IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAURICE A. SMITH,

OPINION AND ORDER

Plaintiff,

11-cv-646-slc

v.

PAMELA WALLACE, CAPTAIN COWAN,
CAPTAIN T. WALLACE, MS. PARR,
SERGEANT HOFKES, and GARY HAMBLIN

Defendant.

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On December 14, 2011, I dismissed without prejudice plaintiff Maurice Smith's complaint for failure to state a claim under Fed. R. Civ. P. 8. Plaintiff has now filed a proposed amended complaint to correct the defects in his previous complaint. Dkt. #10. As a prisoner proceeding in forma pauperis, plaintiff is subject to the 1996 Prisoner Litigation Reform Act, so I must screen his amended complaint to determine whether it states a claim upon which relief may be granted. 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). Having reviewed plaintiff's amended complaint, I conclude that plaintiff will be allowed to proceed on his claims that defendants

Sergeant Hofkes, Captain Cowan, Captain T. Wallace and Pamela Wallace (1) violated his right to access the courts by confiscating computer disks containing legal materials without grounds and (2) retaliated against him when he tried to obtain redress through the grievance process. With respect to defendants Gary Hamblin and Ms. Parr, plaintiff's claims will be dismissed for failure to state a claim.

For purposes of this screening order, I accept plaintiff's allegations as true. In his amended complaint, plaintiff refers to the exhibits from his original complaint, so I will incorporate those exhibits in his amended complaint. Where necessary for clarity, I have supplemented plaintiff's allegations with facts from the judicial record relating to his state court appeal.

In addition, plaintiff has filed a separate motion for a temporary restraining order and a preliminary injunction under 18 U.S.C. § 3626, dkt. #12, against unspecified staff and administration officials at Oakhill Correctional Institution. For the reasons stated below, this motion will be denied.

ALLEGATIONS OF FACT

Plaintiff is an inmate at the Oakhill Correctional Institution in Oregon, Wisconsin, but the events giving rise to the present lawsuit occurred while he was an inmate at the Chippewa Valley Correctional Treatment Facility. Before that, he was an inmate at the

Felmers O. Chaney Correctional Center and, before that, at the Gordon Correctional Center. Defendants Sergeant Hofkes, Captain Cowan and Captain T. Wallace are correctional officers at Chippewa Valley. Defendant Parr is a social service professional and an Alcohol and Other Drug Abuse facilitator at Chippewa Valley. Defendant Pamela Wallace is the warden at Chippewa Valley, and defendant Gary Hamblin is Secretary of the Department of Corrections.

Plaintiff's direct appeal from his criminal conviction was in process around the time of his transfer to the Chippewa Valley facility. On June 9, 2011, during an initial property inventory following plaintiff's transfer, defendant Hofkes discovered twelve computer disks among plaintiff's personal possessions. These computer disks were labeled "legal documents" and contained "months of legal research, documents in various stages of legal development, [and] legal fill in the blank forms . . . relating to [his] appellate court processes." Am. Cpt., dkt. #10, at 5. Plaintiff does not give any more specific description of the content of these documents. He purchased the disks from the Felmers O. Chaney Correctional Center and the Gordon Correctional Center. According to plaintiff, those prisons permitted inmates to purchase disks for various uses. Hofkes seized the disks, explaining that he needed to check with security because he did not think plaintiff was permitted to keep computer disks.

A week later, when plaintiff attempted to access Ednet to work on his appellate documents, the librarian informed him that he could not log on because he was under

investigation for possession of the disks. Plaintiff filed an interview request with the property department. On June 15, 2011, the department denied his request. Defendant Cowan signed the form and explained that "inmates are not allowed to possess computer disks because it is necessary to be able to visually verify content" and plaintiff would be told how to dispose of the disks when the inquiry was complete.

On June 21, 2011, plaintiff filed an offender complaint in which he demanded the return of his disks on the ground that the seizure violated his right of access to the courts and to defend himself pro se under the Sixth Amendment. Cpt., dkt. #4, Ex. 1-D. He threatened in the complaint to bring a legal action unless the disks were returned.

On June 22, 2011, Captain Cowan gave plaintiff a conduct report charging him with theft, counterfeit and forgery, misuse of state property and inadequate work or study performance. Cowan asked where plaintiff got the disks, and plaintiff replied that he had purchased them from the Department of Corrections at the other institutions in which he had been housed. When Cowan denied that the department sold computer disks, plaintiff told Cowan that he still had the disbursement receipts. Plaintiff was ordered to retrieve the receipts and make a list of staff who knew that he possessed the disks. He did and returned immediately, but another officer informed plaintiff that security would contact him after the investigation. (Plaintiff has attached to his complaint copies of disbursement receipts for multiple computer disks from the Chaney and Gordon Correctional Centers.)

Plaintiff has attached a copy of the conduct report to his complaint, Cpt., dkt. #4, Ex. 1-C, which indicates it was completed by a Defendant Hofkes. The report states that Hofkes reviewed the contents of each disk, reading the contents of some of the files. According to the report, the disks contain legal documents for plaintiff and other inmates, as well as employment cover letters and resumes, time sheets, income spreadsheets and personal letters of plaintiff and other inmates.

On June 22, 2011, the court of appeals denied plaintiff's direct appeal. On July 1, 2011, plaintiff filed a petition for writ of habeas corpus with the Wisconsin Court of Appeals, District 1, dkt. #4, Ex. 1F-A, contending that the Department of Corrections and the Chippewa Valley Treatment Facility had violated his constitutional right of access to the courts by confiscating the computer disks with his legal materials, which interfered with his appeals process.

On July 10, 2011, defendant Captain T. Wallace held a hearing on plaintiff's conduct report and found plaintiff not guilty of theft or counterfeiting but guilty of misuse of state property and inadequate work or study performance. Dkt. #4, Ex. 1E-A-2. On July 14, 2011, plaintiff filed an appeal with the warden, defendant Pamela Wallace, which she denied on August 4, 2011. Dkt. #4, Ex. 1-F.

Plaintiff attempted to work on his appellate and Supreme Court documents, but without his research, templates and "document development source materials," he was

unable to complete them in a timely manner. On July 26, 2011, plaintiff filed a motion for reconsideration with the court of appeals regarding its ruling on his direct appeal. According to the court rules, the motion for reconsideration was due on July 12, 2011.

On August 5, 2011, the court of appeals denied the petition for writ of habeas corpus that plaintiff had filed on July 1, 2011. Smith v. Wallace, No. 2011AP1526-W (Wis. Ct. App., Dist. 1 Aug. 5, 2011) (unpublished). The court found plaintiff's petition invalid because it did not include allegations about the circumstances of his confinement as required for habeas corpus petitions by Wis. Stat. § 782.04 and because he had failed to exhaust the administrative remedies provided by the internal grievance process. Id. at 2, 3. The court did not reach the merits of plaintiff's claim that the seizure of his computer disks denied him access to the courts.

On August 9, 2011, the court of appeals denied plaintiff's motion for reconsideration of its ruling on his direct appeal, noting only that it was not timely filed.

Sometime after he submitted the habeas petition, plaintiff began receiving "strict scrutiny" from defendant Parr, his Alcohol and Other Drug Abuse counselor. On her recommendation, plaintiff was terminated from the treatment program and transferred to a medium security facility. In her recommendation, defendant Parr revealed what plaintiff describes as confidential medical information and "erroneous self-reported facts." Am. Cpt., dkt #10, at 3.

OPINION

A. Access to the Courts

Prisoners have a constitutional right to "meaningful access to the courts." Bounds v. Smith, 430 U.S. 817, 821-22 (1977). A claim for access to the courts may be forward-looking, for a lawsuit yet to be litigated, or backward-looking, for a lawsuit or a chance to sue that has already been lost. Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). For backward-looking claims, a plaintiff must show that the defendants caused him to lose a meritorious claim or a chance to sue on a meritorious claim. Id. at 414. To state a claim for backward-looking denial of access to the courts, a plaintiff must at least (1) describe an underlying non-frivolous claim and (2) explain how his ability to file or litigate the claim was lost or impeded. Id. at 415-16.

Plaintiff alleges that seizure of the disks containing his legal documents violated his right of access to the courts. The allegations in plaintiff's initial complaint were too vague to determine whether he stated a claim because it was unclear (1) which lawsuits he was unable to pursue without the disks; (2) what deadlines he missed, documents he was unable to file or arguments he was unable to develop; and (3) what specific files or information was on the disks that he needed.

In his amended complaint, plaintiff alleges that defendants interfered with his direct

appeal by preventing him from filing a motion for reconsideration in the Wisconsin Court of Appeals and a petition for review in the Wisconsin Supreme Court. He alleges that the disks contained legal research and form documents relating to his direct criminal appeal, without which he was unable to complete his filings in a timely manner. Although the amended complaint is still vague about the arguments that plaintiff intended to make before the court of appeals or Supreme Court, I will permit defendant to proceed with this claim at this early stage of the proceedings. As I indicated in the initial order, plaintiff should be aware that he will be required to show that he had non-frivolous arguments for his motion for reconsideration and petition for review with the Supreme Court.

B. Retaliation

Plaintiff further alleges that defendants retaliated against him for filing the offender complaint seeking the return of his disks and threatening a lawsuit. Plaintiff must plead three elements in order to state a claim for retaliation. He must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts that would make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 556 (7th Cir. 2009).

Filing the inmate complaint and threatening a lawsuit are protected activities. As in his original complaint, in his amended complaint plaintiff identifies two purported retaliatory actions: (1) the conduct report and (2) his termination from the treatment program and transfer to another correctional facility.

The problem with plaintiff's original claim about the conduct report was that his allegations were insufficient to hold defendants Hamblin and Pamela Wallace personally liable for the actions of their subordinates. A supervisor is liable only if they were "personally involved" in the unconstitutional actions, but plaintiff did not allege that Pamela Wallace or Hamblin were involved in the conduct report or that they knew about the conduct report was filed as retaliation but turned a blind eye to it. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982).

Plaintiff's amended complaint is sufficient to state a claim against defendants Cowan, Hokes, T. Wallace and Pamela Wallace. Defendant Cowan denied plaintiff's interview request and decided to issue a conduct report. Defendant Hofkes investigated plaintiff's disks and prepared the report. Although more than two weeks had passed without development after Hofkes seized the disks, it was only one day after plaintiff submitted his official complaint that defendant Cowan confronted plaintiff about the disks and threatened to file a conduct report. Moreover, he ignored plaintiff's offer to produce disbursement receipts showing he did not steal the disks. These allegations are sufficient at this early stage

to imply that defendant Cowan and Hofkes issued the conduct report in retaliation for plaintiff's inmate complaint.

Defendant T. Wallace conducted the hearing on the conduct report and defendant Pamela Wallace denied plaintiff's appeal of the allegedly retaliatory conduct report. They did so despite plaintiff's claims that the disks contain legal documents necessary for his appeal. By upholding the conduct report, T. Wallace and Pamela Wallace "approved" of the conduct report and thus might be "personally involved" in the unconstitutional retaliation. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). Plaintiff should be aware that, at later stages of the litigation, he will be required to show that T. Wallace and Pamela Wallace actually knew that the conduct report was retaliation. It is not enough for plaintiff to claim they should have known the report was retaliatory or that they disregarded plaintiff's assertion that he was permitted to keep computer disks at his prior institutions. The warden and hearing officer were entitled to believe the filing officers' statements rather than plaintiff. Plaintiff will be required to show that defendants T. Wallace and Pamela Wallace did not honestly believe that the conduct report was valid but decided to find plaintiff guilty and to uphold that decision anyway. Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007).

D. Defendant Parr

The second instance of putative retaliation in the amended complaint is that defendant Parr, the counselor for plaintiff's drug treatment program, subjected plaintiff to additional scrutiny and reported erroneous and confidential information about him that led to his termination from the program and transfer to a medium security facility. For the reasons given in my previous order, these allegations are insufficient to state a claim for retaliation. Except for vague allegations that defendant Parr's actions were part of a campaign of harassment, he alleges no facts that connect her actions to the dispute about the computer disks or to his offender complaint. Plaintiff has not alleged facts that would make it plausible to infer that his protected activity was one of the reasons defendants Parr recommended that plaintiff be terminated from the drug treatment program and transferred to a facility with a higher level of security. Accordingly, plaintiff's claims against defendant Parr for denial of access to the courts and retaliation are dismissed without prejudice for failure to state a claim under Fed. R. Civ. P. 8.

Plaintiff contends also that defendant Parr violated his right to due process by reporting erroneous and confidential information in her recommendations. As an initial matter, the due process clause does not give prisoners an interest in avoiding transfer from a low to maximum security prison, Meachum v. Fano, 427 U.S. 215, 225 (1976), or in remaining in rehabilitation programs. Stanley v. Litscher, 213 F.3d 340, 342 (7th Cir. 2000). In any case, these additional claims are not properly a part of this lawsuit because

they does not arise out of the same transactions or occurrences as his denial of access to the courts or retaliation claims and because there are no common questions of law or fact between these claims. Fed. R. Civ. P. 20. Accordingly, I will not consider this potential claim and defendant Parr will be dismissed from the case.

E. Defendant Hamblin

With respect to defendant Hamblin, plaintiff's amended complaint suffers from the same problem as his initial complaint: he fails to allege that defendant Hamblin was personally involved in denying plaintiff's access to the courts or in retaliating against plaintiff. The only new allegations in the amended complaint regarding defendant Hamblin are that he oversees the internal grievance process and that this grievance process is not an effective means to protect prisoners' rights. Plaintiff does not identify any specific flaws in the grievance process. Although he disagrees with the outcome of his grievance, he identifies no specific procedural mistakes made during his internal appeals.

As explained in the prior opinion, it is not enough for plaintiff to allege that defendant Hamblin failed to act and that his inaction enabled others to violate plaintiff's constitutional rights. Because plaintiff has not alleged that defendant Hamblin participated in the violation of plaintiff's rights or he knew about such violations and turned a blind eye to them, Trentadue v. Redmon, 619 F.3d 648, 652 (7th Cir. 2010), plaintiff's claims against

defendant Hamblin for denial of access to the courts and retaliation are dismissed without prejudice for failure to state a claim under Fed. R. Civ. P. 8.

F. Temporary Restraining Order and Preliminary Injunctions

Last, plaintiff has filed a separate motion for a temporary restraining order and preliminary injunction against staff and administration at his new prison facility, Oakhill Correctional Institution. Plaintiff asserts that he needs "unlimited access" to computer research software, the law library and library resources and reinstatement of his legal loan instead of "partial access for postage." Insofar as plaintiff is asserting that the general policies at Oakhill Correctional Institution are interfering with his right of access to the courts, this claim is outside the scope of this lawsuit, which is about the seizure of his legal materials at the Chippewa Valley facility. Moreover, the staff of Oakhill Correctional Institution are not parties to this lawsuit, and courts are loath to issue injunctions against non-parties.

When a prisoner plaintiff alleges that his institution is interfering with his right of access to the courts, it is the policy of this court to require such claims to be presented in a separate lawsuit. The sole exception is when it appears that the alleged interference directly, physically impairs the plaintiff's ability to prosecute his lawsuit. Plaintiff does not allege that anyone at Oakhill Correctional Institution is physically preventing him from prosecuting this

lawsuit. He also does not explain why additional access to the library or legal loans or postage is necessary for him to pursue this case. Accordingly, plaintiff's motion for a temporary restraining order or preliminary injunction will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Maurice Smith is GRANTED leave to proceed on his access to the courts claim and his retaliation claim against defendants Sergeant Hofkes, Captain Cowan, Captain T. Wallace and Pamela Wallace.

2. Plaintiff is DENIED leave to proceed on his access to the courts claim and his retaliation claim against defendants Ms. Parr and Gary Hamblin. These claims are DISMISSED without prejudice for failure to state a claim under Fed. R. Civ. P. 8.

3. Defendant Parr and Hamblin are DISMISSED from the case.

4. Plaintiff's "motion for a temporary restraining order or preliminary injunction under 18 U.S.C. § 3626," dkt. #12, is DENIED.

5. 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 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 if it accepts service on behalf of the state defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. 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.

8. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the officials at the plaintiff's institution of its obligation to deduct payments until the filing fee has been paid in full.

Entered this 26th day of January, 2012.

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