UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LUIS ROSALES,

Plaintiff,

9:03-CV-601
(LES)

-against-

LIEUTENANT QUINN; *et al.*,

*Defendant*s.

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TRIAL BRIEF

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PRELIMINARY STATEMENT

In the amended complaint [Dkt. No. 42], the plaintiff claims that the fourteen (14) defendants violated his First, Eighth and Fourteenth Amendments rights while he was incarcerated at Auburn Correctional Facility between January and May 2003. However, after a summary judgment motion was filed by the defendants and decided by the Court on April 11, 2007 [Dkt. No. 89], nine (9) defendants were dismissed from this action, as was the Fourth Cause of Action. Accordingly, the following Causes of Action remain for trial:

1. First Cause of Action: Plaintiff claims defendant Giannotta violated his First Amendment rights by placing plaintiff on keeplock confinement on January 19, 2003 with the intent to punish him for having exercised his constitutional rights to seek redress through established procedures.

2. Second Cause of Action: Plaintiff claims defendant Pflueger violated his First Amendment rights by assaulting him on February 17 and 18, 2003, with the intent to punish him for having exercised his constitutional rights to seek redress through established procedures. In addition, the plaintiff alleges that Lt. Quinn violated plaintiff's First Amendment rights by telling him that threats of physical harm from C.O. Pflueger would only stop once plaintiff stopped filing written grievances.

3. Third Cause of Action: Plaintiff claims defendants Martens and Calhoun assaulted him on May 8, 2003 with the intent to punish him for and dissuade him from filing grievances and/or complaints in violation of his First Amendment rights. The plaintiff further alleges that defendant Quinn thereafter impeded and/or obstructed the investigation into the alleged assault of plaintiff by defendants Martens & Calhoun.

STATEMENT OF THE CASE

In January 2003, the plaintiff, a New York State inmate, was housed at Auburn Correctional Facility ("Auburn"). On or about January 11, 2003, the plaintiff wrote a letter of complaint to Commissioner Glenn S. Goord, in which he alleged that he and his wife were being verbally harassed by Corrections Officer ("C.O.") Eggersdorf in the visiting room at Auburn. The complaint was investigated by Sergeant ("Sgt.") Giannotta, who interviewed the plaintiff and C.O. Eggersdorf. On January 14, 2003, Deputy Superintendent of Security ("D.S.S.") Mark Bradt advised the plaintiff the result of the investigation into his January 11, 2003-complaint. After receiving this memorandum, the plaintiff wrote back to D.S.S. Bradt and accused Sgt. Giannotta of filing a false report regarding his investigation of plaintiff's January 11, 2003-complaint.

On January 18, 2003, the plaintiff was served with a misbehavior report authored by Sgt. Giannotta, which charged him with violating facility rule 107.10 (providing false statements). Specifically, the plaintiff was accused of lying in a complaint to facility staff regarding the January 13, 2003- interview Sgt. Giannotta had conducted. The plaintiff was confined to his cell pending the hearing on his misbehavior report. On January 21, 2003, the January 18, 2003-misbehavior report was dismissed at the plaintiff's Tier II disciplinary hearing.

On February 17, 2003, Correction Officer Richard Pflueger was working a 7 a.m. to 3 p.m. shift at Auburn Correctional Facility. On that date, at approximately 9:30 a.m., Officer Pflueger released the plaintiff from his cell on C-12 company for a visit. The plaintiff complained that the officer had not provided him with a shower. Despite the fact that the plaintiff had not requested a shower prior to that time, C.O. Pflueger offered to let him take a shower then. The plaintiff declined

the shower, stating, "My wife is waiting. I will take it up with the sergeant." The plaintiff then left the company. In his amended complaint, the plaintiff claims that C.O. Pflueger assaulted him during this meeting, which the officer denies.

Officer Pflueger also worked a 7 a.m. to 3 p.m. shift at Auburn on February 18, 2003. On that date, at approximately 7:05 a.m., he was conducting the count on C-12 company. At that time, cell C-12-37 was the plaintiff's assigned housing location. During the morning count on February 18, 2003, the plaintiff was on his bed sleeping and unresponsive to C.O. Pflueger's call, which is a violation of count procedures. Officer Pflueger had to call into the plaintiff's cell several more times before he finally responded. Later, after the messhall run on February 18, 2003, C.O. Pflueger was making security rounds in C-12 company. As he passed cell C-12-37, the plaintiff yelled, "I want to see a sergeant asshole! When I get out I am gonna fuck you up." Officer Pflueger considered this statement a threat. In the amended complaint, the plaintiff claims that C.O. Pflueger threw coffee on him during this encounter, which the officer denies.

The plaintiff also claims in his amended complaint that Sgt. Martens and C.O. Calhoun assaulted him on May 8, 2003 when he refused to "sign off" on written complaints he had filed against Officers Pflueger and Calhoun. While Sgt. Martens did interviewed the plaintiff on or about May 8, 2003 about the April 28, 2003-letter plaintiff wrote to the Commissioner regarding Officer Pflueger and the May 6, 2003-letter he wrote to the Superintendent regarding Officer Calhoun, he denies threatening and/or assaulting him during said conversation. Officer Calhoun also denies the plaintiff's allegations that joined Sgt. Martens in the assault of plaintiff.

Finally, the plaintiff claims that on or about February 7, 2003, Lt. Quinn threatened him with physical harm from C.O. Pflueger unless plaintiff stopped filing written grievances and that Lt. Quinn impeded and/or obstructed the investigation into the alleged assault of plaintiff by defendants Martens and Calhoun by ordering that no photographs be taken of the plaintiff on May 9, 2003. Lt. Quinn adamantly denies the plaintiff's allegations.

POINT I

DEFENDANTS DID NOT VIOLATE THE PLAINTIFF'S FIRST AMENDMENT RIGHTS.

The Second Circuit has acknowledged that inmate claims of retaliation are easily abused: "[C]laims by prisoners that particular administrative decisions have been made for retaliatory purposes are prone to abuse. Virtually every prisoner can assert such a claim as to every decision which he or she dislikes." *Flaherty v. Coughlin*, 713 F.2d 10, 13 (1983). Accordingly, the courts "must approach prisoner claims of retaliation with skepticism and particular care." *Dawes v. Coughlin*, 239 F.3d 489, 491 (2d Cir. 2001)(citing *Flaherty*, *supra* at 13).

"In order to survive summary dismissal, a plaintiff asserting First Amendment retaliation claims must advance non-conclusory allegations establishing: (1) that the speech or conduct at issue was protected; (2) that the defendant took adverse action against the plaintiff; and (3) that there was a causal connection between the protected speech and the adverse action." *Dawes v. Coughlin*, 239 F.3d at 492. "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of

retaliation. Otherwise, the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection." *Id.* at 493 (citations omitted).

In this case, the evidence will establish that the defendants did not subject the plaintiff to an adverse action. In addition, the defendants will argue that the plaintiff cannot establish a causal connection between the alleged adverse action and plaintiff's protected speech. Accordingly, the plaintiff's First Amendment claims against the defendants should be dismissed.

POINT II

DEFENDANTS ARE QUALIFIEDLY IMMUNE FROM THE CLAIM FOR DAMAGES.

As the Second Circuit has held, "[o]nce qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Williams v. Smith*, 781 F.2d 319, 322 (2d Cir. 1986), *quoting*, *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). *See generally Wood v. Strickland*, 420 U.S. 308 (1974). The right the official is alleged to have violated must have been "clearly established" in a particularized sense. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Brown v. D'Amico*, 35 F.3d 97 (2d Cir. 1994) (under circumstances of case, identification of the right not to be arrested or prosecuted without probable cause is too abstract and general to establish clear law for purpose of qualified immunity defense).

In determining whether a particular right was clearly established, courts in this circuit consider three factors: "(1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." *Jermosen v. Smith*, 945 F.2d 547, 550 (2d Cir. 1991), *cert. denied*, 503 U.S. 962 (1992); *see also Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995) (qualified immunity granted to defendants on false arrest, malicious prosecution, and excessive force claims).

In the instant matter, the plaintiff will not establish evidence that the defendants violated any "clearly established statutory or constitutional rights of which a reasonable person would have known." Accordingly, the defendants are entitled to qualified immunity.

POINT III

PLAINTIFF DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES WITH RESPECT TO HIS CLAIM THAT LT. QUINN THREATENED HIM WITH PHYSICAL HARM BY C.O. PFLUEGER; THUS, THIS CLAIM MUST BE DISMISSED.

The Prison Litigation Reform Act ("PLRA") provides in clear language that "no action shall be brought with respect to prison conditions under §1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997[e][a]. The statute thus requires the exhaustion of all "available" state "administrative remedies" by the prisoner before a federal court may entertain and decide his §1983

action. *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983 (2002). Adhering to the plain language of the exhaustion provision, in *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001), the Second Circuit had held that in all cases where exhaustion is required, it must occur prior to the initiation of litigation.

New York State prison inmates have an elaborate grievance procedure available to them in pursuit of administrative remedies. 7 NYCRR §701.1 - 701.16. An inmate may grieve any complaint about the substance or application of any written or unwritten policy, regulation, procedure or rule of the prison system. 7 NYCRR §701.2[a]. Allegations that an inmate has been a victim of employee misconduct or harassment are expressly grievable, and, in fact, are subject to an expedited procedure for the review of such allegations. 7 NYCRR §701.11[1]. Employee misconduct meant to annoy, intimidate, or harm an inmate constitutes harassment. 7 NYCRR §701.11[1][a].

In the instant action, the plaintiff did not exhaust his administrative remedies with respect to the remaining claim he asserts against defendant Quinn in the Second Cause of Action, namely that on or about February 7, 2003, Lt. Quinn threatened him with physical harm from C.O. Pflueger unless plaintiff stopped filing grievances. Therefore, this claim against Lt. Quinn should be dismissed.

POINT IV

PLAINTIFF'S CLAIM FOR DAMAGES IS LIMITED BY THE P.L.R.A.

The PLRA states that no action may be brought by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The constitutionality of this provision was sustained in *Zehner v. Trigg,* 133 F 3d. 459, 462 (7th Cir. 1997) *affg.* 952 F. Supp 1318 (S.D. Ind. 1997). Therefore, if the plaintiff establishes a defendant's liability, but fails to prove that the defendant's actions cause him physical injury, he is only entitled to nominal damages in the amount of $1.00. *See Wright v. Dee*, 54 F.Supp.2d 199, 207 (S.D.N.Y. 1999).

CONCLUSION

THE AMENDED COMPLAINT SHOULD BE DISMISSED AND JUDGMENT ENTERED FOR THE DEFENDANTS.

Dated: July 9, 2007
Syracuse, New York

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