

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

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KEIFVIN MALONE,

Plaintiff,

v.

MICKEY THOMPSON,  
WAYNE MIXDORF and  
JOHN CLARK,

Defendants.

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ORDER

04-C-229-C

This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Plaintiff, who is presently confined at the Stanley Correctional Institution in Stanley, Wisconsin, claims that defendants violated his rights under the First Amendment by issuing a conduct report in retaliation for plaintiff's having written a letter complaining of prison conditions.

Although plaintiff has paid the entire filing fee, because he 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 plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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). 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). 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).

From his complaint and documents attached thereto, Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002) (documents attached to a complaint considered part of complaint), I understand plaintiff to allege the following facts.

#### ALLEGATIONS OF FACT

Plaintiff Keifvin Malone is an inmate of the Wisconsin state prison system. On June 18, 2003, he was placed at the Gordon Correctional Center in Gordon, Wisconsin. At all relevant times, defendant John Clark was the superintendent at the Gordon facility, defendant Mickey Thompson was the warden at a corrections facility in Oregon, Wisconsin and defendant Wayne Mixdorf was a sector chief at the Oregon facility.

Shortly after plaintiff was transferred to the Gordon facility, he submitted a medical request form for a new pair of tinted glasses. About a week later, a nurse at the facility denied plaintiff's request, indicating that the facility would only provide clip-on shades. Plaintiff filed an inmate complaint and ultimately was allowed to see an eye care professional for a determination of his need for tinted lenses.

On July 25, 2003, an eye care professional prescribed plaintiff tinted lenses. On August 13, 2003, a member of the staff at the Gordon facility called plaintiff into his office to ask plaintiff whether he still wanted a state-issued pair of glasses. Plaintiff responded that he was going to purchase a tinted pair, but still wanted the state-issued glasses as a backup.

The following day, plaintiff encountered Captain Alsum, an assistant superintendent at the Gordon facility, in the kitchen. Plaintiff asked Alsum why the state issued glasses weren't ordered earlier and Alsum said that it was because one of the nurses had indicated that plaintiff planned to purchase his own pair from a catalog. Plaintiff told Alsum that he wanted both his own pair and the state-issued glasses, to which Alsum responded that inmates were allowed only one pair of glasses. In addition, Alsum told plaintiff that he would send plaintiff out of the minimum security facility if plaintiff continued to push him.

On October 10, 2003, plaintiff wrote a letter to defendant Mixdorf, stating, "I have a great fear of retaliation, this fear is not exaggerated but very real and this is something that I can prove." In this letter, plaintiff asked defendant Mixdorf about the appropriate

reviewing body for his concern and indicated that he believed any internal procedure would be tainted with bias. On October 24, 2003, after receiving no response from defendant Mixdorf, plaintiff wrote a letter to defendant Thompson regarding his concerns about retaliation. Plaintiff did not indicate in either letter who he believed might retaliate against him or what motivation that person might have.

On October 26, 2003, Thompson sent plaintiff a letter advising him to use the facility inmate complaint procedures. Later that day, Alsum approached plaintiff in the kitchen and asked plaintiff whether the letter referred to him. Plaintiff responded that he believed Alsum's actions were racially discriminatory. Two days later, plaintiff took defendant Thompson's advice and filed an inmate complaint. In it, he alleged that he had been denied access to a copy of the Wisconsin Department of Corrections internal management procedures and complained about Alsum's comments. Alsum, who was the inmate complaint reviewer, denied plaintiff's complaint on the ground that plaintiff had raised more than one grievance, in violation of a state administrative code provision.

The next day, plaintiff was transferred to temporary lock-up in the Douglas County jail. On November 4, 2003, defendant Clark visited plaintiff in the Douglas County jail to discuss the letter plaintiff sent to defendant Thompson. Defendant Clark asked plaintiff: "Why didn't you contact me regarding your issues, why did you go over my head?" Plaintiff responded that he had addressed his concerns to defendant Thompson directly to let him

know about the racially discriminatory environment in the Gordon facility. Shortly after this meeting, defendant Clark issued a conduct report, accusing plaintiff of violating rules on lying, lying about staff and group resistance and petitions. As a result of the conduct report, plaintiff was given a higher security classification and was transferred to a medium security facility.

## DISCUSSION

Prison officials may not retaliate against inmates for the exercise of a constitutional right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. Otherwise lawful action “taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.” DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). Plaintiff has a protected constitutional right to complain about prison conditions. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002). Although it is insufficient for an inmate simply to allege the ultimate fact of retaliation, Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), an inmate need not allege a chronology of events from which retaliation may be inferred. Walker, 288 F.3d at 1009. To state a claim that officials retaliated against an inmate for filing a grievance, the plaintiff need only identify the act of retaliation and the grievance that sparked the retaliatory act. Higgs, 286 F.3d at 439.

Plaintiff has met this standard with respect to defendant Clark. He alleges that defendant Clark issued plaintiff a conduct report, resulting in his transfer to a medium security facility, in retaliation for plaintiff's complaints to defendants Thompson and Mixdorf about prison conditions. Accordingly, plaintiff will be allowed to proceed on his First Amendment claim against defendant Clark.

However, plaintiff will not be allowed to proceed against defendants Thompson and Mixdorf. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. 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). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Although it is not necessary that a defendant participate in the deprivation directly, an official will be held liable for a failure to act only if the deprivation occurs at his direction or consent or he fails to act with "deliberate or reckless disregard of plaintiff's constitutional rights." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985).

Plaintiff alleges that defendants Thompson and Mixdorf violated his rights under the First Amendment by failing to remedy or prevent defendant Clark's actions. Plaintiff does not indicate that defendants Thompson and Mixdorf even knew or could be assumed to have

known that defendant Clark issued the conduct report or that as a result, plaintiff had been transferred to a medium security facility. Although there is an indication that defendants Thompson and Mixdorf may have been defendant Clark's superiors, there is no place in a § 1983 action for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Without an allegation that these defendants even knew of the alleged retaliatory act, the issuance of the conduct report cannot be attributed to them. Because plaintiff has not stated a constitutionally cognizable claim against them, plaintiff will not be allowed to proceed against defendants Thompson and Mixdorf.

Finally, I note that to the extent plaintiff has alleged wrongful conduct of other prison officials, he will not be allowed to proceed against them. Plaintiff has not named them as potential defendants either in the caption or the body of his complaint.

#### ORDER

IT IS ORDERED that

1. Plaintiff Keifvan Malone is GRANTED leave to proceed on his claim that defendant John Clark violated his rights under the First Amendment by issuing plaintiff a conduct report in retaliation for plaintiff's complaint about prison conditions but DENIED leave to proceed on this claim against defendants Mickey Thompson and Wayne Mixdorf;

2. Defendants Thompson and Mixdorf are DISMISSED from this case; and

3. Plaintiff is responsible for serving his complaint upon the defendants. A memorandum describing the procedure to be followed in serving a complaint on state officials is attached to this order, along with the extra copies of the complaint and blank waiver of service of summons forms that plaintiff submitted.

4. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 25th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge