IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TONY WALKER,
Inmate No. 0167841,

Petitioner,

ORDER

v.

01-C-095-C

DANIEL R. BERTRAND, PETER ERICKSEN, PATRICK BRANT, DENNIS NATZKE, WENDY BRUNS, CINDY O'DONNELL and JOHN RAY,

Respondents.

- -

This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Green Bay Correctional Institution in Green Bay, Wisconsin, contends that respondents conspired to harass and retaliate against him because he exercised his constitutional rights. He seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted an affidavit, averring that 100% of his income is being

taken to pay fees in other cases. Therefore, although he has not made the initial partial payment required under § 1915(b)(1), petitioner is permitted to bring this action pursuant to 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. 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 on three or more previous occasions the prisoner has had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove 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).

Because I find that petitioner has failed to state a claim upon which relief may be granted, I will deny his motion to proceed in forma pauperis on his retaliation and conspiracy claims.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Tony Walker is an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent Cindy O'Donnell is the deputy secretary of the Wisconsin Department of Corrections. Respondent John Ray is a corrections complaint examiner. The remaining respondents are employed at the Green Bay Correctional Institution: respondent Daniel Bertrand is the warden; respondent Peter Ericksen is the security director; respondents Patrick Brant and Dennis Natzke are security captains; and respondent Wendy Bruns is an inmate complaint examiner.

A. Conduct Report

The Wisconsin Department of Corrections issues inmate complaint forms so that inmates can seek redress of their grievances through the inmate complaint system. The instructions on the back of the forms tell inmates that they will not be punished for using the complaint system unless they lie about a staff member and make the lie known outside the complaint system. The forms also state that inmates "should talk to appropriate staff in an effort to informally resolve [their] complaint prior to filling out [the] form. If [inmates] have not done so the ICE has authority to direct [them] to [do so] in accordance

with DOC 310.11(7)."

In the past, petitioner has followed the instructions on the back side of the inmate complaint forms and has written grievances to respondent Bertrand regarding an assortment of problems. Prior to September 6, 2000, petitioner had never received a conduct report or been punished for his grievances to respondent Bertrand. The grievances contained hostile, abusive and threatening language.

On September 6, 2000, respondents Bertrand and Bruns were served by the United States Marshals with the summons and complaint in Walker v. Zunker, case no. 00-C-281-C. On October 27, 2000, petitioner was moved from the back side of the North Cell Hall where it is peaceful and quiet to the South Cell Hall where the younger inmates are housed and where it is very noisy. On October 30, petitioner wrote a letter to respondent Bertrand, complaining that the loud noise in the South Cell Hall was causing him to have migraine headaches. Petitioner asked to be moved back to the North Cell Hall. On October 31, respondent Bertrand responded to petitioner's grievance, stating that "housing assignments are decided on by security." On November 2, petitioner wrote a response to respondent Bertrand's letter, stating "you said 'housing assignments are decided on by security.' Well why else did I write to you? You're the chief security officer of this gay ass institution. . . . Now you're right, you do make housing assignments and you've been informed of this problem. So either cure this foul condition by moving me back to the North away from

these loud ass young punks or leave me here." Petitioner cited cases to support his complaint. Petitioner told respondent Bertrand that he would be "checking" the loud inmates about the noise and criticized Bertrand for refusing to follow the rules of the Wisconsin Administrative Code.

Respondent Bertrand received petitioner's November 2 informal letter of complaint on November 6. Petitioner believes that respondent Bertrand read it, did not like its contents and sent it to respondent Brant for disciplinary action. Petitioner believes that respondent Bertrand knew that petitioner could not be disciplined for his informal grievance and that the Wisconsin Administrative Code prohibits punishment for written grievances because on September 16, 1999, respondent Bertrand had reversed a disciplinary conviction against petitioner for a written grievance, stating that the Wisconsin Administrative Code prohibited the conduct report.

On November 13, 2000, respondent Bertrand issued petitioner a conduct report (no. 1107975). In the conduct report, respondent Bertrand acknowledged that petitioner's letter was a complaint about his housing assignment and other things. Respondent Bertrand alleged that the content of petitioner's letter violated §§ DOC 303.16 (abusive language) and 303.25 (making threats). Petitioner believes that respondent Bertrand knew or should have known that the Wisconsin Administrative Code prohibits petitioner from being disciplined for his letter of complaint.

On November 14, 2000, respondent Peter Ericksen reviewed the conduct report and petitioner's letter. Petitioner believes that respondent Ericksen knew or should have known that the Wisconsin Administrative Code prohibits petitioner from being disciplined for his letter. Respondent Ericksen approved the conduct report for processing and disciplinary action.

On November 27, the conduct report was the subject of a disciplinary hearing with respondent Natzke presiding as the adjustment committee. At the hearing, petitioner submitted a written statement outlining the instructions and note on the back side of the inmate complaint forms and quoting the contents of §§ DOC 310.05(15) and 310.06(6). In his statement, petitioner pointed out that:

> The courts also state that "[p]rison officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance" Bradley v. Hall, 64 F.3d 1276, 1282 (9th Cir. 1995) and "punishing an inmate for the content of his grievance rather than for filing it, is a distinction without a difference." Id. Also, I've used this language with the warden on many occasions in the past and the only reason the C.R. was written would be for retaliation, but on 9/16/99 the warden himself wrote that "the Code prohibits the conduct report." This conduct report must be dismissed.

Respondent Natzke found petitioner guilty of the alleged rule violations, stating "inmate is guilty of both charges based on contents of letter . . . ." Petitioner believes that respondent Natzke knew or should have known that the Wisconsin Administrative Code prohibits petitioner from being disciplined for his letters of complaint. Respondent Natzke punished

petitioner by imposing 5 days of adjustment segregation and 180 days of program segregation.

Petitioner appealed to respondent Bertrand, explaining that he had followed the instructions on the back side of the inmate complaint forms. Petitioner argued that the law and § DOC 310.16(6) prohibits the conduct report and that the disciplinary action was a clear case of retaliation. On December 20, respondent Bertrand affirmed the disciplinary conviction. The previous year, petitioner had received a conduct report (no. 976637) for complaining to respondent Bruns in business letter format. On September 16, 1999, respondent Bertrand had reversed the disciplinary conviction imposed on petitioner, stating that the "Code prohibits this conduct report."

B. Inmate Complaint

On November 28, 2000, petitioner filed an inmate complaint, stating that he was retaliated against when he was punished for the contents of his written grievance to respondent Bertrand. The next day, petitioner received both a receipt and a rejection for his retaliation complaint. Respondent Bruns rejected the complaint, stating that "once a conduct report is issued, as is the case here, the disciplinary process is invoked and complaints of this nature are outside the scope of the ICRS as noted under DOC 310.08(2)(a)."

On December 6, 2000, petitioner appealed the rejection of his retaliation complaint. On January 11, 2001, respondent corrections complaint examiner John Ray recommended that petitioner's appeal be dismissed. Petitioner believes that respondent Ray knew or should have known that the Wisconsin Administrative Code protects petitioner from being disciplined for his written complaint.

On January 27, respondent O'Donnell dismissed petitioner's appeal. Petitioner believes that respondent O'Donnell knew or should have known that the Wisconsin Administrative Code prohibits petitioner from being disciplined for his written complaint.

DISCUSSION

A. Retaliation

I understand petitioner to allege that respondents have taken unauthorized actions against him in retaliation for his writing complaints "in business letter format" to various prison officials and for his filing lawsuits against prison officials. As to his letters of complaint, petitioner's behavior was not protected and he fails to state any cognizable claim against respondents. As to his engaging in legal activity, petitioner has failed to allege a chronology of events from which retaliation may be inferred.

A prison official who takes action against a prisoner to retaliate against the prisoner for exercising a constitutional right may be liable to the prisoner for damages. See Babcock

v. White, 102 F.3d 267, 275 (7th Cir. 1996). Retaliation inquiries should be undertaken in light of Sandin v. Conner, 515 U.S. 472 (1995), in which the Supreme Court disapproved of excessive judicial involvement in day-to-day prison management. See id. Courts should "'afford appropriate deference and flexibility' to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." Id. (citing Sandin, 515 U.S. at 482) (other internal citations omitted).

To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. In addition, the facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275.

Petitioner contends that respondent Bertrand retaliated against him when he issued a conduct report charging disrespect and threat-making after petitioner sent him a letter criticizing his transfer to South Cell Hall. Despite petitioner's assertions otherwise, his informal communications "in business letter format" do not constitute the exercise of a constitutionally protected right, as required to pursue a viable retaliation claim.

Petitioner argues that his informal letters of complaint to prison officials implicate

two different constitutional rights: access to the courts and free speech. Petitioner asserts that by writing down his complaints "in business letter format," he is utilizing the inmate complaint review system and, thus, is exercising his right to access the courts. Petitioner's argument fails for two reasons. First, the language on the back side of the inmate complaint suggests that inmates talk to the appropriate official in an attempt to resolve their concerns on an informal basis pursuant to § DOC 310.11(7). The complaint form and the statute do not require inmates to discuss their concerns with prison officials before filing a formal inmate complaint. Instead, they provide the option of informal resolution to inmate complaint examiners. Because petitioner was not required to send letters to prison officials, his act falls outside the inmate complaint review system.

Second, if I were to accept petitioner's argument and take it to its logical end, any communication whatsoever by an inmate could be labeled "an effort to informally resolve [the] complaint" pursuant to the back of the inmate complaint form. An inmate could violate Wisconsin Administrative Code provisions, such as those prohibiting disrespectful language and threats, yet claim that he was exercising his right to access the courts. Prison officials would be liable for retaliation each time that they wrote a conduct report or otherwise punished an inmate for violating prison rules. Because I find that petitioner's informal letters of complaint do not fall within the inmate complaint review system, the letters do not implicate his right to access the courts.

Petitioner also cannot establish that he was exercising his right to free speech when he sent the letters to respondent Bertrand. An inmate is not stripped of all his First Amendment rights upon incarceration. Rather, he retains "those first amendment rights that are not inconsistent with his status as a prisoner." Rios v. Lane, 812 F.2d 1032, 1036 (7th Cir. 1987) (citing Pell v. Procunier, 417 U.S. 817 (1974)). Although state officials may not take retaliatory action against an individual to intimidate or chill the exercise of his or her constitutional right to free speech, the First Amendment does not protect the direct and potentially inflammatory criticism of a guard in the presence of other inmates. See Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986) (prison regulation prohibiting inmates from "being disrespectful to any employee" and from using "vulgar, abusive, insolent, threatening, or improper language toward any other resident [i.e., inmate] or employee" did not violate First Amendment in light of paramount need for prison discipline and control of violence).

In this case, petitioner was charged with being disrespectful and making threats in violation of the Wisconsin Administrative Code. See Wis. Admin Code §§ DOC 303.16, 303.25. Although the written format of petitioner's abusive and threatening language is perhaps less inflammatory than the verbal threats in Ustrak, the logic in that case applies here. The instructions on the back side of the inmate complaint form do not constitute a license for inmates to insult and threaten prison officials. Prisoners do not retain a free speech right to insult correctional officers in the context of informal complaints that violate

prison rules; such activity undermines prison officials' ability to maintain order and constitutes a threat to prison security. Because petitioner was not exercising a constitutionally protected right, his claim regarding his informal letter of complaint fails.

Petitioner also contends that respondents Bertrand and Bruns retaliated against him for filing a lawsuit against them. Although liberal pleading standards apply at this stage of the litigation, petitioner's allegations are insufficient to establish "'a chronology of events from which retaliation may be inferred.'" Black, 22 F.3d at1399. Over seven weeks after respondents Bertrand and Bruns were served with a complaint and summons in a suit brought by petitioner, petitioner was moved from North Cell Hall to South Cell Hall. Although it can be inferred from the allegations that respondent Bertrand was responsible for petitioner's transfer, a seven-week gap between petitioner's exercise of his constitutional right (access to the courts) and the alleged retaliatory act is so long that one cannot infer retaliation. Petitioner's allegations fail to establish a link between petitioner's filing of a lawsuit and respondent Bertrand's act of transferring him to a different cell block. In addition, petitioner has failed to allege facts showing that absent a retaliatory motive, the prison official would have acted differently (i.e., would not have moved him to South Cell Hall). Inmates are moved from cell to cell for any variety of security, personnel or safety reasons. Accordingly, petitioner will be denied leave to proceed in forma pauperis on his claim of retaliation.

B. Conspiracy

Petitioner alleges respondents conspired to harass and retaliate against him because he exercised his constitutional rights. To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. However, a bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. See Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999).

Nothing in petitioner's complaint supports such an inference. Petitioner has provided no explanation of how respondents would have conspired to harass and retaliate against petitioner. In addition, petitioner has failed to allege when the conspiracy was formed. See

Ryan, 188 F.3d at 860 ("A conspiracy is an agreement and there is no indication of when an agreement between [respondents] was formed.") The basis for petitioner's conspiracy claim appears to be that respondents Bertrand, Brant, Ericksen, Natzke and Bruns each played a role in imposing discipline for conduct reports against petitioner after he wrote an informal complaint and that respondents Bruns, Ray and O'Donnell each knew that the discipline was improper but did nothing to lift the punishment. These facts are insufficient to establish that respondents conspired to harass or retaliate against petitioner. Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim for his failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner Tony Walker is DENIED leave to proceed in forma pauperis and this action is DISMISSED with prejudice with respect to petitioner's retaliation and conspiracy claims because petitioner fails to state a claim upon which relief may be granted;

2. 28 U.S.C. § 1915(g) directs the court to enter a strike when an "action" is dismissed" on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." Because petitioner's claims fall under one of the enumerated grounds, a strike will be recorded against petitioner under § 1915(g);

3. The unpaid balance of petitioner's filing fee is $150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

4. The clerk of court is directed to close the file.

Entered this 5th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge