

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

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CHRISTOPHER MEDINA,

Plaintiff,

v.

SERGEANT MCDONALD,

Defendant.

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ORDER

10-cv-45-slc<sup>1</sup>

In this proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Christopher Medina contends that Sergeant McDonald retaliated against him for asserting his rights under the First and Fourteenth Amendments. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails

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<sup>1</sup> While this court has a judicial vacancy, it is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. For the purpose of issuing this order only, I am assuming jurisdiction over this case.

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. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the complaint, I conclude that plaintiff has failed to state a claim for retaliation against defendant. Therefore, his complaint must be dismissed.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

Plaintiff Christopher Medina is a prisoner at the Jackson Correctional Institution, in Black River Falls, Wisconsin. Defendant Sergeant McDonald is an employee at the Jackson Correctional Institution. On December 13, 2009, defendant took plaintiff's radio because plaintiff was playing it loudly. Approximately 30 minutes after defendant took the radio, plaintiff told defendant that defendant must issue a conduct report and plaintiff must be found guilty of a rule violation before he could be deprived of personal property. Immediately after plaintiff said this to defendant, defendant returned plaintiff's radio to him. The radio had a sticker attached to it stating: "return 12/14/09 at 12:45 [p.m]."

Defendant filled out a conduct report, but offered plaintiff a "summary disposition" of five days' loss of electronics. Plaintiff declined the offer and told defendant to send the conduct

report to the security director.

On December 14, 2009, plaintiff received a copy of the conduct report #1936640, written by defendant. On the conduct report, defendant did not explain that he had taken plaintiff's radio and offered plaintiff a summary disposition before issuing the conduct report. On December 23, 2009, a hearing was held regarding the conduct report. During the hearing, plaintiff told the hearing officer that defendant had summarily punished him by taking the radio and offering him a summary disposition instead of issuing a conduct report. Plaintiff showed the hearing officer the sticker that had been attached to his radio. Defendant told the hearing officer that he had taken plaintiff's radio for about half an hour to verify that it belonged to plaintiff. The hearing officer concluded that defendant did not follow proper procedures and found plaintiff "not guilty" of any charge.

## DISCUSSION

Plaintiff contends that defendant retaliated against him for asserting his constitutional rights. To state a claim for retaliation, plaintiff must: (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to

take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)).

Plaintiff contends that he engaged in a constitutionally protected activity when he protested defendant's seizure of his radio and told defendant that he must issue a conduct report before taking his property. Plaintiff contends that defendant retaliated against him by omitting facts from the conduct report and hearing regarding defendant's improper seizure of plaintiff's radio and the summary disposition offer. Assuming that plaintiff's protestations were not inconsistent with legitimate penological interests and were therefore constitutionally protected, plaintiff has satisfied the first element of a retaliation claim. Bridges, 557 F.3d at 551 (prisoner speech constitutionally protected if not inconsistent with legitimate penological interest). However, plaintiff has not alleged sufficient facts to satisfy the second element of a retaliation claim. In particular, plaintiff has not alleged that he experienced an adverse action that would likely deter constitutionally protected activity in the future. Although plaintiff is not required to prove at the pleading stage that defendant's alleged retaliatory actions would actually deter a person from engaging in the protected activity, plaintiff's complaint must allege sufficient facts to permit an inference that defendant's actions would "deter a person of ordinary firmness" from exercising his constitutional rights. Id. at 552. Plaintiff's complaint falls short in this respect. Plaintiff admits that he was playing his radio "too loud" and this caused defendant to seize his radio.

Also, plaintiff alleges that after he realized his property had been taken improperly, he asserted his constitutional rights and demanded a conduct report and hearing. After plaintiff asserted his rights, defendant issued a conduct report and a hearing was held. Plaintiff was able to present his case and the charges against him were dismissed. Although defendant may have omitted facts from the conduct report regarding his procedural errors, these omissions do not seem to have harmed plaintiff. The Court of Appeals for the Seventh Circuit has explained that a prisoner cannot state a claim for retaliation under such circumstances because the prisoner was not harmed and would not be deterred from exercising his constitutional rights in the future. Id. at 555 (“A single retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action”) (citing Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) (“A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . .”)); see also Peck v. Whelan, 2009 WL 2170497, \*4 (N.D. Ind. July 17, 2009) (holding that prisoner cannot state claim for retaliation based on single, dismissed retaliatory conduct report). Because plaintiff cannot state a claim for retaliation under the facts alleged in his complaint, his complaint must be dismissed.

ORDER

IT IS ORDERED that

1. Plaintiff Christopher Medina is DENIED leave to proceed on his retaliation claims against defendant Sergeant McDonald and his complaint is DISMISSED with prejudice for his failure to state a claim on which relief may be granted.

2. A strike will be recorded against plaintiff pursuant to § 1915(g) because one or more of his claims has been dismissed for failure to state a claim upon which relief may be granted.

3. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Jackson Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

4. The clerk of court is directed to close this case.

Entered this 1<sup>st</sup> day of March, 2010.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge