IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SALAAM JOHNSON,

Plaintiff,

v.

LIEUTENANT PRIMMER;
LIEUTENANT HANFELD; ELLEN K. RAY (ICE);
and GARY BOUGHTON (Deputy Warden/ICE);

Defendants.

ORDER

10-cv-316-slc[1]

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In an order entered August 11, 2010, I granted plaintiff Salaam P. Johnson leave to proceed on his claim that defendants Lieutenant Hanfeld, Ellen K. Ray and Gary Boughton violated his First Amendment rights for taking away his electronics for 65 days. However, I dismissed his claim that defendants engaged in an "unjust taking" and dismissed his claims against defendants Board of Supervisors Legislative Personnel of Grant County, Boscobel, Wisconsin; Rick Raemisch; Peter Huibregste; Tom Gozinske; Ismael Ozanne; and Grant County Board of Supervisors because there was no suggestion that any of these defendants

[1] I am assuming jurisdiction over this case for the purpose of issuing this order.

were personally involved in any alleged violation. In addition, I dismissed his claim that defendants Lieutenants Primmer and Hanfeld retaliated against him for participating in the inmate complaint review system. I dismissed to this last claim without prejudice to plaintiff's filing a supplement to his complaint to include allegations that would satisfy Fed. R. Civ. P. 8.

Now before the court is plaintiff's motion for reconsideration in which he argues that it was error to dismiss his unjust takings claim, dismiss defendants for lack of personal involvement, disregard his claim that the prison is operating "outside the statutes' stated goal and plan" and dismiss his retaliation claim for failing to satisfy Rule 8. I will deny plaintiff's motion, but I will treat one portion of the motion as a supplement to his complaint and allow him to proceed on his retaliation claim against defendants Primmer and Hanfeld.

A. Unjust Taking

Plaintiff contends that his "unjust takings" claim should not have been dismissed. He does not explain why, except to say that the Fourteenth and Fifth Amendment prohibits taking "inmates' electronics that were mandated by contract, command or gratuitous services." He also mentions a Department of Corrections policy that "limits the taking of electronics to the inmates' own electronics," suggesting that he thinks defendants violated that policy as well. The takings clause of the Fifth Amendment provides that private

property shall not "be taken for public use, without just compensation." To state a takings claim, a plaintiff must show that he has a property interest protected by the Fifth Amendment and that the defendants have "taken" that property. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-01 (1984). Although I was willing to assume in the first order that plaintiff had his *own* electronic equipment taken away, his current position seems to be that what was taken away was simply his access to electronic equipment of the prison. Plaintiff has no property interest in such equipment.

Even if plaintiff could show a property interest, he could not proceed on his takings claim because the clause is not violated "until the government refuses to compensate the owners." Rockstead v. City of Crystal Lake, 486 F.3d 963, 965 (7th Cir. 2007) (citations omitted). This means that before plaintiff can bring his takings claim, he must seek compensation through state proceedings or show that no compensation is available in any state proceedings. Plaintiff does not suggest that he has attempted to obtain compensation through any state proceeding, so any takings claim would not be ready for decision.

B. Dismissed Defendants

Next, plaintiff contends that it was error to dismiss his claims against the Board of Supervisors Legislative Personnel of Grant County, Boscobel, Wisconsin; Rick Raemisch; Peter Huibregste; Tom Gozinske; Ismael Ozanne; and Grant County Board of Supervisors

because each was either a "contributing cause" or can be held vicariously liable for the alleged violations. By "contributing cause," plaintiff explains that certain defendants "are required to review all decisions rendered or made by their deputies" and reverse any decision made in error. In other words, plaintiff contends that these defendants should be liable because they play a supervisory role over those who violated the law.

Neither vicarious liability nor plaintiff's notion of "contributing cause" (supervisory liability) is consistent with the requirements of § 1983. As the Supreme Court explained recently in Aschroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), in a § 1983 case, "masters do not answer for the torts of their servants"; instead "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." This does not mean a supervisor can never be liable, but it does mean that there must be something more to establish his or her liability than the fact that the defendant is a supervisor.

Plaintiff contends that the rule against vicarious and supervisory liability does not apply at this early stage, especially because his allegations should be construed broadly, but he is mixing apples and oranges. The fact that plaintiff's complaint must be construed broadly and all inferences drawn in his favor at this stage does not make the law any broader. Section 1983 limits liability to personal involvement, regardless at what stage of a lawsuit a plaintiff finds himself.

C. Prison's Operation "Outside the Statutes' Stated Goal and Plan"

Plaintiff contends that the court should not have dismissed his claim that the Wisconsin Secure Program Facility "operated outside the statutes' stated goal and plan, causing a constitutional violation," pointing out that there was no discussion about why this claim was dismissed. There was no discussion because the claim itself was overlooked.

That does not mean that plaintiff should be allowed to proceed on the claim. The claim was overlooked because it appeared to be a reiteration of plaintiff's retaliation claim (he refers to the facility's "retaliatorial tactics"), but now that the claim has been distinguished, I conclude that it lacks merit. A prison does not violate the Constitution simply by failing to follow state statutes or policies, and plaintiff does not specify any constitutional violation or even any of the state law violations that he contends led to a constitutional violation. More important, however, plaintiff does not bother to tie this vague "claim" to any defendant. He does not sue the prison (and could not do so under § 1983 because it is not a person) and he does not explain which plaintiff was personally involved in any of the unidentified state law violations.

D. Retaliation

Finally, plaintiff contends that his retaliation claim against defendants Primmer and Hanfeld should not have been dismissed under Rule 8. His first argument is that Rule 8 is

broad enough to permit even his conclusory allegations to proceed, citing Conley v. Gibson, 355 U.S. 41, 45-467 (1957). However, the permissive pleading standard in Conley has been "retired." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007) ("[A]fter puzzling the profession for 50 years, [Conley's "no set of facts" standard] has earned its retirement."). That rule has been replaced with the standard I relied on to dismiss plaintiff's retaliation claim, set forth in Twombly, 550 U.S. at 547, and Iqbal, 129 S. Ct. at 1953.

Next, plaintiff contends that it was error to dismiss his complaint because the allegations show what I said was missing: a basis for thinking defendants Primmer and Hanfeld had a retaliatory motive for charging and convicting him for lying to staff. Plaintiff quotes the conduct report he received for lying about staff, which points to statements he made in an inmate complaint as being the "lie" forming the basis of the complaint. What plaintiff overlooks is the fact that the quoted language is nowhere to be found in the complaint. (Even had he attached the conduct report to the complaint, which he did not, it would not be considered part of the complaint; a plaintiff cannot expect defendants an the court to sift through his conduct reports to find out what he is alleging.) Thus, it was not error to conclude that he had failed to state a claim for retaliation against defendants Primmer and Hanfeld.

Although it was not error to dismiss his claims, I also told plaintiff he could come back with a supplement to repair the Rule 8 problems. Although he nestles this quoted

language within his motion for reconsideration, I will overlook this problem and treat the relevant paragraph (last full paragraph on page three, running over to page four) as a supplement to his complaint.

As I explained in the previous order, what was missing from the complaint were allegations suggesting that defendants Hanfeld and Primmer had a retaliatory motive. Plaintiff now alleges that the alleged "lie" for which he received a conduct report was a statement he made in support of an inmate complaint and both Hanfeld and Primmer were involved in prosecuting that conduct report. These allegations are sufficient to allow an inference that defendants Hanfeld and Primmer retaliated against him for using the inmate complaint system to complain about staff. He may proceed on that claim.

ORDER

IT IS ORDERED that

1. Plaintiff Salaam Johnson's motion for reconsideration, dkt. #17, is DENIED.

2. The last paragraph of page 3, running over to page 4 of the motion for reconsideration, is ADOPTED as a supplement to the complaint.

3. Aside from the claims on which plaintiff has already been granted leave to proceed, plaintiff is GRANTED leave to proceed on his claim that defendants Primmer and Hanfeld retaliated against him for participating in the inmate complaint review system.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint, dkt. #1, the supplement, dkt. #17, the original screening order, dkt. #12, and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

Entered this 14th day of September, 2010.

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