

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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TROY OLMSTED,

Plaintiff,

v.

OFFICER SHERMAN,  
in his official and personal capacities,

Defendant.  
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OPINION and ORDER

08-cv-439-bbc

On August 1, 2008, judgment was entered in favor of defendant in this case after I concluded that plaintiff's complaint failed to state a claim upon which relief may be granted. Subsequently, plaintiff filed a timely Rule 59 motion, in which he argued that he could state a federal claim if I were to allow him to amend his complaint. Simultaneously, however, plaintiff argued that he never meant to assert federal claims, only state law claims. In light of plaintiff's confusing statements, I denied plaintiff's motion for reconsideration in an order entered August 12, 2008 but acknowledged that plaintiff might be able to state a First Amendment claim of retaliation if he provided further information in an amended complaint in which he stated with specificity what protected activity prompted the retaliation.

Now, plaintiff has filed a proposed amended complaint together with a motion to reopen his case. That motion will be granted and the judgment will be vacated.

In reviewing plaintiff's proposed amended complaint pursuant to 28 U.S.C. § 1915A, I note that several of his claims must be dismissed. First, plaintiff's claims that defendants subjected him to cruel and unusual punishment and violated his right to equal protection will be dismissed because there are no facts in the complaint to support such claims. Second, I have already considered in the context of plaintiff's original complaint whether he states a due process claim and I have ruled he does not. To the extent the amended complaint attempts to reassert these claims, they will be dismissed. Only one claim remains: that defendant Sherman violated plaintiff's First Amendment rights by taking away and destroying his photographs in retaliation for his having filed or threatened to file grievances against defendant. As to that claim, plaintiff has alleged sufficient facts to state a claim upon which relief may be granted.

From plaintiff's complaint I draw the following allegations of fact.

## ALLEGATIONS OF FACT

### A. Parties

At all times relevant to this complaint, plaintiff Troy J. Olmsted was an inmate at the Wisconsin Secure Program Facility. (He is now confined at the Redgranite Correctional

Institution.) Defendant officer Sherman is a correctional officer at the Facility, who was in charge of the property room and the security of inmates' property at times relevant to this complaint.

### B. Background

Plaintiff was transferred to the Wisconsin Secure Program Facility on or about December 22, 2005. He was designated to the Facility to serve a "segregation sanction." At the time, the Wisconsin Secure Program Facility served as a temporary housing facility for inmates such as plaintiff serving segregation or administrative confinement. Inmates in this status are not allowed to keep inside their cells all the usual property they would be allowed in other facilities such as electronics, personal clothing, books and food items. Moreover, certain quantity limits were lower. For example, although the Department of Corrections general policy allows an inmate to possess 50 photographs, the in-cell allowable limit at the Wisconsin Secure Program Facility is 20. The items not allowed or over the quantity limit would be placed into the inmate's "stored property" pursuant to the Wisconsin Secure Program Facility policy and procedure.

On or about December 23, 2005, defendant delivered plaintiff's allowable property to his cell. Plaintiff had more than 100 photographs in his property at the time. He was told to pick the 20 that he wanted to keep in his cell and the 30 additional that he wanted

to be kept in his stored property. The remaining photographs were allowed to be mailed out to a family member.

Plaintiff chose 18 laminated photographs he wanted to have in his cell. Defendant approved them. These photographs had “sentimental” and “inspirational” value to plaintiff. They were of family members who are no longer alive. Most were original historical photographs of plaintiff’s grandfather.

Subsequently, on May 14, 2006, defendant and another officer searched plaintiff’s cell and removed the photographs. Ultimately they were destroyed. Plaintiff believes that defendant took and destroyed the photographs because he

1. threatened to file a complaint against defendant for damaging plaintiff’s fan;
2. filed complaint #WSPF-2006-27, alleging that defendant had destroyed plaintiff’s shampoo, deodorant and food items without cause; and
3. filed complaint #WSPF-2006-4820, alleging that defendant was destroying more of plaintiff’s stored property without cause.

## OPINION

As noted earlier, plaintiff cites a laundry list of constitutional rights that he believes defendant violated. Some have nothing to do with the facts he alleges. For example, he contends that defendant subjected him to cruel and unusual punishment and violated his

right to equal protection by taking his photographs. However, characterizing defendant's taking of plaintiff's sentimental photographs as "cruel and unusual punishment" is legally meritless. Moreover, there are no facts alleged in the complaint that would provide a basis for inferring that plaintiff was treated differently from others similarly situated. Thus, these claims must be dismissed.

The remaining claims are that defendant violated plaintiff's state and federal due process rights by taking his property without due process and his state and federal free speech rights by taking and destroying his photographs and other personal property in retaliation for his previous complaints. I note that section 1, article 1 of the Wisconsin Constitution affords the same protections as those of the due process clause, Chicago & N.W. Railway Co. v. La Follette, 43 Wis. 2d 631, 643, 169 N.W.2d 441, 446 (1969), and section 1, article 3 of the Wisconsin Constitution affords the same free speech protections as those of the First Amendment, Lawson v. Housing Authority, 270 Wis. 269, 274, 70 N.W.2d 605, 608 (1955); therefore, to the extent plaintiff's federal due process and First Amendment claims rise or fall, so do his state constitutional claims.

#### A. Due Process Claim

Plaintiff's due process claim is identical to the claim he made in his original complaint. As I explained in the order dismissing the original complaint, dkt. #4, plaintiff

has no due process claim because defendant's taking of his property was a random and unauthorized act and plaintiff had adequate post-deprivation procedures available to him in state court. Therefore, plaintiff's due process claim against defendant will be dismissed for his failure to state a claim upon which relief may be granted.

### B. Retaliation Claim

To state a retaliation claim, 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 the defendant 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 the defendant adequate notice of the claim against him. Beanstalk Group, Inc. v. AM General Corp., 283 F.3d 856, 863 (7th Cir. 2002).

Plaintiff contends that defendant took and destroyed his sentimental photographs because plaintiff threatened to file a complaint against defendant for damaging his fan and because he filed inmate complaints against him numbered WSPF-2006-27 and WSPF-2006-

4820. Inmates 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.”). Thus, even if plaintiff had no independent right to his photographs, and it would have been permissible to remove them from his cell and destroy them, it would still be improper for defendant to remove the photographs and destroy them for the reason that plaintiff had engaged in constitutionally protected activities. Therefore, plaintiff will be allowed to proceed on his claim that defendant violated his rights under the First

Amendment and state constitution by removing and destroying his photographs in retaliation for plaintiff's having filed or threatened to file grievances against defendant.

## ORDER

IT IS ORDERED that

1. Plaintiff Troy Olmsted's motion to reopen this case is GRANTED; the judgment entered in this case on August 1, 2008 is VACATED.

2. Plaintiff's motion for leave to file an amended complaint is GRANTED in part:

a. plaintiff may proceed on his claim that defendant Officer Sherman violated his First Amendment rights by taking away and destroying his photographs in retaliation against him for threatening to file or filing grievances against him;

b. plaintiff's claims that defendants subjected him to cruel and unusual punishment, violated his right to equal protection, and violated his state and federal rights to due process are DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) for plaintiff's failure to state a claim upon which relief may be granted.

3. For the remainder of this lawsuit, plaintiff must send defendant 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 defendant, he should serve the lawyer directly rather than defendant. 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.

4. 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.

5. Because I have dismissed one or more claims asserted in plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), the strike previously recorded against plaintiff stands.

Entered this 29<sup>th</sup> day of August, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge