IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MITCHELL G. ZIMMERMAN,

OPINION AND ORDER

Plaintiff,

16-cv-827-bbc

v.

GARY BOUGHTON, T. KROENING-SKIME, ANTHONY L. BROADBENT and CATHY BROADBENT,

Defendants.

- -

Prisoner and pro se plaintiff Mitchell G. Zimmerman brings this lawsuit under 42 U.S.C. § 1983, alleging that state prison officials violated his rights under the First Amendment, the due process and equal protection clauses of the Fourteenth Amendment and state law by retaliating against him for filing grievances. Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A. After reviewing the complaint, I conclude that plaintiff may proceed on his First Amendment retaliation claims against defendants Anthony L. Broadbent and Cathy Broadbent. However, I am dismissing plaintiff's retaliation claims against defendants T. Kroening-Skime and Boughton as well as all of his purported equal protection, due process and access to the courts claims. I am also dismissing plaintiff's state law claims for his failure to comply with the requirements of Wisconsin's notice-of-claim statute.

I note that plaintiff filed a "supplement" to his complaint, dkt. #13, expanding upon his due process and equal protection claims. However, he must file a motion for leave to amend his complaint before I will consider these allegations.

Plaintiff's pro se complaint must be read generously, Haines v. Kerner, 404 U.S. 519, 521 (1972), and it contains the following factual allegations, which I must accept as true and read in the light most favorable to him. Perez v. Fenoglio, 792 F.3d 768, 774 (7th Cir. 2015).

ALLEGATIONS OF FACT

Plaintiff Mitchell G. Zimmerman is currently incarcerated at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin. On June 7, 2015, plaintiff was assigned to work as the "first Lead Law Clerk" for the WSPF Echo Unit. On several occasions, plaintiff "was threatened" with disciplinary action for requesting items necessary to do his job, including tape, a stapler and a hole-punch. Plaintiff filed numerous grievances about this issue with defendants Anthony Broadbent, the Echo Unit manager, and Cathy Broadbent, the law librarian, "seemingly to no avail."

Plaintiff filed several grievances related to his pay, which was "less than what normally would be paid." For example, plaintiff filed grievances with defendant Cathy Broadbent on July 10, 2015, and with defendants Cathy Broadbent and Anthony Broadbent on August 7, 2015. After defendant Anthony Broadbent informed plaintiff that he would not receive retroactive, overtime or weekend pay, plaintiff filed a grievance with Deputy Warden Troy Hermans on August 8. Plaintiff received a new "'Offender Work/Program/Placement' form"

on August 12, which adjusted his pay, and he received some retroactive pay on August 19, 2015.

Plaintiff also filed a grievance related to his leisure time. Because plaintiff worked from 8:30 a.m. to 7:45 p.m., six or seven days a week, he could not access "weights, phones, and generally anything else other inmates [could] access." When plaintiff tried to speak with defendants Cathy Broadbent and Anthony Broadbent about this issue, they told him that "'people need to make sacrifices for work.'" After plaintiff filed a written grievance, defendant Anthony Broadbent told plaintiff that Broadbent planned to cut plaintiff's hours and pay by reducing his work to part-time "'because [plaintiff] would not stop complaining.'" Plaintiff threatened to sue on the basis of defendant Anthony Broadbent's retaliatory threat. Defendant Anthony Broadbent later agreed to compromise by hiring a part-time worker, allowing plaintiff to have leisure time. On August 12, 2015, plaintiff filed a grievance stating that he intended to sue defendant Anthony Broadbent for threatening plaintiff and directing Echo Unit staff to discontinue plaintiff's law library time.

On August 21, 2015, defendant Cathy Broadbent fired plaintiff from his law clerk position, with "help" from defendant Anthony Broadbent. Plaintiff was terminated in part for "'[b]r[inging] forward some issues to be addressed . . . not allow[ing] staff time to address them or for the process to work . . . continually writ[ing] numerous staff trying to circumvent the process.'" On August 27, plaintiff filed a grievance with defendant T. Kroening-Skime, the WSPF program director, because he believed he was fired in retaliation for filing grievances. On September 2, 2015, defendant Kroening-Skime informed plaintiff he was fired

because of a negative evaluation. Defendant Kroening-Skime told him to follow the "exhaustion process" and affirmed the termination. Plaintiff also "contacted" defendant Gary Boughton, the warden, about his termination. Defendant Boughton "effectively did absolutely nothing but affirm the decision to fire plaintiff, siding with the other defendants."

On May 13 and May 20, 2016, plaintiff informed defendant Boughton of his intent to file this lawsuit and asked him to appoint someone other than defendant Cathy Broadbent to assist him with electronic filing and printing documents related to his case. Plaintiff was afraid that she would alter, destroy or refuse to file documents. Plaintiff was also concerned that she could negatively affect his meeting filing deadlines by refusing to timely print or file documents and that she could become aware of plaintiff's legal strategy before service. On May 25, 2016, defendant Boughton responded by assuring plaintiff that defendant Cathy Broadbent completes her duties in a professional manner and informing plaintiff of procedures to protect himself.

OPINION

Plaintiff contends that defendants Cathy and Anthony Broadbent retaliated against him by firing him for filing grievances, and that defendants Kroening-Skime and Boughton were "deliberately indifferent" to this retaliation, in violation of the First and Fourteenth Amendments to the United States Constitution. He also claims that defendant Boughton impeded his access to the courts and he alleges additional Wisconsin state law claims arising from these same allegations. I will address each of these claims in turn.

A. First Amendment Retaliation

To state a claim for retaliation, plaintiff must allege the following: (1) he was engaged in activity that was protected under the First Amendment; (2) defendant's conduct toward plaintiff was sufficiently adverse to deter someone of "ordinary firmness" from engaging in the protected activity in the future; and (3) defendant subjected plaintiff to the adverse treatment because of plaintiff's constitutionally protected activity. Gomez v. Randle, 680 F.3d 859, 866-67 (7th Cir. 2012); Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009).

In the context of a First Amendment retaliation claim, a prisoner's right to file a non-frivolous grievance or lawsuit has been recognized as constitutionally protected. Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). Being fired from a job would likely deter a reasonable person from filing grievances in the future. Lewis v. Henneman, No. 16-cv-733-jdp, 2016 WL 7336567, *2 (W.D. Wis. Dec. 16, 2016) (citing Harris v. Fleming, 839 F.2d 1232, 1236-37 (7th Cir. 1988)). At this stage, I must accept as true plaintiff's allegation that he was fired because he filed the grievances. See, e.g., King v. Ditter, 432 F. Supp. 2d 813, 817 (W.D. Wis. 2006) ("An inmate is not required to allege a chronology of events from which retaliation may be inferred but must allege the retaliatory act and describe the protected act that prompted the retaliation.").

To be individually liable under § 1983, defendants must be personally involved in the alleged violation of plaintiff's constitutional rights. Minix v. Canarecci, 597 F.3d 824, 833-34 (7th Cir. 2010). That means that each individual defendant must have a hand in causing the

violation, or at least "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." Jones v. City of Chicago, 856 F.2d 985, 992-93 (7th Cir. 1988).

Plaintiff's allegations against defendants Cathy Broadbent and Anthony Broadbent satisfy all of these requirements. Plaintiff says he raised informal complaints and filed grievances with both of them, which caused Cathy Broadbent to fire him with Anthony Broadbent's "help." That is more than enough at this stage for plaintiff to proceed on his retaliation claim against these two defendants.

Plaintiff's allegations against the other two defendants are much less direct. All that plaintiff alleges on the part of defendant Kroening-Skime is that he responded to plaintiff's August 27 grievance "stating that plaintiff was removed due to a negative evaluation. Plaintiff was told to follow the exhaustion process. Kroening-Skime affirmed the decision to fire plaintiff." Plaintiff also alleges that he contacted defendant Boughton on numerous occasions regarding the termination and improper retaliatory motive, and that defendant Boughton "effectively did absolutely nothing but affirm the decision to fire plaintiff, siding with the other defendants." It is unclear from plaintiff's complaint whether defendant Boughton in fact took any steps to affirm the termination or whether plaintiff is drawing inferences from inaction on defendant Boughton's part. From these allegations, plaintiff concludes that defendants Kroening-Skime's and Boughton's "actions or inactions [exhibited] deliberate/willful indifference to plaintiff's rights."

Plaintiff alleges that defendants Kroening-Skime and Boughton were told by plaintiff

that defendants Cathy Broadbent and Anthony Broadbent retaliated against him, but he does not show that they turned a blind eye to plaintiff's grievances or that they participated in either defendant's alleged violation of his rights. To the contrary, defendants Kroening-Skime and Boughton both responded to plaintiff's grievances and other contacts, although they did not respond as plaintiff wished they had. Plaintiff nowhere alleges that their responses (to affirm Cathy Broadbent's and Anthony Broadbent's actions, dismiss his grievances or otherwise fail to act affirmatively) subjected plaintiff to further adverse treatment because of his engaging in constitutionally protected activity. Therefore, I conclude that the allegations in plaintiff's complaint do not state a claim for retaliation against either defendant Kroening-Skime or defendant Boughton. If plaintiff has additional factual allegations about defendant Kroening-Skime's or defendant Boughton's involvement in his firing or in subjecting him to further constitutional deprivations, he will have to seek the court's permission to file an amended complaint that contains those additional allegations.

Plaintiff may proceed on his retaliation claims against defendants Cathy Broadbent and Anthony Broadbent. However, at summary judgment or at trial, plaintiff will not be able to rely on these allegations, but he must present evidence to prove his claims. In particular, he will have to show that each defendant fired him (or helped or participated in firing him) because plaintiff complained or filed grievances, rather than because they believed plaintiff performed poorly at his prison job.

B. Fourteenth Amendment Claims

1. Equal protection

As a general rule, in claims brought under the equal protection clause, plaintiffs allege that they are members of a "protected class" or that they have been arbitrarily classified as members of an "identifiable group," or a plaintiff may bring a "class of one" claim, which requires a showing that he or she has been intentionally singled out and treated differently from others similarly situated, for no rational reason. Engquist v. Oregon Department of Agriculture, 553 U.S. 591, 601 (2008); D.S. v. East Porter County School Corporation, 799 F.3d 793, 799 (7th Cir. 2015). However, plaintiff does not allege that defendants have discriminated against him on the basis of his membership in a protected class or group and class-of-one claims are generally disfavored in the prison context. Taliaferro v. Hepp, No. 12-cv-921-bbc, 2013 WL 936609, *6 (W.D. Wis. Mar. 11, 2013) (citing Engquist, 553 U.S. at 604; Abcarian v. McDonald, 617 F.3d 931, 939 (7th Cir. 2010)). In his complaint, plaintiff has not alleged any facts showing that he was intentionally treated differently from other, similarly situated inmates for no legitimate reason. Therefore, his complaint does not state an equal protection claim against any of the defendants.

In his supplement, dkt. #13, plaintiff states that he believes his claim "supports a 'class of one' equal protection claim" and speculates that he could obtain evidence supporting this claim during discovery. I am skeptical. As previously mentioned, plaintiff must get permission to file an amended complaint before I will give further consideration to this claim. If he does

so, plaintiff must allege facts that could support his claim; he cannot merely speculate that he might discover some facts later on.

2. Due process

To state a due process claim, plaintiff must allege he was deprived of a constitutionally protected liberty or property interest without the appropriate procedural safeguards to which he is entitled in that particular context. Doe v. Heck, 327 F.3d 492, 526 (7th Cir. 2003). However, a prisoner does not have a constitutionally protected interest in keeping a particular prison job. Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980); see also Holol v. Lundquist, No. 08-C-0832, 2010 WL 1961181, *3 (E.D. Wis. May 14, 2010). Because plaintiff did not have a constitutionally protected interest in keeping his job as a law clerk in the prison library, the due process clause is not implicated, and he cannot prevail on his due process claim against any of the defendants.

In his supplement, dkt. #13, plaintiff contends that "retaliation is a per se substantive due process violation." I know of no legal authority that would support this argument, but again, plaintiff must get permission to file an amended complaint before he can introduce any new claims or allegations.

3. Access to courts

Plaintiff also alleges that defendant Boughton's refusal to appoint someone other than Cathy Broadbent to help plaintiff with electronic filing and printing violated plaintiff's right

of access to the courts. "The right to litigate claims that have a reasonable basis in law or fact is protected by the First Amendment right to petition and the Fourteenth Amendment right to substantive due process." Prince v. Lloyd, No. 14-cv-677-jdp, 2015 WL 7176371, *2 (W.D. Wis. Nov. 13, 2015) (citing Snyder v. Nolen, 380 F.3d 279, 291 (7th Cir. 2004)). For prisoners, the right of access to courts "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1977). However, a prisoner asserting a denial of access claim must allege "an 'actual injury' in the form of interference with a 'nonfrivolous legal claim.'" Bridges, 557 F.3d at 553 (quoting Lewis v. Casey, 518 U.S. 343, 353 (1996)); Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006) (plaintiff must allege specifically the prejudice suffered as a result of defendants' conduct).

Plaintiff has not alleged facts sufficient to show that defendant Boughton's conduct interfered with plaintiff's ability to litigate a potentially meritorious claim. Plaintiff raises several fears and concerns related to defendant Cathy Broadbent's potential ability to interfere with his case, but he does not allege that defendant Boughton's conduct actually prevented him from litigating in any meaningful way or caused him to suffer any other injury.

Although I am skeptical of this claim as well, if plaintiff seeks the court's permission to file an amended complaint, he should clarify the specific prejudice suffered as a result of defendant Boughton's conduct. For example, plaintiff should specify whether defendant Boughton's conduct actually caused one of plaintiff's claims to fail. See, e.g., Marshall, 445

F.3d at 969 ("A prisoner states an access-to-courts claim when he alleges that even though he successfully got into court by filing a complaint or petition challenging his conviction, sentence, or conditions of confinement, his denial of access to legal materials caused a potentially meritorious claim to fail").

If plaintiff chooses to file a motion for permission to file an amended complaint, regarding this or any of the other claims discussed above that I am not allowing to proceed, he must follow two important rules. First, he must file a proposed amended complaint along with his motion. Second, that proposed amended complaint should completely replace the complaint that is now before the court. That is, plaintiff should start over and draft an entirely new complaint that contains any new allegations he wishes to bring along with his existing allegations. He cannot simply "supplement" his existing complaint with additional allegations in a separate document. The court cannot screen, and defendants cannot respond to, a "complaint" that is based on allegations spread across various documents in the record. All of plaintiff's allegations must be in one single document, to be considered.

However, I stress that plaintiff does not need to do any of this, if he simply wishes to proceed on his First Amendment retaliation claims against defendant Cathy Broadbent and defendant Anthony Broadbent. His allegations against those two are already sufficient to state a claim, and no amended complaint is necessary.

D. State Law Claims

Plaintiff raises state law claims under Wis. Stat. § 227.10, Wis. Adm. Code DOC §

309.155 and the common law doctrine of intentional infliction of emotional distress. However, plaintiff does not allege that he has complied with Wisconsin's notice-of-claim statute, Wis. Stat. § 893.82. Because plaintiff is asserting state law claims against state employees, he must satisfy this jurisdictional requirement. Weinberger v. State of Wisconsin, 105 F.3d 1182, 1188 (7th Cir. 1997) ("Section 893.82 is jurisdictional and *strict* compliance is required."). Under this statute, plaintiff may not bring his state law claims unless "within 120 days of the event causing the injury, damage, or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage, or death and the names of persons involved, including the name of the state officer, employee or agent involved." Wis. Stat. § 893.82(3). Because plaintiff fails to allege compliance with § 893.82, he "fails to state a claim upon which relief can be granted." Weinberger, 105 F.3d at 1188.

ORDER

IT IS ORDERED that

1. Plaintiff Mitchell G. Zimmerman is GRANTED leave to proceed on his claim that defendant Cathy Broadbent and defendant Anthony L. Broadbent retaliated against him for filing grievances in violation of the First Amendment.

2. Plaintiff's claims that defendant T. Kroening-Skime and defendant Gary Boughton retaliated or were deliberately indifferent to retaliation against him are DISMISSED without

prejudice.

3. Plaintiff's claims that defendants Cathy Broadbent, Anthony L. Broadbent, T. Kroening-Skime and Gary Boughton violated his rights under the Fourteenth Amendment due process and equal protection clauses are DISMISSED for failure to state a claim upon which relief may be granted.

4. Plaintiff's claim that defendant Gary Boughton violated plaintiff's right of access to courts under the First and Fourteenth Amendments is DISMISSED without prejudice.

5. Plaintiff's state law claims are DISMISSED without prejudice for failure to comply with Wisconsin's notice-of-claim requirement under Wis. Stat. 893.82.

6. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

7. Once the defendants answer the complaint, the clerk of court will set a telephone conference before Magistrate Judge Stephen Crocker. At the conference, Magistrate Judge Crocker will set a schedule for the case.

8. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer rather than defendants. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to

defendants or their attorney.

9. Plaintiff should keep a copy of all documents for his own files. If he does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

10. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 11th day of May, 2017.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge