IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUIS VASQUEZ,

ORDER

Plaintiff,

06-C-743-C

v.

PHIL KINGSTON, Warden;
STEVEN SCHUELER, Security Supervisor, Capt.;
CURT JANSSEN, Security Supervisor, Capt.;
CAPT. GEMPELER, Security Supervisor;
BRUCE SIEDSCHLAG, HSC Manager;
OFFICER BAUER, Lieutenant;
BELINDA SCHRUBBE, HSU Manager;
GARY ANKARLO, Ph.D., PSUS;
SGT. PREIST; SGT. MEYER; SGT. GUTJAHR;
SGT. TONY; SGT. HILBERT;OFFICER II GUNRATT;
OFFICER II ROLINS; OFFICER KMIECIK;
OFFICER NICKEL;
and DOES 1-10,
all in their individual and official capacities,

Defendants.

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Plaintiff Luis Vazquez moves for reconsideration of an order dated March 14, 2007, in which I screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A and dismissed various claims for plaintiff's failure to state a claim upon which relief may be granted. Plaintiff argues that I erred in dismissing claims regarding his right of access to the courts and his right to be free from excessive force. In addition, he says that the screening order

failed to address a claim he intended to raise for denial of due process of law. I will address each of his arguments in turn.

Access to the Courts

In the screening order, I denied plaintiff leave to proceed on a claim that he was denied his right of access to the courts because he did not have adequate time in the law library to prepare the complaint for this case. I concluded that the claim was not ripe because it could not yet be determined whether limited law library time had any effect on his ability to litigate the very case he had just filed. In addition, I noted that even if the claim were ripe, it would have to be dismissed. As I read plaintiff's claim, he wanted more library time in order to put more legal authority in his complaint. Because the complaint is a statement of facts and not a brief requiring legal argument, I concluded that plaintiff could not show an injury. Plaintiff argues that this conclusion was an error because he was "forced to withdraw" several claims that he believed "may fail due to the lack of legal research and inadequate access to the law library." Dkt. #7, at 1.

It may very well be that the claims plaintiff abandoned lacked merit. However, at this stage, he cannot complain that he was denied his right of access to the courts. Plaintiff *chose* to withdraw those claims. Nothing any prison official has done prevented him from including those claims in his lawsuit. In fact, plaintiff *did* include those claims in his original

complaint, but he deleted them in an amended complaint that he filed before this court could screen the first complaint. Although those claims might have been dismissed after screening, they would not have been dismissed because plaintiff failed to support the claim with legal citations. Again, plaintiff was not required to make legal arguments in his complaint. Plaintiff might have had a claim for a denial of his right of access to the courts if he had asserted these claims and they were dismissed at the summary judgment stage for his failure to develop an adequate legal argument. He does not have such a claim now.

Searches and Uses of Force

I allowed plaintiff to proceed against numerous officials who plaintiff alleges conducted inappropriate body cavity searches or used excessive force against him. However, plaintiff believes that I erred in dismissing several officers to whom he complained after each incident.

Plaintiff is correct that prison officials may be liable under 42 U.S.C. § 1983 even if they did not directly participate in an alleged constitutional violation. However, it is well established that an official must have somehow *caused* the violation by directing the conduct of others, failing to intervene or creating a policy or practice. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Each of the defendants I dismissed in the screening order did not learn of the alleged constitutional violations until after they occurred, which means that their

actions or inactions after obtaining this knowledge could not have contributed to the violation. All of the cases plaintiff cites in his motion on this issue involve officials who learned of unconstitutional conduct while it was still occurring and could be stopped. Plaintiff's argument appears to be that the Constitution guarantees him the right to force high ranking officials to take disciplinary action against those he believes violated his rights. However, he points to no authority supporting this contention and I am not aware of any.

Alternatively, plaintiff appears to argue that the defendants who learned of the first use of force or search may be liable for failing to prevent the later searches and uses of force. As I discussed in the screening order, a failure to prevent a constitutional violation could be a basis for liability if the defendant knew that another violation was highly likely to occur without remedial action. However, plaintiff's allegations show that the violations were not the result of policy of the high-ranking defendants and each incident involved different officers and different circumstances. Nothing in plaintiff's complaint suggests that the dismissed defendants knew, or even should have known that plaintiff's rights would be violated. Distilled, plaintiff's argument is that the higher ranking defendants should be held liable simply because they are the supervisors of the officers directly involved in the alleged violations, but this theory of liability has no place in an action under § 1983.

Due Process

In his amended complaint, plaintiff alleges that officer Yunto confiscated his legal manual and placed it in the property office. In the screening order, I construed this allegation as a claim for a denial of plaintiff's right of access to the courts. I dismissed the claim because plaintiff did not allege that the loss of the legal manual prevented him from filing or litigating a nonfrivolous lawsuit.

In his motion, plaintiff says that I failed to consider another claim, which is that officer Yunto deprived plaintiff of his property without due process of law. Plaintiff is correct that I did not consider this claim. Nevertheless, I cannot allow plaintiff to proceed on a claim under the due process clause because he has not stated a claim upon which relief may be granted.

As long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). The state of Wisconsin provides several post-deprivation procedures for challenging the alleged wrongful taking of property. Wis. Stat. §§ 810 and 893 provide replevin and tort remedies. In particular, § 810.01 provides a remedy for the retrieval of wrongfully taken or detained property, and § 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because plaintiff has post-deprivation procedures available to him in state court, he cannot

claim that Yunto deprived him of due process by confiscating his legal manual.

ORDER

IT IS ORDERED that plaintiff's motion for reconsideration is DENIED.

Entered this 23d day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge