IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY STEVEN AKRIGHT,

OPINION and ORDER

Petitioner,

07-cv-00625-bbc

v.

ROXANE CAPELLE, sued in
her individual capacity,

Respondent.

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This is a proposed civil action for monetary, declaratory and injunctive relief brought under 42 U.S.C. § 1983. Petitioner Jeffrey Steven Akright, who is presently confined at the Stanley Correctional Institution in Stanley, Wisconsin, contends that respondent Roxanne Capelle violated his constitutional rights when she refused to provide him with notary services and retaliated against him for filing an administrative grievance regarding her refusal to provide notary services. Petitioner asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fee for filing this lawsuit. Petitioner has made the initial partial payment required under § 1915(b)(1).

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). 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 claims in 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 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 his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Jeffrey Steven Akright is a prisoner who is presently incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. Respondent Roxanne Capelle is an employee of the Wisconsin Department of Corrections. At all times relevant to this

complaint, she was the Record Custodian and Notary Public assigned to the records department at the Stanley Correctional Institution.

On several occasions, respondent refused to notarize affidavits and other legal documents prepared and properly drafted by petitioner. On August 13, 2007, after reading petitioner's affidavit that he prepared in support of a Motion for Order to Show Cause, respondent refused to notarize the document. She told petitioner that she did not certify documents, notarize documents that she did not understand or "notarize just any document."

Immediately after respondent refused to provide petitioner with notary services, petitioner wrote to Ms. Semanko, the records supervisor, to complain about respondent's conduct. On August 20, 2007, petitioner filed an administrative grievance, complaint number SCI-2007-24939, regarding respondent's refusal to notarize his affidavit. On August 22, 2007, Matthew Gerber, an inmate complaint examiner, approached petitioner regarding the incident and took him to a meeting with Semanko. After the meeting, Gerber told petitioner that respondent's conduct would be investigated and that petitioner was to contact him if he had any additional problems.

On August 23, 2007, petitioner received an "Interview/Information Request" from Ms. Birch, the librarian at the Stanley Correctional Institution. The request stated that "Per Captain Vandeslunt your computer account has been disabled as the court has ordered that

you not have contact with computers. If you have questions regarding this you will need to contact him."

When petitioner was convicted and sentenced in 2005, one of the conditions of his probation was that he would not be allowed any access to computers. That court order was unknown to prison officials until 2007. Respondent "unearthed" this court order.

On the evening of August 23, petitioner wrote to Vandeslunt regarding the request he had received from Birch. On August 25, after discussing the issue with Birch, petitioner wrote to the program director, Ms. Oldenburg, to ask her how he could gain meaningful access to legal materials in light of the restriction on his computer use. All legal materials at the Stanley Correctional Institution are located on the computer system.

On August 27, 2007, petitioner met with Vandeslunt to discuss the letter petitioner had sent him and the effect of the court order. Vandeslunt said that he had learned about the court order from "Verfurth" and that Verfurth had received the information from someone in the records department. Vandeslunt told petitioner that he had not directed Birch to disable petitioner's computer privileges, that he believed the court order had been taken out of context and that it was meant to apply during petitioner's probation. However, Vandeslunt said that there was nothing he could do once Verfurth enforced the order.

On August 29, 2007, petitioner contacted Birch and asked who had given the order directing her to disable his computer account. Birch told petitioner that Verfurth had given

her the instruction. When petitioner asked Verfurth who in the records department had given him the information about the court order, Verfurth refused to answer and said that this information was not available to inmates.

On September 7, 2007, petitioner met with Oldenburg, the program director, and Gerber, the complaint examiner. They told him that a meeting with the warden was scheduled later that morning regarding his access to the computer. At 1 p.m. that afternoon, Oldenburg told petitioner that his law computer privileges had been reinstated immediately and that an investigation was underway to determine why respondent had been "digging for information" about petitioner as result of the grievance he had filed.

On September 13, 2007, Gerber requested copies of the documents that respondent had refused to notarize. Later that day, Lt. Buesgen met with petitioner and told him again about the investigation regarding respondent's actions.

DISCUSSION

A. Respondent's Refusal to Notarize Legal Documents

Petitioner identifies "Count One" of his lawsuit as "Failure to Provide Notary Services." Petitioner has no independent constitutional right to notary services. However, in his complaint, petitioner states that respondent refused to notarize his affidavit in "Support of Motion for Order to Show Cause" and indicates that Wisconsin state courts will

not accept "unsworn" affidavits or other legal documents. This suggests that the actual nature of petitioner's claim is that respondent's refusal to notarize documents interfered with his ability to pursue a lawsuit that was pending in the Wisconsin state court system.

Prisoners have a constitutional right of access to the courts to pursue post-conviction remedies and to challenge the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). As a general matter, plaintiffs need not plead facts to state a claim; notice is all that is required. Pratt v. Tarr, 464 F.3d 730, 731 (7th Cir. 2006). However, the Court of Appeals for the Seventh Circuit has held that, to provide proper notice regarding a denial of access to courts claim, a prisoner is required to allege in his complaint not only that he has been denied access to the courts but also that he "has suffered an injury over and above" the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). The reason for this "heightened standard" is simple:

> [T]he mere denial of access to . . . legal materials is not itself a violation of a prisoner's rights; his right is to access the courts, and only if the defendants' conduct prejudices a potentially meritorious challenge to the prisoner's conviction, sentence, or conditions of confinement has this right been infringed.

Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006).

Petitioner's complaint offers hints about the nature of his claim, but not the fundamental information necessary to put respondent on notice. Specifically, petitioner did not identify the non-frivolous legal claim that he was pursuing that was impeded by

respondent's failure to notarize documents, and he did not state whether he "lost a case or suffered some other legal setback" as a result. See, e.g., Pratt, 464 F.3d at 732. Therefore, the complaint fails to meet the requirements of Rule 8 of the Federal Rules of Civil Procedure, which requires that the complaint set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. "The primary purpose of Rule 8 is rooted in fair notice: a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 775 (7th Cir. 1994).

In Hoskins v. Poelestra, 320 F.3d 761, 764 (7th Cir. 2003), the court of appeals held that district courts may call on the plaintiff to provide additional allegations in situations like this one, in which the facts alleged are so sparse that it is difficult to determine whether the plaintiff has a viable claim. Therefore, I will allow petitioner a short period of time in which to file an addendum to his complaint. In this addendum, petitioner should identify: (1) the non-frivolous legal claim he was trying to pursue when respondent refused to notarize his affidavit on August 13, 2007; and (2) what, if any, "legal setback" he experienced as a result of her failure to notarize this document. If petitioner fails to provide the court with this information by December 17, 2007, I will dismiss this claim without prejudice.

B. Retaliation for Filing a Grievance

Next, petitioner asserts that respondent found information about conditions of his probation and reported it to other prison officials in retaliation for his filing an administrative grievance about her. This led to a relatively short revocation of petitioner's computer access. As with an access to courts claim, the Court of Appeals for the Seventh Circuit has determined that, to state a First Amendment retaliation claim, a prisoner must provide basic information in order to give a prison official notice of his claim.

Therefore, to state a retaliation claim under the First Amendment, a prisoner must provide information in his complaint from which it may be inferred that he engaged in constitutionally protected conduct and that his protected actions prompted one or more prison officials to take adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). An inmate is not required to allege a chronology of events from which retaliation may be inferred but must allege the retaliatory act and describe the protected act that prompted the retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). These minimal facts are necessary to give prison officials adequate notice of the claim against them. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 863 (7th Cir. 2002).

Petitioner contends that respondent "went digging" through his file to find negative information and reported this information broadly, resulting in petitioner's temporary loss

of computer privileges. As noted above, prisoners have a right of access to the courts, Lewis v. Casey, 518 U.S. 343, 351 (1996), and numerous appellate court decisions have held that inmates have a right to file complaints regarding the conditions of their confinement, see, e.g., Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005) ("Prisoners are entitled to utilize available grievance procedures without threat of recrimination."); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002) (grievances may be protected by right to petition, right to free speech or right to access courts); Babcock v. White, 102 F.3d 267, 275 (7th Cir.1996) (assuming that filing prison grievance implicated prisoner's right of access to courts). When prison officials take action against prisoners for filing lawsuits and grievances, they violate the First Amendment, even if their actions do not independently violate the Constitution. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). 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) ("[O]therwise permissible conduct can become impermissible when done for retaliatory reasons.").

Although petitioner had no independent right to prohibit respondent from looking for public records regarding his conviction and sentence or disclosing this public information to others, it would be improper for her to search for negative information about petitioner and provide it to prison officials, with the hope that they would take actions adverse to

petitioner, on the ground that he had engaged in constitutionally protected activities. Therefore, petitioner will be granted leave to proceed on his claim that respondent violated his rights under the First Amendment by searching for information regarding the terms of petitioner's conviction and sentence and disclosing it in retaliation for his filing a grievance about her.

ORDER

IT IS ORDERED that

1. Petitioner Steven Jeffrey Akright's motion for leave to proceed in forma pauperis is GRANTED on his claim that respondent Roxanne Capelle violated his rights under the First Amendment by searching for and sharing with other prison officials negative information about petitioner in retaliation for his filing a grievance about her.

2. The decision whether to grant petitioner leave to proceed is STAYED with respect to his claim that respondent interfered with his right of access to the courts. Petitioner may have until December 17, 2007, in which to file an addendum to his complaint. In this addendum, petitioner should identify: (1) the non-frivolous legal claim he was trying to pursue when respondent refused to notarize his affidavit on August 13, 2007, and (2) what, if any, "legal setback" he experienced as a result of her failure to notarize this document. If, by December 17, petitioner does not file an addendum with the court, I will assume that

petitioner does not wish to pursue this claim and I will dismiss it from the case.

3. Once petitioner has filed his addendum, I will determine whether he should be granted leave to proceed on his claim that he was denied access to the courts. Subsequent to that decision, petitioner's complaint and any addendum against respondent. If he is granted leave to proceed, his complaint and any addendum he submits will be sent to the Attorney General's office for service on the respondents in accordance with an informal service agreement.

4. The unpaid balance of petitioner's filing fee is $348.20; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 3d day of December, 2007.

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