

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

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AIRRY DAVID MASSEY,

Plaintiff,

v.

OPINION AND ORDER

18-cv-127-wmc

TAMMY MCGINNIS, SERGEANT ALLEN, and  
OSHKOSH CORRECTIONAL INSTITUTION,

Defendants.

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*Pro se* plaintiff Airry David Massey filed this lawsuit pursuant to 42 U.S.C. § 1983. Massey claims that defendants violated his constitutional rights when his property was confiscated for a period of time in 2016. Massey's complaint is ready for screening as required by 28 U.S.C. §§ 1915(e)(2). For the following reasons, the court will allow him to proceed, but only against defendant Sergeant Allen on a First Amendment retaliation claim. Also before the court is plaintiff's motion to expedite and for an order keeping him at the Wisconsin Resource Center ("WRC") (dkt. #23), which the court will deny.

ALLEGATIONS OF FACT<sup>1</sup>

Plaintiff Airry David Massey is currently incarcerated at the Kettle Moraine Correctional Institution ("Kettle Moraine"), but the allegations comprising his claims took place when he was incarcerated at the Oshkosh Correctional Institution ("Oshkosh") in 2016. Besides seeking to proceed against Oshkosh, plaintiff names as defendants Tammy McGinnis, his unit manager, and Sergeant Allen, who also worked in Massey's unit.

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<sup>1</sup> In addressing any *pro se* litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint, unless otherwise noted.

From August 17, 2016, through September 12, 2016, Massey was sent to the Restrictive Housing Unit (“RHU”) because he and another prisoner got in a fight. During his time in the RHU, Massey’s legal materials were either left in his cell or in his locker in his cell. Massey alleges that among his legal materials was a legal brief that contained sensitive information related to protective custody proceedings in Milwaukee County, but he has not described the nature of that proceeding or provided details about the contents of the brief.

Massey claims that while he was in RHU, McGinnis moved another prisoner into his cell, and that other prisoner stole his legal brief. When Massey returned to his cell on September 12, he found that prisoner’s legal materials mixed in with his materials. On the night of September 12, Massey complained to Allen about his legal materials, as well as other pieces of missing property (a rug, receipts, hat and gloves). Allen responded by shrugging his shoulders and denying that he mishandled Massey’s legal materials.

After that interaction, Massey filed a grievance about Allen’s response, and Massey claims that Allen and other unidentified staff members subsequently retaliated against him after they learned about the grievance. While Massey lists numerous vague ways that Allen retaliated against him, such as “mind misuse,” “corruption,” “threats,” “fodder,” and “stalking,” Massey also states that Allen outed him to gangs, told other prisoners about his protective custody history, and discarded his mail. Furthermore, Massey alleges that Allen started harassing Massey by using the unit speakers to play extremely loud and upsetting sounds very early in the morning (gun-shots, glass breaking, people screaming), and also banging on his cell walls and yelling at him to scare him.

## OPINION

While plaintiff does not cite to any constitutional amendment, his allegations appear to implicate First Amendment, access to courts, and Fourteenth Amendment claims. While the court will address the merits of those claims, it must first dismiss improper defendants Oshkosh and McGinnis.

Plaintiff may not proceed against Oshkosh because a prison is not a “person” that may be sued under § 1983. *Smith v. Knox Cty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) (“A prison or department in a prison cannot be sued because it cannot accept service of the complaint.”). McGinnis must also be dismissed because plaintiff has not alleged any facts suggesting that she had reason to know that plaintiff’s legal materials could be, or were, stolen, or that McGinnis was involved in any of the alleged acts of retaliation. Since “individual liability under § 1983 requires personal involvement in the alleged constitutional violation,” *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010), McGinnis will be dismissed. To the extent that plaintiff has named McGinnis due to her supervisory position in plaintiff’s unit, he may not proceed against her on that theory, since a supervisory defendant cannot be held liable under § 1983 for a subordinate’s conduct simply because of his or her position as a supervisor. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001). To maintain a claim against a supervisory defendant, plaintiff must allege facts showing that the supervisor had sufficient *personal* responsibility in the allegedly unconstitutional conduct. Said another way, the facts must support a finding that the supervisor “directed the conduct causing the constitutional violation, or . . . it occurred with [his] knowledge or consent.” *Sanville v. McCaughtry*, 266 F.3d 724, 739-40

(7th Cir. 2001) (internal citations omitted). Since plaintiff does not allege that McGinnis was aware that plaintiff's materials were taken or that Allen was retaliating against plaintiff, she will be dismissed from this lawsuit.

## **I. First Amendment**

### **A. Access to legal materials**

The court understands plaintiff to be pursuing a First Amendment claim related to the fact that plaintiff was separated from his legal materials while he was in RHU. A prison's restriction on an inmate's speech may be upheld under the First Amendment, if it is reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) what impact accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Id.*

Based on plaintiff's allegations, his transfer to the RHU was tied to a legitimate security interest because he concedes that he fought with another prisoner. Furthermore, plaintiff has not alleged that he was denied access to his legal materials at any point during his time in the RHU, nor that he actually needed or wanted his legal materials to work on an ongoing proceeding. More importantly for purposes of this lawsuit, none of plaintiff's allegations suggest that *Allen* was involved in the decision to separate him from his legal

materials or had reason to know where plaintiff's missing materials were located. Accordingly, plaintiff may not proceed on a First Amendment claim related to plaintiff's separation from his legal materials.

## **B. Retaliation**

That said, plaintiff has pled sufficient facts to proceed on a First Amendment retaliation claim against Allen. To state a claim for retaliation, a plaintiff must allege that: (1) he engaged in activity protected by the Constitution; (2) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future. *Gomez v. Randle*, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

The first prong is fulfilled because prisoners have a constitutional right to pursue nonfrivolous grievances. *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1005 (7th Cir. 2005). The same is true of the second prong: plaintiff alleges both that Allen subjected him to the threats of other prisoners and harassed him repeatedly by playing upsetting and disruptive sounds over the unit's speaker system early in the morning. While some of plaintiff's allegations about Allen's conduct are vague, plaintiff's description of Allen's harassment using the speaker system and alleged outing him to other prisoners permits the conclusion that a reasonable person in plaintiff's position would likely be deterred from pursuing another grievance as a result of Allen's actions.

Finally, plaintiff's allegations about Allen's allegedly directed campaign to harass him *after* he filed his grievance permit an inference that Allen intended to punish plaintiff

for filing that grievance. While plaintiff has not alleged any facts beyond the timing of the two events, in this circuit, a conclusory allegation that defendants acted adversely because of protected conduct is sufficient to state a claim for retaliation. *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002); *see also Henderson v. Wilcoxon*, 802 F.3d 930, 933 (7th Cir. 2015) (reaffirming *Higgs* standard). As such, the court will permit plaintiff to proceed on a First Amendment retaliation claim against Allen.

In going forward with this claim, plaintiff will likely be unable prove his claim based only on the allegations in his complaint, *Sparing v. Vill. 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). Indeed, even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive. *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.”). Rather, plaintiff will have to come forward with specific evidence either at summary judgment or at trial suggesting that Allen’s motivations were not supported by a legitimate purpose.

## II. Access to Courts

Next, plaintiff may also be seeking to proceed on an access to courts claim, but his allegations do not support such a claim. Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. *See Campbell v. Miller*, 787 F.2d 217, 225 (7th Cir. 1986) (citing *Bounds v. Smith*, 430 U.S. 817, (1977)); *Wolff v. McDonnell*, 418 U.S. 539, 578-80 (1974); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974). To state a claim of denial of access to the courts,

however, the plaintiff must allege facts from which an inference can be drawn of “actual injury.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996). At a minimum, the plaintiff must allege facts showing that the “blockage prevented him from litigating a nonfrivolous case.” *Walters v. Edgar*, 163 F.3d 430, 433-34 (7th Cir. 1998); *see also Pratt v. Tarr*, 464 F.3d 730, 731–32 (7th Cir. 2006) (to state access to courts claim, plaintiff must allege that he was deprived of the ability to pursue “a legitimate challenge to a conviction, sentence, or prison conditions”). As plaintiff has not actually alleged that his legal brief was part of an ongoing proceeding, much less that he suffered any sort of consequence when another prisoner took it, the court is not granting plaintiff leave to proceed on an access to courts claim.

### **III. Due Process Deprivation of Property**

Finally, plaintiff’s allegations about his legal brief and missing property implicates the Due Process Clause of the Fourteenth Amendment, which prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. To prevail on a § 1983 procedural due process claim, a plaintiff must demonstrate that he: (1) has a cognizable interest; (2) has suffered a deprivation of that interest; and (3) was denied due process. *Kahn v. Bland*, 630 F.3d 519, 527 (7th Cir. 2010). “A protected property interest is a ‘legitimate claim of entitlement’ that is ‘defined by existing rules or understandings that stem from an independent source such as state law.’” *Tenny v. Blagojevich*, 659 F.3d 578, 581 (7th Cir. 2011) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Even accepting that plaintiff was deprived of his legal materials, rug, hat and gloves, his allegations do not permit an inference that he was deprived of his property as a result of constitutionally infirm procedures. In particular, he does not claim that there is a prison policy that required these confiscations, or that he had a right to pre-deprivation process before his materials were taken away. Instead, his allegations suggest that his property was removed (and possibly disposed of) as a result of “random and unauthorized” actions by either other prisoners or Oshkosh staff while he was housed in the RHU. When an official’s conduct is random and unauthorized, due process requires only that an adequate post-deprivation remedy exist. *Zinerman v. Burch*, 494 U.S. 113, 128-30 (1990).

Wisconsin affords statutory procedures to address random, unauthorized deprivations of property by government actors. *See* Wis. Stat. §§ 893.35 (action to recover personal property after wrongful taking, conversion, or wrongful detention); 893.51 (action for damages from injury to property); *see also Hamlin v. Vaudenberg*, 95 F.3d 580, 585 (7th Cir. 1996) (inmate complaint review system, certiorari review under Wisconsin law, and Wisconsin tort remedies are adequate remedies for deprivation of good-time credits by prison officials); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 871 (7th Cir. 1983) (Wisconsin tort remedies are adequate for deprivation of property resulting from sheriff’s execution of outdated writ of restitution). Because plaintiff never alleges that the deprivation of his property resulted from an established prison procedure or that Wisconsin’s post-deprivation statutory remedies are inadequate to redress his loss, he has failed to state a viable due process claim. To the contrary, plaintiff claims he availed himself of the prison grievance system related to his legal brief and lost items, indicating that he did have access



to post-deprivation remedies within the prison system. Accordingly, the court will not grant him leave to proceed on a Fourteenth Amendment claim.

#### **IV. Motion to Expedite and Allow Plaintiff to Stay at WRC (dkt. #23)**

Finally, the court is denying plaintiff's motion to expedite this case and order him to stay at (or be transferred back to) the WRC, since he has not complied with this court's procedures for obtaining preliminary injunctive relief, a copy of which will be provided to plaintiff with this order.<sup>2</sup> Under these procedures, a plaintiff must file and serve proposed findings of fact that support his claims, along with any evidence that supports those proposed findings. Plaintiff has neither submitted proposed findings of fact nor cited any evidence to support those findings.

Even if plaintiff's motion were not insufficient on its face, it would almost certainly be denied on the merits at this time. To prevail on a motion for a preliminary injunction, plaintiff must show: (1) a likelihood of success on the merits of his case; (2) a lack of an adequate remedy at law; and (3) an irreparable harm that will result if the injunction is not granted. *Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007). Furthermore, the Prison Litigation Reform Act ("PLRA"), which governs this lawsuit, narrows the available relief to an even greater extent in cases involving prison conditions. Specifically, the PLRA states that any injunctive relief to remedy prison conditions must be "narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and

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<sup>2</sup> While providing these procedures, the court is neither directing nor encouraging Massey to file proposed findings for the reasons that follow.

be the least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2); *see also Westefer v. Neal*, 682 F.3d 679, 681 (7th Cir. 2012) (vacating overbroad injunction related to the procedures for transferring prisoners to a supermax prison). The PLRA also requires this court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief.” § 3626(a)(2).

In his motion, plaintiff alludes to “dangers” that await him outside of the WRC, but he does not provide any further details suggesting that these supposed dangers relate in any way to his claim in this lawsuit. Given the limitations of the Federal Rules of Civil Procedure and § 3626, plaintiff has no basis to pursue injunctive relief here. Accordingly, his motion for a preliminary injunction and temporary restraining order will be denied. While the denial will be without prejudice, if plaintiff renews his motion, he should do so only if he has a good-faith basis, follows the court’s procedures and bears in mind that now that he is out of the WRC, it will be more difficult for him to show that the court should change the status quo.

## ORDER

IT IS ORDERED that:

1. Plaintiff Airry Massey is GRANTED leave to proceed on a First Amendment retaliation claim against defendant Sergeant Allen, as provided above.
2. Plaintiff is DENIED leave to proceed on any other claims, and defendants Tammy McGinnis and Oshkosh Correctional Institution are DISMISSED from this lawsuit.
3. Pursuant to 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 defendant. Under the agreement, the Department of Justice will have 60 days from the date of the

Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendant.

4. For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the 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 the defendant or to the defendant's attorney.
5. 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.
6. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.
7. Plaintiff's motion to expedite and stay at WRC (dkt. #23) is DENIED.
8. The clerk of court is directed to send to plaintiff a copy of this court's procedures for requesting preliminary injunctive relief.

Entered this 27th day of September, 2019.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge