights.

2. Respondents Matthew Frank, Richard Raemisch, Thomas G. Borgen, Larry Jenkins John Ray and Mel Pulver are DISMISSED from this case.

3. 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 respondents or to respondents' attorney.

4. 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.

5. The unpaid balance of petitioner's filing fee is $145.85; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

6. 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 respondent Garro.

7. Petitioner submitted documentation of exhaustion of administrative remedies with his complaint. In this case, I have considered many of them in screening petitioner's complaint. Therefore, they have been appended to petitioner's complaint and will be considered part of the complaint.

Entered this 8th day of December, 2004

BY THE COURT:

BARBARA B. CRABB
District Judge