

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

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LUIS VASQUEZ,

Plaintiff,

v.

SGT. TROCHINSKI,

Defendant.  
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ORDER

11-cv-474-bbc

In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Luis Vasquez, an inmate at the Waupun Correctional Institution, contends that defendant Sgt. Trochinski retaliated against him in violation of his rights under the First Amendment. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that 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. 28 U.S.C. § 1915A. 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). After reviewing the complaint, I conclude that plaintiff may proceed on his claim that defendant issued a false conduct report against him in retaliation for his threatening to file an inmate complaint or lawsuit against defendant.

In his complaint, plaintiff alleges the following facts.

#### ALLEGATIONS OF FACT

Plaintiff is incarcerated at the Waupun Correctional Institution, where defendant Trochinski is a correctional supervising sergeant. On July 8, 2009, plaintiff was participating in a psychotherapy group when he became involved in an argument with another inmate. Defendant told plaintiff to “shut up” in an “aggressive,” “loud” and “disrespectful” manner. Plaintiff complied, but the other inmate continued to insult plaintiff. Defendant did not tell the other inmate to stop talking and plaintiff complained that defendant had treated him unfairly. Defendant responded to plaintiff by yelling at him repeatedly to “shut up.” Plaintiff told defendant that he would file a grievance and lawsuit against defendant for his verbal abuse, unfair treatment and for abusing his authority. Defendant responded, “Go ahead, and I’ll write you a conduct report.”

Defendant then handcuffed plaintiff and escorted him back to his cell. On the way, plaintiff said that if defendant hurt him, he would sue defendant. Defendant squeezed

plaintiff's arm and whispered that if plaintiff ever threatened to sue him again, he would "take plaintiff down forcibly, face first, to the floor."

On the following day, defendant filed a conduct report against plaintiff that contained "false accusations." After a disciplinary hearing was held on the conduct report, plaintiff was found guilty of disobeying orders and showing disrespect. As a result, he spent 8 days in adjustment segregation and lost 30 days of recreation.

## DISCUSSION

"An act 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). To state a claim for retaliation, plaintiff must (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)).

Plaintiff contends that defendant issued him a false conduct report in retaliation for plaintiff's threatening to file a grievance and lawsuit against defendant. In the context of a

retaliation claim, a prisoner's right to file a grievance or lawsuit has been recognized as a constitutionally protected activity. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002). In previous cases, I have concluded that threatening to file an inmate complaint or initiate legal action is a similarly protected activity and that it is unconstitutional for prison officials to respond to such threats with acts of retaliation. *Ripp v. Nickel*, 10-cv-492-bbc, dkt. #6 (W.D. Wis. Sept. 21, 2010) (“[A] threat to take legal action is constitutionally protected, which means that prison officials may not retaliate against prisoners for expressing an intent to file a lawsuit.”) (citation omitted). I explained the reasoning for this conclusion in *Lindell v. O'Donnell*, 05-C-04-C, 2005 WL 2740999, at \*30 (W.D. Wis. Oct. 21, 2005):

Retaliation is constitutionally impermissible because it inhibits individuals from exercising their constitutional rights. *Crawford-El v. Britton*, 523 U.S. 574, 589 n.10 (1998); see also *Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 574 (1968). It stands to reason that an inmate is more likely to be dissuaded from filing an inmate complaint or lawsuit when his verbalized intention to do so is met with retaliation than when an act of retaliation follows the filing of the grievance or lawsuit. If inhibition is the evil the law seeks to avoid, there is no reason to find anticipatory retaliation more permissible than reactive retaliation. If anything, retaliatory actions taken in advance of the exercise of constitutionally protected rights are more likely to inhibit the exercise of those rights than are subsequent acts of retaliation.

Thus, assuming that plaintiff's threat to file a grievance or lawsuit was a constitutionally protected activity, the only issues are whether defendant took retaliatory

action against plaintiff and whether he did so at least in part because plaintiff threatened to file a grievance or lawsuit against him.

Plaintiff alleges that he told defendant he was going to file a grievance and lawsuit against defendant for his verbal abuse and unfair treatment of plaintiff. Defendant responded that he would file a conduct report if plaintiff complained. Later, defendant told plaintiff that he would force plaintiff to the ground if plaintiff threatened to sue him again. The next day, defendant filed a false conduct report. These allegations are sufficient at this stage to imply that plaintiff's threatened complaint was a motivating factor in defendant's issuance of the conduct report. Additionally, it is plausible to infer that a person of ordinary firmness would be deterred from filing grievances in the future if it meant that he would receive a conduct report. Therefore, plaintiff may proceed with his retaliation claim against defendant.

## ORDER

IT IS ORDERED that

1. Plaintiff Luis Vasquez is GRANTED leave to proceed on his claim that defendant Sgt. Trochinski violated his rights under the First Amendment by issuing him a false conduct report in retaliation for plaintiff threatening to file a grievance and lawsuit against defendant.
2. Under an informal service agreement between the Wisconsin Department of

Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendant. 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 if it accepts service on behalf of the state defendant.

3. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he 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 plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 23d day of August, 2011.

BY THE COURT:

/s/  
BARBARA B. CRABB  
District Judge