IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ONTARIO A. DAVIS

Petitioner, OPINION AND ORDER

v. 3:07-cv-667-bbc

PETER HUIBREGTSE, TIM HAINES
and ELLEN K. RAY,

Respondents.

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This is a proposed civil action brought pursuant to 42 U.S.C. § 1983. Petitioner Ontario Davis seeks leave to proceed in forma pauperis and has made his initial partial payment in accordance with 28 U.S.C. § 1915. Because petitioner is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail 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. §§ 1915 and 1915A.

In an order dated December 31, 2007, I screened petitioner's complaint and determined that I could not allow him to proceed because each of his claims either failed to

state a claim upon which relief may be granted or failed to give respondents the notice required by Fed. R. Civ. P. 8. I dismissed petitioner's claims under the due process clause and the Eighth Amendment for his failure to state a claim upon which relief may be granted. Although it appeared that petitioner may have intended to include a retaliation claim as well, that claim did not satisfy Fed. R. Civ. P. 8 because petitioner failed to identify his constitutionally protected conduct and the respondents who allegedly retaliated against him. I gave petitioner an opportunity to amend his complaint to cure the deficiencies of his retaliation claim.

Petitioner's proposed amended complaint is now before the court. He has dropped all but three of the respondents (he had named 24 respondents in his original complaint) and he has identified his constitutionally protected conduct. Because petitioner alleges that respondents Ellen Ray and Tim Haines denied him promotions through the prison's level system because he filed a lawsuit in state court challenging his confinement and because he filed grievances against respondent Ray, I will allow him to proceed against those two respondents. However, because petitioner does not allege that respondent Peter Huibregtse retaliated against him, I will dismiss the complaint as to that respondent.

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). In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner is a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Before 2006, the prison used a "level system" to gauge a prisoner's behavior. According to the policy in effect then, prisoners could "earn privileges and progress through the system to the point where they may be reassigned to other maximum security institutions where the rules are less stringent. As such, inmates receive evaluations on a regular basis as to their progress. If one displays satisfactory progress, he is promoted."

The prison had five levels. If a prisoner wished to be promoted from level 3 to level 4, he had to submit an application. A committee would review that application and consider the prisoner's past conduct and attitude while at the prison. If the committee believed the prisoner was an appropriate candidate for promotion, he would receive an interview by a panel of prison officials.

In October 2003, petitioner was on Level 3. He submitted an application to be promoted to Level 4 and was granted an interview before respondents Tim Haines (a unit manager) and Ellen Ray (an inmate complaint examiner). However, before he received the interview, he filed a lawsuit in the Circuit Court for Dane County, Wisconsin, "challenging his confinement." Because of that lawsuit, respondents denied petitioner's promotion. (Petitioner identifies another lawsuit, but it was related to his conditions at a private facility in Oklahoma and he does not allege that respondents denied his promotion because of that

lawsuit.)

In April 2004, petitioner filed a grievance against respondent Ray for her handling of his inmate complaints. He had filed other similar grievances in the past. Also in April, respondents Haines and Ray again interviewed petitioner for possible promotion to Level 4. During the interview, respondent Ray said that petitioner "should know her" because of the grievances he filed against her. Ray made the comment "to convey a message that [petitioner] should not be filing so many grievances." Respondents Ray and Haines denied petitioner a promotion because of the grievances he filed against respondent Ray.

Respondent Peter Huibregtse is the warden of the prison. He reviewed the decisions of respondents Ray and Haines and affirmed them.

Plaintiff was promoted to Level 4 in January 2005.

DISCUSSION

Prison officials may not retaliate against a prisoner for exercising a constitutional right. Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). Petitioner has a constitutional right of access to the courts, which includes the right to file nonfrivolous lawsuits. Lehn v. Holmes, 364 F.3d 862, 868 (7th Cir. 2004). He also has the right to complain about prison conditions under the free speech clause, at least when the complaint touches a matter of public concern, Pearson, 471 F.3d at 740-41, and to file grievances

under the petition clause, Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007).

Petitioner alleges that respondents Ray and Haines denied him level promotions because he filed grievances and a lawsuit. This is sufficient to state a claim upon which relief may be granted as to those respondents. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, petitioner's claim against respondent Huibregtse is different. Huibregtse's only involvement in the alleged constitutional violation is that he failed to overturn Ray's and Haines' decisions on appeal. Petitioner does not allege that Huibregtse's motive for affirming the decisions was related to petitioner's lawsuit or grievances, that Huibregtse knew that Ray and Haines were retaliating against petitioner or even that Huibregtse knew about petitioner's legal activity. In cases brought under § 1983, officials may be held liable for their own unconstitutional actions only; they may not be sued simply because they are the supervisor of someone else who may have violated the prisoner's rights. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). See also George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Only persons who cause or participate in the violations are responsible. . . Ruling against a prisoner on an administrative complaint does not cause or contribute to the violation.") Because petitioner does not suggest that respondent Huibregtse caused the constitutional violation, I must dismiss the complaint as to that respondent.

In going forward with his claims against respondents Ray and Haines, petitioner

should know that he has a difficult road ahead of him. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Petitioner will have to come forward with *evidence* either at summary judgment or at trial that respondents denied his promotions because of the exercise of his constitutional rights. For example, petitioner will first have to prove that both respondents knew he had filed the lawsuit and grievances. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 313 (7th Cir. 2007) (in retaliation case, plaintiff must show that defendant knew that plaintiff was engaging in protected conduct). However, such knowledge will not be sufficient by itself to prove his claims. Rather, he will have to show that similarly situated prisoners not engaging in similar protected conduct were treated better than he was, cf. Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir.2006), or point to other evidence suggesting a retaliatory motive, such as suspicious timing or statements by a respondent suggesting that he or she was bothered by the protected conduct. E.g., Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005). Petitioner may also support his claim by coming forward with evidence that respondents' reasons for denying

his promotion are pretextual, meaning that they are lies covering up their true retaliatory motives.

Even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive without additional evidence. Sauzek v.Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second.") Further, to the extent that respondents denied petitioner's promotion because of a frivolous lawsuit he filed, there would be no violation because filing a frivolous law suit is not protected by the Constitution. Hale v. Scott, 371 F.3d 917, 918-19 (7th Cir. 2004). If petitioner does not have evidence necessary to prove his claim and does not have a reasonable basis to believe that he will be able to obtain such evidence after an opportunity for discovery, he should not maintain this suit.

ORDER

IT IS ORDERED that

1. Petitioner Ontario Davis is GRANTED leave to proceed on his claims that respondents Tim Haines and Ellen Ray refused to promote him to Level 4 in October 2003 and April 2004 because petitioner filed a lawsuit in October 2003 challenging his confinement and filed grievances against respondent Ray.

2. Petitioner is DENIED leave to proceed against respondent Peter Huibregtse for

petitioner's failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to respondent Huibregtse. (I will not assess a strike against petitioner because he already has received one in this case when I dismissed his claims under the due process clause and the Eighth Amendment in the December 31, 2007 order.)

3. Petitioner 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.

4. The unpaid balance of petitioner's filing fee is $343.25; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

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

Entered this 23d day of January, 2008.

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