IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

ORDER

Plaintiff,

05-C-003-C

v.

MATTHEW J. FRANK; PETER HUIBREGTSE;
GARY BOUGHTON; STEVEN HOUSER;
CAPTAINS STEVE SCHUELER, THOMAS
CORE, KURT LINJER, GILBERG and
GARY BLACKBOURN; C.O. LANGE and
SGT. CARPENTER,

Defendants.

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff, Nathaniel Allen Lindell, an inmate at Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that defendants Matthew Frank, Peter Huibregtse, Gary Boughton, Steven House, Steve Schueler, Thomas Core, Kurt Linjer, Gilberg, Gary Blackbourn, C.O. Lange and Seargeant Carpenter conspired to harm him in retaliation for his religious and philosophical views. In an order dated March 8, 2005, I granted plaintiff leave to proceed in forma pauperis on this claim.

Presently before the court are defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) and plaintiff's motion for sanctions pursuant to Fed. R. Civ. P. 11. Defendants contend that plaintiff failed to exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). Also, defendants contend that defendant Frank should be dismissed from the lawsuit because plaintiff has not alleged that Frank was personally involved in violating plaintiff's constitutional rights. Plaintiff contends that defendants' motion is legally frivolous and worthy of sanction.

MOTION TO DISMISS

A. Failure to Exhaust Administrative Remedies

In support of their motion, defendants have submitted an affidavit and numerous documents relating to plaintiff's use of the inmate complaint review system and the prison disciplinary process. Documentation of a prisoner's use of the inmate complaint review system is a matter of public record. Therefore, I can consult inmate complaint records without converting the motion to a motion for summary judgment. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir. 1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997). However, documentary evidence of plaintiff's disciplinary proceedings is not a matter of public record. If it is necessary to consider these documents to resolve defendants' motion,

the motion will have to be converted to one for summary judgment. Fed. R. Civ. P. 12(b).

In his complaint, plaintiff contends that defendants issued three false conduct reports as part of a conspiracy to retaliate against him for expressing his religious and philosophical views. Pursuant to Wis. Admin. Code § DOC 310.08, an inmate may not use the inmate complaint review system to challenge "any issue related to a conduct report." If the issue is related to a conduct report, the inmate must raise it at the time of his disciplinary hearing and again on appeal to the warden, assuming the matter is not resolved at the disciplinary hearing stage. Wis. Admin. Code § DOC 303.76.

Wis. Admin. Code § DOC 310.08(3) permits inmates to use the inmate complaint review system after a disciplinary proceeding is closed to challenge procedural errors during the proceeding. In this case, plaintiff is not challenging the procedures used at his hearing. Rather, his claims of wrongdoing are tied directly to the validity of the conduct reports written against him. To exhaust his administrative remedies with respect to his retaliation claim, plaintiff must have made it clear to the disciplinary hearing officer and the warden that he believed the conduct reports had been written in an effort to chill his First Amendment rights. In order to exhaust his administrative remedies with respect to his conspiracy claim, plaintiff must have made it clear to the disciplinary hearing officer and the warden that he believed two or more people had plotted together to engage in the alleged retaliatory conduct.

I cannot determine whether plaintiff exhausted his administrative remedies without examining the records of his disciplinary proceedings. Therefore, defendants' motion to dismiss will be converted to a motion for summary judgment and the parties will be given an opportunity to present all evidentiary materials pertinent to the motion. I will not require the parties to submit proposed findings of fact, however. It should be a simple matter to determine from the parties' submissions whether plaintiff gave defendants fair warning of his claims so as to allow prison officials an opportunity to resolve them without judicial intervention. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537-38 (7th Cir. 1999) (purpose of exhaustion to narrow dispute and avoid litigation).

B. Dismissal of Defendant Frank

Defendants have moved the court to dismiss the complaint as to defendant Frank because plaintiff has not alleged any facts in his complaint suggesting that Frank was involved personally in the alleged conspiracy or retaliation against plaintiff. 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). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. In order to satisfy the personal involvement requirement, a plaintiff need not show direct participation. Palmer v. Marion County, 327 F.3d 588, 594

(7th Cir. 2002). However, he must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Accordingly, a plaintiff should name supervisory officials as defendants only if he believes they were involved personally with the wrongs of which he complains and not simply because they are charged with supervisory responsibility for others who were involved. In this case, plaintiff does not allege that defendant Frank knew anything about an alleged conspiracy to violate his constitutional rights or to retaliate against him for exercising those rights. Thus, plaintiff has failed to satisfy the personal involvement requirement for § 1983 actions.

Even if plaintiff had alleged facts from which it could be inferred that Frank personally participated in issuing the allegedly retaliatory conduct reports, plaintiff would not be entitled to injunctive relief against defendant Frank. When a plaintiff alleges only past exposure to allegedly unconstitutional acts, he has standing to seek monetary relief, but does not have standing to seek injunctive or declaratory relief. Olzinski v. Maciona, 714 F. Supp. 401, 411 (E.D. Wis. 1989)(citing Robinson v. City of Chicago, 868 F. 2d 959, 966-67 (7th Cir. 1989)). Courts recognize exceptions to this general rule in cases that are

"capable of repetition, yet evading review." However, this exception is limited to those situations in which 1) the challenged action is too short in duration to be fully litigated prior to its cessation and 2) a reasonable expectation exists that the same parties would be subjected to the same action again. Murphy v. Hunt, 455 U.S. 478, 482 (1982). Plaintiff's speculation that he may be retaliated against in the future for exercising his First Amendment rights is not sufficient to give the court authority to issue an injunction against defendant Frank. Farmer v. Brennan, 511 U.S. 825, 846 (1994) (issuance of injunctive orders should be approached with caution).

MOTION FOR RULE 11 SANCTIONS

Plaintiff has filed a "Notice and Motion for [Rule 11] Sanctions . . ." against Assistant Attorney General Karla Keckhaver, Attorney General Peggy Lautenschlager, and Ellen Ray. When a litigant suspects that the opposing party has violated Rule 11, the litigant is required to give the opposing party formal notice of the conduct alleged to violate Rule 11 and offer the party an opportunity to withdraw or correct its actions to avoid imposition of sanctions. Fed. R. Civ. P. 11(c)(1)(A); Divane v. Krull Electric Co., Inc., 200 F.3d 1020, 1026 (7th Cir. 1999). Plaintiff does not aver that he has complied with this requirement. Furthermore, defendants have withdrawn one of the arguments to which plaintiff objects. The remaining statements made by defendants in support of their motion

to dismiss are not worthy of sanction. If plaintiff believed that defendants' averments or documentary evidence misstates his efforts to exhaust his administrative remedies, he was free to produce competing facts in response to defendants' motion.

IT IS ORDERED that

1. Defendants' motion to dismiss is converted to a motion for summary judgment with regard to the question whether plaintiff exhausted his administrative remedies on his claims of conspiracy and retaliation. The parties may have until October 7, 2005, in which to serve and file any additional evidentiary materials relevant to the question of exhaustion of administrative remedies they deem appropriate.

2. Defendants' motion to dismiss defendant Frank for lack of personal involvement is GRANTED.

3. Plaintiff's motion for Rule 11 sanctions is DENIED.

Entered this 23rd day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge