IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL HILL,

ORDER

Plaintiff,

04-C-732-C

v.

GARY THALACKER, GREGORY GOODHUE, MICHAEL BARTKNEHT, TERRY CARD and JOHN SHOOK,

Defendants.

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This is a proposed civil action for monetary damages relief, brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 ( 1971), and 28 U.S.C. § 1331. Plaintiff Michael Hill is confined at the Federal Correctional Institution in Oxford, Wisconsin. He contends that defendants Gary Thalacker, John Shook and Terry Card denied him a promotion at the Unicor Industries of the Oxford Correctional Institution because of his race and that all defendants acted individually and pursuant to a conspiracy in retaliating against plaintiff for filing an inmate complaint about the discriminatory promotional practices and for filing the present action. Plaintiff will be allowed to proceed on his claims with the limited exception of his claim that defendants are retaliating against

him for having filed this civil suit.

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 he 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. 28 U.S.C. § 1915A. 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); 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. See Haines v. Kerner, 404 U.S. 519, 521 (1972).

Plaintiff's initial filing had characteristics of both a habeas petition and a Bivens action. In an order dated September 6, 2004, I directed plaintiff to inform the court which type of pleading he intended. Plaintiff amended his complaint, making it clear that he is pursuing an action under Bivens. In an order dated October 7, 2004, I made clear that plaintiff's amended pleading would be the operative one in this case. In his amended

complaint, plaintiff refers to attached documents that are not attached. I assume that plaintiff is referring to the documents he attached to his initial submission. Accordingly, I will append these documents to the amended complaint and consider them as part of the amended pleading. From the amended complaint, I understand plaintiff to allege the following facts.

## ALLEGATIONS OF FACT

Plaintiff Michael Hill is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He is employed at Unicor Industries at the facility. Defendant Gary Thalacker is plaintiff's detail supervisor, defendant John Shook is the Unicor Associate Warden and Terry Card is the factory manager. Defendants Gregory Goodhue and Michael Bartknecht are both non-inmate supervisory employees at Unicor.

Plaintiff began working at Unicor on November 11, 2000. In late November 2003, plaintiff sought a promotion to pay grade #1. Defendants Thalacker, Shook and Card denied plaintiff's request and instead promoted white employees whom plaintiff had trained. On July 29, 2004, plaintiff filed an inmate complaint, alleging racially discriminatory promotional practices.

Beginning November 25, 2003, defendants conspired to harass, intimidate and punish plaintiff in retaliation for filing this inmate complaint. Specifically, defendant

Thalacker prevented plaintiff from working overtime when a group of inmates came to plaintiff's work area without permission; he frequently stood behind plaintiff monitoring his work; he followed plaintiff into the restroom or would wait outside and reprimand him if he took too long; he followed plaintiff into the business office even after giving him permission to go there and broke his assurance that plaintiff would receive a "solder card" that would essentially insure a promotion to pay grade #1. On one occasion, defendant Thalacker docked plaintiff's pay for being late when an officer failed to open a particular gate on time. Defendant Thalacker did not dock any pay from other Unicor employees when they were late a few days later for the same reason.

Defendant Goodhue ordered staff not to allow plaintiff to work overtime and initially provided no particular reason for this decision. When plaintiff asked defendant Card why he was prohibited from working overtime, defendant Card said it was because plaintiff had not been working during his regular shift. This was not true. In addition, defendant Goodhue walks in plaintiff's path so that plaintiff is forced to side-step him.

On one occasion, plaintiff went into the business office during his break. He had been carrying administrative grievances in which he had complained about certain Unicor employees at the time. Defendant Bartknecht asked plaintiff to see the papers and after reading them, wrongly accused plaintiff of making unauthorized photocopies. He then took plaintiff to defendant Thalacker, threatening plaintiff that if he did not admit to making

unauthorized photocopies, he would be fired. Defendant Thalacker punished plaintiff by prohibiting him from working overtime for seven days and defendant Bartknecht later increased this punishment to thirty days after receiving permission from defendant Shook. Defendant Bartknecht told plaintiff he would write him an incident report for being in an unauthorized area in possession of legal materials even though he caught another inmate repairing a radio and headphone using Unicor materials but did not issue him an incident report.

Plaintiff has brought these incidents to the attention of defendant Card, who has reacted with indifference. He has not explained why plaintiff has not been promoted to pay grade #1 and has allowed his employees to punish plaintiff without any documentation of wrongdoing. Plaintiff also complained to defendant Shook about the thirty-day suspension from overtime work. Defendant Shook instructed plaintiff to direct his concerns to defendant Card, Thalacker or Bartknecht and advised plaintiff that if he left things alone and did his job, the situation would change.

In September 2004, plaintiff attempted to have $145 processed for his filing fee in this case. The unit case manager with whom he dealt was defendant Thalacker's brother. Plaintiff later saw the two talking and learned that they hadn't spoken to one another for nearly a year before that time. Defendants continue to harass, intimidate and deny plaintiff a pay grade promotion in retaliation for filing this lawsuit.

## DISCUSSION

### A. Equal Protection

Plaintiff alleges that he was denied a pay grade promotion because he is (presumably) African American, while white inmates with less experience than he has are being promoted. Lawful imprisonment deprives convicted prisoners of many rights, but not the right to equal protection of the laws. Williams v. Lane, 851 F.2d 867, 871 (7th Cir. 1988) (citing Lee v. Washington, 390 U.S. 333 (1968)). Absent a compelling state interest, racial discrimination in administering a prison violates the constitutional guarantee of equal protection of the law. Black v. Lane, 824 F.2d 561, 562 (7th Cir. 1987) (black inmate stated cause of action by alleging racial discrimination in assignment of prison jobs).

Because petitioner is challenging the actions of federal officials rather than state actors, the equal protection analysis must proceed under the Fifth and not the Fourteenth Amendment. Markham v. White, 172 F.3d 486, 491 (7th Cir. 1999). Although the Fifth Amendment does not contain an equal protection clause, the Supreme Court has held that the amendment's due process clause prevents the federal government from "engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). Under either amendment, the constitutional guarantee of equal protection prohibits government actors from applying different legal standards to similarly situated

individuals. E.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

Discriminatory intent may be established by showing an unequal application of a prison policy or system. Minority Policy Officers Ass'n v. South Bend, 801 F.2d 964, 967 (7th Cir. 1986). According to plaintiff's allegations, defendants Thalacker, Shook and Card promoted whites to pay grade #1 but not plaintiff. Although this assertion, if proved, would provide some support for plaintiff's claim, there are undoubtedly numerous considerations that go into pay grade promotion determinations. Given the multitude of variables, plaintiff may have an uphill battle to prove that a discriminatory motive was the basis for the promotion denial. Nonetheless, he has identified the discriminatory act (failing to give plaintiff a pay grade promotion) and the basis for the discriminatory treatment (his race). Because this is sufficient to state an equal protection claim, I will allow plaintiff to proceed against defendants Thalacker, Shook and Card.

## B. First Amendment Retaliation

### 1. Retaliation for filing administrative complaint

Plaintiff alleges that defendants engaged in a variety of activities designed to harass and intimidate him in retaliation for his having filed inmate complaints about the allegedly discriminatory promotion decisions. A prison official who takes action in retaliation for a

prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not violate the Constitution independently; 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); Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000). Inmates have a protected right to complain about prison conditions.

To state a claim for retaliation, a plaintiff need not allege a chronology of events from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). It is sufficient to specify the complaint he filed and the act of retaliation. Id.; see also Fed. R. Civ. P. 8(a). Plaintiff has alleged that his claim is based on the complaint he filed alleging racial discrimination in promotional determinations and he has listed a number of retaliatory acts by defendants: Defendant Thalacker watched over plaintiff, docked him for pay, barred him from working overtime and denied him a solder card; defendant Goodhue denied plaintiff an opportunity to work overtime and intentionally walked in plaintiff's path; defendant Bartknecht accused plaintiff of making unauthorized photocopies and threatened to have plaintiff fired if he did not admit to it; and defendants Card and Shook have ignored plaintiff's complaints about these retaliatory acts. Because these allegations are sufficient to meet the applicable pleading requirements, I will allow plaintiff to proceed on this First Amendment retaliation claim.

2. Retaliation for filing this civil action

Plaintiff also alleges that defendants continue to harass, intimidate and deny him pay because he has filed this suit. In situations in which a plaintiff alleges that the defendants have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action. The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit. Because this exception is not applicable in this case, plaintiff's claim that he was retaliated against for filing the present action will be denied without prejudice to plaintiff's refiling it in a separate action.

C. Conspiracy

Finally, plaintiff alleges that defendants conspired to retaliate against him for filing an inmate complaint and that each engaged in the conduct described above pursuant to this conspiracy. Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought against federal officials under Bivens or 42 U.S.C. §1985(3). Walrath v. United States, 35 F.3d 277 (7th Cir. 1994)(conspiracy claim under Bivens); Benson v. United States, 969 F. Supp. 1129, 1135 (N.D. Ill. 1997) (§ 1985 does not have a state action

requirement comparable to that found in § 1983 and thus, federal officials may be sued under it) (citing Kaufmann v. United States, 840 F. Supp. 641, 648 (E.D. Wis. 1993)); see also Davis v. United States Dept. of Justice, 204 F.3d 723, 726 (7th Cir. 2000) (federal officials may not be sued in their official capacity under § 1985).

In pleading a conspiracy, it is sufficient for a plaintiff to indicate "the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). Although plaintiff will need to prove that there was "an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage'" to succeed on his claim, 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)), it is not necessary that he plead the overt act in order to state a valid claim. Walker, 288 F.3d at1007. Because plaintiff has identified the parties, general purpose and the approximate time frame of the alleged conspiracy, he will be permitted to proceed on his claim of conspiracy.

However, plaintiff should be aware that conspiracy claimants bear a heavy burden of proof. To succeed, plaintiff will need to adduce evidence showing that defendants reached an understanding to deprive him of his constitutional rights. Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003). In order to succeed on his claim under §1985(3), plaintiff will need to prove "(1) the existence of a conspiracy, (2) a purpose of depriving a person or class

of persons of equal protection of the laws, (3) an act in furtherance of a conspiracy, and (4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens." Green v. Benden, 281 F.3d 661, 665 (7th Cir. 2002) (citing Hernandez v. Joliet Police Department, 197 F.3d 256, 263 (7th Cir.1999)). Under either section, plaintiff may be able to prove the existence of an agreement through circumstantial evidence, "but only if it is sufficient to permit a reasonable jury to conclude that a meeting of the minds had occurred and that the parties had an understanding to achieve the conspiracy's objectives." Id. at 666; see also Williams, 342 F.3d at 785.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Hill is GRANTED leave to proceed on his claims that defendants Gary Thalacker, Terry Card and John Shook denied him a pay grade promotion because of his race, that defendants Thalacker, Card and Shook, Gregory Goodhue and Michael Barknecht retaliated against plaintiff for filing an administrative grievance about the allegedly discriminatory promotional practices and that all defendants conspired to retaliate against plaintiff for filing a grievance.

2. Plaintiff's claim that defendants have retaliated against him for filing the present action is DISMISSED without prejudice to his refiling it in a separate action.

3. Plaintiff is responsible for serving his complaint upon the defendants. A memorandum describing the procedure to be followed in serving a complaint on federal officials is attached to this order, along with 5 copies of plaintiff's complaint and blank waiver of service of summons forms.

5. 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.

6. 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 22nd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge