IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES E. HENNINGS,

OPINION
AND ORDER

Petitioner,

06-C-353-C

v.

DAVE DITTER (BSI), BRIAN FRANSON (BSI),
RICK RAEMISCH (BSI), AMY MILLARD (I.C.E.),
JANELL NICHOLS (S.D.), SANDY HAUTAMAKI (C.C.E.),
and GREGORY GRAMS (WARDEN),

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

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). However, if the litigant 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 petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the administrative 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).

Petitioner alleges that (1) all of the respondents violated his rights to due process and "equal treatment" when they failed to reinstate him in his job with Badger State Industries even though he was found not guilty of rules violations; (2) respondents violated his rights under the Wisconsin Constitution; (3) respondents Millard and Hautamaki violated his due process rights by failing to refer his inmate complaint to the Bureau of Correctional Enterprises; and (4) respondent Ditter retaliated against him for appealing the findings of the adjustment committee by directing respondent Franson not to rehire him. Petitioner will be granted leave to proceed in forma pauperis on his claim that respondent Ditter retaliated against him by directing respondent Franson not to rehire petitioner. For the reasons stated below, petitioner will be denied leave to proceed on his remaining claims against all other

respondents.

In the complaint and attachments, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Charles E. Hennings is a Wisconsin inmate housed at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Dave Ditter is a supervisor at Badger State Industries. When the events leading to this lawsuit occurred, respondent Ditter was a unit manager at Columbia Correctional Institution. Respondent Brian Franson is a unit manager at Columbia Correctional Institution. When the events leading to this lawsuit occurred, respondent Franson was a supervisor at Badger State Industries. Respondent Rick Raemisch works in the Office of the Secretary of the Department of Corrections. Respondent Amy Millard is an institution complaint examiner at Columbia Correctional Institution. Respondent Janell Nichols is the security director at Columbia Correctional Institution. When the events leading to this lawsuit occurred, respondent Nichols was the administrative captain at Columbia Correctional Institution. Respondent Sandy Hautamaki is a corrections complaint examiner at Columbia Correctional Institution. Respondent Greg Grams is the warden at Columbia Correctional Institution.

B. Petitioner's Employment at Badger State Industries

From January 2005 through June 13, 2005, petitioner was employed at the Columbia Correctional Institution by Badger State Industries. (Public records reveal that Badger State Industries is an entity of the state of Wisconsin that was established to provide employment opportunities to inmates incarcerated in Wisconsin correctional facilities.)

On or about May 23, 2005, petitioner was charged with a conduct violation for using equipment belonging to Badger State to copy personal legal documents. That same day, petitioner was suspended from his job and received a conduct report accusing him of violating rules 303.27 and 303.34. Respondent Ditter, who at the time was the unit manager for the unit where petitioner resided, wrote the conduct report and investigated the charges against petitioner. The adjustment committee found petitioner guilty of the alleged rules violations on June 13, 2005. The committee concluded that petitioner had used his employer's equipment to copy several pounds of personal documents. On June 13, respondent Franson sent petitioner a termination letter.

Petitioner appealed the findings of the adjustment committee to respondent Grams, explaining that he had photocopied *ounces*, not *pounds*, of documents. On July 21, 2005, respondent Grams reversed the conclusions of the adjustment committee, finding that the committee had made an error regarding the evidence against petitioner. Respondent Franson was notified that the finding of guilt had been reversed. Respondent Ditter directed

respondent Franson not to hire petitioner back.

Petitioner wrote respondents Ditter and Nichols several times to request an interview to inform them that respondent Grams had found him not guilty and therefore he should be reinstated into his position with Badger State Industries. Respondent Nichols responded that petitioner should apply for another job at the Columbia facility because his termination by Badger State Industries "was not up for debate." Respondent Nichols did not provide a valid reason for Badger State Industries' failure to rehire petitioner. Petitioner was housed in a unit at the Columbia facility reserved for inmates employed by Badger State Industries. At some point during the investigation of petitioner's alleged misconduct he was removed from his housing unit. Respondent Franson notified petitioner that prison security staff was reviewing his placement.

C. Inmate Complaint

Petitioner filed an inmate complaint on August 1, 2005. In the complaint, he alleged that Badger State Industries should have rehired him once respondent Grams reversed the adjustment committee's finding of guilt. On August 10, 2005, respondent Millard recommended dismissal of petitioner's complaint, stating:

> ICE contacted [Ditter]. He stated that the inmate has received back pay for the time lost while in segregation status. He responded with the following statement about inmate not being placed back in his work assignment:

> "Inmate was acting inappropriately when returned from segregation status. His behavior led the unit team to strongly recommend to Mr. Franson, BSI Supervisor, that he not be rehired to his old position as he was viewed by the team as being a negative influence on the rest of the BSI workers, and other inmates housed on unit 9. Mr. Franson concurred and choose not to rehire Mr. Hennings based on these facts, not that the [conduct report] was dismissed.

On August 12, 2005, the complaint reviewer (respondent Grams) accepted Millard's recommendation and dismissed petitioner's complaint. Petitioner appealed the dismissal, complaining that respondent Millard had failed to contact respondent Franson to inquire whether respondent Ditter's statements were true. Petitioner alleged also that:

> Moreover, Mr. Ditter is a biased party in this afore-mentioned matter, since he did the original investigation and wrote the conduct report that was eventually reversed by the Warden, Mr. Greg Grams. Now he [is] employing a tactic of harassment in retaliation against me for getting his conduct report dismissed and expunged from my record, by fraudulently alleging that I acted inappropriately when I was released from segregation.

On September 1, 2005, respondent Hautamaki recommended dismissing the complaint on appeal, stating:

> The issues in this complaint involve a job with BSI and the complaint should have been coded as an industries complaint which would have gone to the Bureau Director of BCE for review and decision, but was miscoded in error. The CCE contacted Mr. Peterson, BSI Director, and he has now reviewed the complaint and decision at the institution and agrees with the outcome. Complainant was properly compensated, and the supervisor has the right to make hiring decisions based upon input from institutional staff and their recommendations. Mr. Peterson concurred with the institution's decision.

On September 9, 2005, respondent Raemisch dismissed the appeal.

The rules governing Badger State Industries, set forth in a Prison Industries Handbook, states the following at page 18:

> The only official written procedure for managing inmate grievances is through the Inmate Complaint System. Complaints filed through this system will be processed through the formal complaint procedure, and the appropriate prison industries staff will be involved. The Director of the Bureau of Correctional Enterprises reviews the recommendations of the inmate complaint examiner for each complaint that is submitted by an inmate worker.

Petitioner's inmate complaint was not referred to the Bureau of Correctional Enterprises. Although respondent Hautamaki alleged in her response of September 1, 2005, that she had contacted the director of Badger State Industries, she did not provide any proof that she actually did so.

DISCUSSION

I understand petitioner to be alleging that all of the respondents violated his rights to due process and "equal treatment" when they failed to reinstate him in his job with Badger State Industries even though respondent Grams found him not guilty of rules violations. Petitioner alleges also that respondents violated his rights under the Wisconsin Constitution. Moreover, petitioner alleges that respondents Millard and Hautamaki violated his due process rights by failing to refer his inmate complaint to the Bureau of Correctional Enterprises. Last, petitioner alleges that respondent Ditter retaliated against him for

appealing the findings of the adjustment committee by directing respondent Franson not to rehire him.

A. Due Process and Equal Treatment

I understand petitioner's allegation that respondents violated his right to "equal treatment" to be an equal protection claim under the Fourteenth Amendment. The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To state a claim of an equal protection violation, a petitioner has to allege facts sufficient to give the respondents notice of the allegation against them so that they can frame a response. Because petitioner has alleged no such facts at all that would put one or more of the respondents on notice how they may have treated petitioner differently from other similarly situated inmates, he has failed to a state a claim under the Fourteenth Amendment's equal protection clause.

Petitioner's allegation that his procedural due process rights were violated appears to be grounded on his belief that he had a right to be reinstated into his job after his conduct report was overturned but none of the respondents was willing to hear him out on his request to be reinstated or take any action to reinstate him. As an initial matter, I must dispel petitioner's belief, if he has one, that he had a right under federal law to have his job

back. No federal law guarantees incarcerated persons the right to have a prison job.

The Fifth Amendment's due process clause provides federal inmates with certain minimum procedural safeguards. A procedural due process claim against government officials requires proof of inadequate procedures as well as interference with a liberty or property interest. In order to state a due process claim, petitioner must allege facts sufficient to suggest that he was deprived of a liberty or property interest and second, that this deprivation took place without the procedural safeguards necessary to satisfy due process. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence, Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997), and to avoiding confinement in certain highly restrictive, super-maximum security prisons, Wilkinson v. Austin, 545 U.S. 209 (2005). The loss of a job is not an infringement on petitioner's liberty interests.

Property interests are defined in terms of a "legitimate claim of entitlement." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("[t]o have a property interest . . . a person clearly must have more than an abstract need or desire"); Scott v.

Village of Kewaskum, 786 F.2d 338, 339 (7th Cir. 1986). The Court of Appeals for the Seventh Circuit defines a property right as that which is "securely and durably yours under . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory or uncertain." Reed v. Village of Shorewood, 704 F.2d 943, 948 (7th Cir. 1983). A claim of entitlement is not created by the Constitution but comes from "existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577. To create a property interest, a state law must contain language of an unmistakably mandatory character and incorporate specific "substantive predicates," both of which must limit an official's discretion relative to the purported protected activity. Hewitt v. Helms, 459 U.S. 460, 471-72 (1983). I am unaware of any Wisconsin statute or regulation relating to prison jobs that meets these qualifications.

Moreover, at-will employees (which means employees who have not entered into a contract with their employer and who can be discharged from their job for any reason at any time) do not have a property interest in their jobs in any context, not just prisons. Plaintiff has not alleged any facts in his complaint suggesting that he was anything other than an at-will employee. Because petitioner has not suggested that he was deprived of either a liberty interest or a property interest, he has failed to state a claim that his procedural due process rights were violated.

Accordingly, petitioner will be denied leave to proceed on his claims that respondents violated his rights to due process and equal protection when they failed to reinstate him into his position with Badger State Industries.

B. Retaliation

Petitioner contends that respondent Ditter directed respondent Franson not to rehire petitioner in retaliation for petitioner's successful appeal of the findings of the adjustment committee, that were grounded on respondent Ditter's accusations and investigation. 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. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. To state a claim for retaliation, a prisoner need not allege a chronology of events that supports drawing an inference that the official acted in retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the respondent on notice of the claim so that he can file an answer. Id. A prisoner satisfies this minimal requirement when he specifies the grievance he filed and the act of retaliation. Id. Petitioner alleges that he filed an appeal of the adjustment committee's finding of guilt. Petitioner argues that respondent Ditter persuaded responded Franson not to rehire petitioner in retaliation for his having filed the appeal. Petitioner will be granted

leave to proceed on this claim against respondent Ditter.

C. Inmate Complaint

Petitioner contends that respondent Millard failed to follow the rules set forth in the Prison Industries Handbook governing inmate complaints filed by Badger State Industries employees because she failed to refer his complaint to the director of the Bureau of Correctional Enterprises. Also, petitioner contends that respondent Hautamaki violated these same rules because she failed to provide proof that she discussed petitioner's appeal with the director of Badger State Industries. If respondents Millard and Hatamaki did fail to follow the rules governing inmate complaints, petitioner may have a state law claim against them, which he is free to raise in a state court. However, petitioner does not have a federal due process claim against them, as he contends. Although petitioner has a right to use the inmate grievance system set up by the prison, he has no federal right to a particular set of procedures to be followed in the system. Those procedures are established by the state and are governed by state rules and regulations. The adoption of mere procedural guidelines does not give rise to a protected liberty interest. Culbert v. Young, 834 F.2d 624, 628 (7th Cir. 1987); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991).

Federal courts hearing a federal cause of action will sometimes entertain state law claims by exercising supplemental jurisdiction over them, but only when the state and federal

claims are part of one constitutional "case"; that is, they derive from a "common nucleus of operative fact" and would ordinarily be tried together. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). The only federal claim that will proceed in this case is petitioner's claim of retaliation against respondent Ditter. The facts underlying that federal claim have no connection to the facts underlying petitioner's claim that respondents Millard and Hautamaki failed to follow state rules governing the processing of his grievance. Accordingly, I decline to exercise supplemental jurisdiction over petitioner's claim against respondents Millard and Hautamaki and petitioner will be denied leave to proceed on this claim.

D. Wisconsin Constitution

Petitioner alleges generally that respondents violated his rights under the Wisconsin Constitution. However, petitioner does not specify what provisions of the Wisconsin Constitution were violated or otherwise put respondents on notice what provisions, if any, their conduct violated. Because respondents cannot know what petitioner's claim under the Wisconsin Constitution is, I have no way to determine whether I may exercise supplemental jurisdiction it. Accordingly, I must deny petitioner leave to proceed. If petitioner believes his rights under the Wisconsin Constitution were violated he may raise this claim in state court.

ORDER

IT IS ORDERED that

1. Petitioner Charles E. Hennings is GRANTED leave to proceed on his claim that respondent Ditter retaliated against him for filing an appeal of a disciplinary committee's finding of guilt on June 13, 2005, by directing respondent Franson not to rehire petitioner.

2. Petitioner is DENIED leave to proceed on his remaining claims against all other respondents.

3. Respondents Brian Franson, Rick Raemisch, Amy Millard, Janell Nichols, Sandy Hautamaki and Gregory Grams are dismissed from this lawsuit.

3. For the remainder of this lawsuit, petitioner must send respondent Ditter a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent Ditter, he should serve the lawyer directly rather than respondent. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent Ditter or to respondent's attorney.

4. Petitioner Charles E. Hennings should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical-handwritten or typed copies of his documents.

5. The unpaid balance of petitioner's filing fee is $345.26; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

6. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 7th day of August, 2006.

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