UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VINCENT MCWRIGHT,

Petitioner,

Civil Case No. 03-70167

v.

District Judge Arthur J. Tarnow

Magistrate Judge Thomas Carlson

STEVEN GERALD, CHIQUITA SWIFT,
ROBERT SCHILLER, GREG MOHON,
SHERRY BURT, MICHAEL POWELL
AND WILLIAM OVERTON,

Respondents.
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OPINION AND ORDER[1]

I. Introduction

The Court has reviewed the file *de novo*, including Plaintiff's Motion for Leave to File Third Amended Complaint [30-1], Defendant's Motion to Dismiss and/or for Summary Judgment [23-1], Plaintiff's Response thereto [26-1], the Magistrate Judge's Report and Recommendation [31-1], Defendants' Objections thereto [21-1], and Plaintiff's Response [33-1].

The Court hereby accepts in part and rejects in part the Magistrate's Report and Recommendation. The Court thus GRANTS Plaintiff's Motion for Leave to File a Third Amended Complaint [30-1], and GRANTS IN PART and DENIES IN PART Defendant's Motion to Dismiss and/or for Summary Judgment [23-1].

[1] Law Clerk Barbara Miltner provided quality research assistance.

II. BACKGROUND

On May 16, 2002, Plaintiff, a state prisoner at the Southern Michigan Correctional Facility (JMF) in Jackson, Michigan, met with his attorney, Craig Daly, at the JMF Control Center. Mr. Daly had traveled from Detroit to confer with his client and had allegedly advised prison officials of his visit. Upon his arrival, Mr. Daly and Plaintiff were directed to an Interview Room adjacent to the Control Center. Defendant Gerald, a corrections officer, remained in the Interview Room. Mr. Daly asked Defendant Gerald if he would be allowed to confer with Plaintiff in private. Defendant Gerald stated that he had been instructed by his supervisor to sit in on the visit. After 10-15 minutes, Defendant Gerald left the Interview Room and stationed himself just outside the door. Gerald was replaced by Defendant Swift, another corrections officer, who also seated herself inside the room. Attorney Daly asked Defendant Swift if she were aware that attorney-client communications were privileged. Defendant Swift allegedly responded that she did not care, and that she was following the instructions given by her supervisor, Defendant Schiller.

Mr. Daly asked to speak with Defendant Swift's supervisor and was told that the supervisor was unavailable. Mr. Daly then asked Defendant Swift if she would place herself outside the interview room and Defendant Swift refused. After approximately 30 minutes, Mr. Daly concluded that it would be a violation of attorney/client privilege to discuss Plaintiff's case with him in the presence of the corrections officer, so he terminated the visit.

That same day, Plaintiff spoke with Defendant Schiller, who denied instructing Defendants Swift and Gerald to post themselves inside the Interview Room. Defendant Schiller stated that staff were required to give attorney visits a reasonable amount of

privacy under MDOC policy directive 05.03.116.

On May 23, 2002, Plaintiff filed an administrative grievance complaining of the interference by Defendants Gerald and Swift in his attorney meeting. A Step 1 Grievance Response was issued on May 31 by Defendant Schiller, co-signed by Defendant Mohon, and acknowledged that Gerald and Swift had improperly positioned themselves inside the interview room contrary to MDOC policy directives.

Plaintiff filed a Step II Grievance on July 9, 2002, further alleging that the interference was in retaliation for reasons of his Islamic faith. Both the Step II Grievance and a Step III Grievance Responses found no additional error. Before receiving a response for his Step III grievance, Plaintiff was transferred to the Ojibway Correctional Facility. Plaintiff stated that he had only just recently arrived at JMF, having been transferred *from* Ojibway.

The second amended Complaint also alleged that defendant Gerald threatened to have him transferred to the Ojibway facility: "Defendant Gerald told plaintiff that since he wanted to cause trouble, plaintiff was going to be transferred back up north and then plaintiff's attorney can travel hundreds of miles, if he wanted to see plaintiff." The magistrate judge issued an order denying leave to amend, on grounds that the new allegations were "too unrelated" to the original complaint, that there was "no basis" for an 8th amendment claim, and that other allegations could simply be proffered through appropriate affidavits. See Order, 5/23/03. The Third Amended Complaint repeats these claims.

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b), a motion to dismiss "requires the Court to construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." *Grindstaff v. Green*, 133 F.3d 416, 421(6th Cir. 1998), *citing Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990).

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. F. R. Civ. P 56(c). According to the court in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), the moving party must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. *Bradford*, 886 F.2d at 1479, citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Recently, in *Crawford- El v. Britton*, 523 U.S. 574 (1998), the Supreme clarified that these same standards apply when plaintiff's affirmative case requires a showing of the subjective element of retaliatory motivation on the part of the defendant.

IV. ANALYSIS

Plaintiff's Motion for Third Amended Complaint

A party may amend its pleading once as a matter of course, and thereafter only by "leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a).

The magistrate judge previously dismissed Plaintiff's first amended complaint and denied the motion for leave to file a second amended complaint, stating that the allegations was too far removed from the issues in the original complaint to be relevant.

The magistrate judge recommends denying the third amended complaint for the same reasons. We disagree, and hereby grant Plaintiff's Motion for Leave to File a Third Amended Complaint.

Dismissal of Defendants Schiller, Mohon, Powell, Burt and Overton

The Third Amended Complaint also contains Plaintiff's voluntary dismissal of all defendants except Steven Gerald and Chiquita Swift. Defendants' motion to dismiss for failure to exhaust administrative claims is thus mooted, and Plaintiffs' claims as against Defendants Schiller, Mohon, Powell, Burt and Overton are hereby dismissed.

Eighth Amendment Claim

Plaintiff's Third Amended Complaint asserts an Eighth Amendment violation. To establish liability under the Eighth Amendment for a claim based on a failure to prevent harm to a prisoner, a plaintiff must show that the prison officials acted with "deliberate indifference" to a substantial risk that would cause a prisoner serious harm. *Curry v. Scott*, 249 F.3d 493, 506 (6th Cir. 2001). Deliberate indifference encompasses both an objective and a subjective component. To satisfy the subjective component, plaintiffs must show that the prison officials had "a sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825 at 834 (1970).

The factual underpinnings for this claim involve allegations that Defendant Swift arranged to have Plaintiff assaulted by other inmates, and threatened to 'find' contraband in his cell[2] in order to dissuade Plaintiff from filing further administrative grievances.

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[2] Plaintiff states that "On another occasion after Plaintiff filed his grievance, Defendant Swift approached plaintiff at his cell, and told him, that contraband can be found in any cell and that plaintiff should check his cell. Defendant Swift then smirked and walked away." P's Second

Plaintiff states that after he filed his Step 1 grievance, he was approached by several inmates on the yard, one of whom stated that Officer Swift had told them that she had gotten into trouble because of the grievance filed by plaintiff. The inmate further told Plaintiff that it would be in his best interest to sign-off of the grievance and let it drop, because "Swift was their girl". When Plaintiff refused to stop appealing the grievance, Plaintiff alleges that he was struck in the face by one of the inmates in the group.

In this case, it is not clear from the pleadings that Defendant Gerald acted with "deliberate indifference" during the assault, because the subjective element has not been adequately established. Not only has Plaintiff failed to show that Defendant Swift had a "sufficiently culpable state of mind", it is not unclear whether Defendant Swift was ever *aware* of the attack, nor is it clear that Swift herself organized or initiated the intimidation. Because there are insufficient facts presented to support such a claim, but circumstantial evidence of prior threats is suspect, we dismiss the Eighth Amendment claim without prejudice.

Religious Retaliation Claim

Plaintiff has asserted a religious retaliation claim charging that the attorney interference was in retaliation for his Islamic faith. Simply put, Plaintiff has presented no evidence to support this claim other than a bald, conclusory assertion. We therefore agree with and adopt the recommendation of the magistrate judge to grant Defendants' motion to dismiss for failure to state a claim of religious retaliation.

Right to Privacy Claim

Amended Complaint at para. 73.

Plaintiff has additionally alleged a violation of his right to privacy stemming from Defendants' interference with his attorney meeting. This Court has reviewed the recommendation of the magistrate judge, and finds that the authorities cited are insufficient to surmount the elements of qualified immunity. Notwithstanding the authorities which recognize that a right to privacy includes the right to communicate confidentially with one's attorney[3], we are not convinced that they constitute "clearly established" law under the stringent test outlined by *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177-78 (6th Cir. 1988) (holding that a "mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit"). For this reason, we grant Defendants' motion for summary judgment as to Plaintiff's right to privacy claim.

First Amendment Right of Access to Courts

We now address Plaintiff's First Amendment right of access to courts claim. We disagree with the magistrate judge's finding that Plaintiff fails to establish standing under *Lewis*. First Amendment right of access to the courts does include meaningful access to an attorney, *Bieregu v. Reno*, 59 F.3d 1445, 1456 (3rd Cir. 1995), overruled in part by *Lewis v. Casey*, 116 S. Ct. 2174 (1996), and a prisoner must prove actual harm in order to have standing to pursue derivative right of access claims. *Lewis v. Casey*, 116 S. Ct. 2174.

We read *Lewis*'s to apply only to alleged violations of derivative violations, rather

[3] The R&R suggests that *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989) and *Williams v. Price*, 25 F. Supp.2d 623 (W.D. Pa. 1998) identify the right to confidential attorney-client communications as a privacy right.

than of direct violations, of the right of access to courts.[4] Plaintiff has alleged a deprivation of his right to meaningfully access his attorney, which is a direct component of the First Amendment right of access to courts. Plaintiff has not, by contrast, merely alleged a violation for something held to serve as a proxy for such right. For these reasons we find that Plaintiff is not required to make a showing of actual harm, and deny Defendants' motion to dismiss as to the First Amendment right of access to courts claim.

Prison Transfer Retaliation Claim

Plaintiff has also raised a First Amendment retaliation claim, alleging that his prison transfer back to Ojibway correctional facility and subsequent physical abuse by fellow inmates was in retaliation for filing administrative grievances regarding the attorney incident.

Defendants move to dismiss for failure to exhaust administrative remedies under *Kemp v. Jones*, 42 Fed. Appx. 744, 2002 U.S. App. LEXIS 16058, extending the administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 to retaliation claims. While Plaintiff did not file an administrative grievance over the fact that he was being transferred to the Ojibway Correction Facility, we are unable to understand how he could have done so[5]. Because it is unlikely that any set of facts will

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[4] "The foregoing analysis would not be pertinent here if, as respondents seem to assume, the right at issue--the right to which the actual or threatened harm must pertain--were the right to a law library or to legal assistance. But Bounds established no such right, any more than Estelle established a right to a prison hospital. The right that Bounds acknowledged was the (already well-established) right of access to the courts." *Lewis v. Casey*, 518 U.S. 343, 350 (1996)

[5] Under *Kemp*, there is no way for a prisoner such as Plaintiff to pursue a prison transfer retaliation claim, because he can never be sure when threats of transfer will actually result in a transfer until he is already outside the jurisdiction of the transferring facility, at which time he is unable to file a grievance with that facility. It is thus impossible for a prisoner to file an

ever permit a prisoner to administratively exhaust a claim of retaliatory prison transfer, and because such a requirement does not support the underlying policies supporting the administrative exhaustion requirement, the narrow sub-set of prison-transfer retaliation claims are distinguished from general retaliation claims in *Kemp* and its holding so limited.

A specific retaliation claim requires a prisoner to establish that 1) the inmate engaged in protected conduct; 2) an adverse action was taken that would deter a person of ordinary firmness from continuing to engage in that conduct; and 3) the adverse action was motivated, at least in part, by the inmate's protected conduct. *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000), citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999).

The Sixth Circuit has held "An inmate has an undisputed First Amendment right to file grievances against prison officials on his own behalf." *Herron* at 415. Because Plaintiff alleges that he was transferred in retaliation for pursuing his administrative grievances against Defendants Swift and Gerald, he has established this first element.

As to the "adverse action" portion of the second element, Plaintiff has alleged that 1) he had only just recently arrived at JMF from the Ojibway facility when the issue arose which prompted him to file the administrative grievances, and 2) he was transferred right back to the Ojibway facility after filing his administrative grievance and after being warned by officer Gerald that since he wanted to cause trouble, Plaintiff "was going to be transferred back up north and then Plaintiff's attorney can travel hundreds of miles if he wanted to see Plaintiff". These facts are sufficient to establish an "adverse action" under

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administrative grievance unless he has some advanced notice and guarantee that such a transfer will take place; and even then, such a grievance would be premature.

the second element.

Whether a prison transfer would "deter a person of ordinary firmness" is a legal question. There is an established view that a prison transfer, on its own and within the same security classification is insufficient to meet the deterrence standard. See *Mandela v. Campell*, 181 F.3d 102, 1999 WL 357825 at 3 (6th Cir. 1999) (unpublished); *Goss v. Myers*, 208 F.3d 213 (6th Cir. 2000), 2000 WL 125905 (unpublished); *Goddard v. Kentucky Dept. of Corrections*, 205 F.3d 1340 (6th Cir. 2000) (unpublished), *Herron v. Campbell*, 198 F.3d 245 (6th Cir. 1999) (unpublished).

However, where 'aggravating factors' are alleged, the courts have been willing to find that a prison transfer would deter a person of ordinary firmness. See *Friedman v. Corrections Corp. of America*, 11 Fed.Appx. 467 (6th Cir. 2001) (unpublished).[6]

Plaintiff is now in the Upper Peninsula of Michigan, to which he was re-transferred following a very brief stay at the Jackson facility. His short stay at Jackson, by itself, raises suspicions that the Jackson-to-Ojibway transfer was not administratively routine. When combined with the facts that Plaintiff had been threatened and assaulted by other inmates for pursuing his administrative grievance against Swift, personally threatened by Swift (who claimed she could find contraband in his cell whenever she

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[6] Claims of fabricated disciplinary charges and placement in segregation in retaliation for use of the administrative grievance system, are sufficient to establish this element, *Dunham-Bey v. Holden*, 198 F.3d 244, 1999 WL 1023730 at 2, (6th Cir. 1999), as are claims of placement in segregation for providing legal assistance to fellow inmates. *Herron v. Harrison*, 203 F.3d 410 (6th Cir. 2000). Under *Spruytte v. Hoffner*, 181 F.Supp. 2d 736, 743 (W.D. Mich. 2001), Judge Quist found adverse action in a prison transfer where Plaintiffs lost high-paying library jobs, were labeled security threats, and lost property during the transfer. *Id*. at 744. However, loss of access to prison programs and increased distance for visitor were not aggravating factors sufficient to establish a claim of retaliatory prison transfer. *Friedman*, 11 Fed.Appx 467.

wanted), and personally threatened by Gerald with a prison transfer expressly for the purpose of impeding Plaintiff's communication with his attorney, the facts strongly support Plaintiff's claim of retaliatory transfer for purposes of interfering with Plaintiff's First Amendment rights. More importantly, it suggests a prison transfer undertaken purposefully and expressly to interfere with an inmate's right of access to his attorney. As such, this is more than sufficient to constitute an aggravating factor sharply distinguishing this case from 'transfer only' cases. Finally, Defendant Gerald's threat to transfer Plaintiff "back up north" so that his attorney could travel "hundreds of miles if he wanted to see Plaintiff" strongly suggests that the prison transfer was motivated by this protected conduct. Therefore Plaintiff meets the elements of a retaliatory transfer claim.

We find that this claim is not shielded by Defendants' qualified immunity defense. It is clear that a constitutional violation has occurred involving Plaintiff's First Amendment right to file administrative grievances in prison, a right clearly established under *Herron v. Harrison*, 203 F.3d 410 (6th Cir. 2000). That such a right was one of which a reasonable person would have known is amply demonstrated by the existence of MDOC policy directives to such effect.[7] More importantly, the directive in support of respecting confidential attorney-client communications is drafted in furtherance of the explicit policy statement: "To ensure that prisoners are permitted to exercise their constitutional right of access to the courts." MDOC PD No. 05.03.116. Plaintiff has established that the actions undertaken by Defendants Gerald and Swift were objectively unreasonable. Defendants' motion for summary judgment as to the retaliatory prison

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[7] The directive explicitly bans retaliation: "Staff are... prohibited from retaliating against a prisoner who...files a complaint [about] prohibited staff conduct." MDOC PD 03.03.130. The underlying conduct was prohibited under a different directive, which mandated that "If requested by the attorney...staff shall arrange a location where the visit can be conducted without being overheard by staff or other prisoners." MDOC PD No. 05.03.116.

transfer claim is therefore denied.

Sixth Amendment Right to Counsel

Plaintiff has also raised a Sixth Amendment right to counsel claim, against which Defendants move for summary judgment on qualified immunity grounds. The magistrate judge recommended that this Court grant Defendants' motion to dismiss as to this claim. We disagree. The Sixth Amendment right to counsel attaches in post-conviction appeals as of right, see *Ross v. Moffitt*, 417 U.S. 600 (1974). The right to counsel mandates that the attorney be available to assist in preparing and submitting a brief and must play the role of an active advocate. *Lopez v. Wilson*, 355 F.3d 931, 940 (6th Cir. 2004) (internal citations omitted). A Plaintiff need not demonstrate actual prejudice resulting from the state's intrusion where 1) presence of counsel is denied at a 'critical stage' of the proceedings; 2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or 3) when counsel is placed in circumstances in which competent counsel could very likely not render assistance. *United States v. Cronic*, 466 U.S. 648 (1984).

Plaintiff was prevented from meeting with his attorney to discuss his appeal when Defendants Gerald and Swift, in their capacity as corrections officers, each prevented Plaintiff from meeting with his attorney by sitting in Interview Room during the attempted meeting. After Plaintiff filed administrative grievances to address this interference with Plaintiff's Sixth Amendment right, he was threatened, assaulted, and ultimately transferred right back to the very facility from which he had recently come so that his attorney would be forced to travel "hundreds of miles if he wanted to see Plaintiff". The combination of threats to contrive contraband, threats to transfer Plaintiff for purposes of impeding his access to his attorney, and his ultimate transfer to the very

facility where Defendant Gerald threatened to send him are sufficient to establish that Plaintiff's counsel was placed in circumstances in which competent counsel could very likely not render assistance.

Plaintiff's allegations also survive qualified immunity defense because he has shown a clearly established Sixth Amendment violation which, even under MDOC's own policy directive and according to its Step 1 Grievance Response, was objectively unreasonable. For these reasons, Defendants' motion for summary judgment on this issue is denied.

For the foregoing reasons, the Court ACCEPTS IN PART and REJECTS IN PART the Report and Recommendation of the Magistrate Judge on Plaintiff's motion for leave to file a Third Amended Complaint [30-1] and Defendant's motion for summary judgment and dismissal [23-1].

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File a Third Amended Complaint is GRANTED, the Eighth Amendment claim is DISMISSED WITHOUT PREJUDICE for failure to state a claim, and Plaintiff's claims as to Defendants Schiller, Mohon, Powell, Burt and Overton are DISMISSED.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss and/or for Summary Judgment [23-1] is GRANTED IN PART as to Plaintiff's claims regarding Religious Retaliation and Right to Privacy.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss and/or for Summary Judgment [23-1] is DENIED IN PART as to Plaintiff's claims regarding First Amendment Right of Access to Courts, First Amendment Prison Transfer Retaliation, and Sixth Amendment Right to Counsel.

The Court notes that Plaintiff has previously moved for the appointment of counsel. It is the practice of this Court to attempt to obtain counsel in civil rights cases filed by prison inmates after the denial or partial denial of a defendant's motion for dismissal and summary judgment. Therefore, IT IS ORDERED that the Court will seek the appointment of *pro bono* counsel for Plaintiff's remaining First Amendment retaliation claim.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

/s/

Dated: March 26, 2004

ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE