

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK RIVERA : CIVIL ACTION
 :
 v. :
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 :
 JOSEPH CHESNEY, JAMES FORR, ROBERT BITNER, J. :
 HARVEY BELL, PETE OTTO, JOHN/JANE DOE, JANE DOE #2, :
 EDWARD POGIRSKI, JOANNE MIRANDA, FRANK DILLMAN :
 C.O. III LIEUTENANT BARNES, C.O. II SERGEANT :
 KUSTKO, and C.O. I BOLANIS : No. 97-7547

MEMORANDUM and ORDER

Norma L. Shapiro, J.

September 15, 1998

Plaintiff Frank Rivera ("Rivera"), an inmate at S.C.I. Frackville, filed this action under 42 U.S.C. § 1983 against defendants, Joseph Chesney, James Forr, Robert Bitner, J. Harvey Bell, Pete Otto, John/Jane Doe, Jane Doe #2, Edward Pogirski, Joanne Miranda, Frank Dillman, C.O. III Lieutenant Barnes, C.O. II Sergeant Kustko, and C.O. I Bolanis, all prison officials at S.C.I. Frackville. Rivera alleged violations of his rights under the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Defendants have filed a motion to dismiss which will be granted in part and denied in part.

FACTS

Rivera is an inmate at S.C.I. Frackville prison. Beginning in June, 1997, Rivera filed a series of grievance reports regarding incidents occurring between May and August, 1997. Shortly after Rivera's incarceration, the Frackville prison implemented a new

"Automated Inmate Telephone System;" prisoners submitted lists of those individuals with whom the inmate desired telephone contact. On May 11, 1997, Rivera submitted his first list of names and telephone numbers to his unit manager, defendant Joanne Miranda ("Miranda"). On May 12, 1998, Miranda returned the form submitted by Rivera with a notation approving all the entries except "attorney."¹ On June 16, 1998, Rivera became involved in a dispute with a prison guard, defendant Sergeant Kustko, and Rivera filed a grievance that day regarding the incident.

On July 5, 1998, Rivera received a letter from his attorney that had been opened in the mail room and not in his presence contrary to prison policy. Rivera filed a grievance report about this incident on July 7, 1998.

On July 17, 1998, Rivera submitted names and numbers of two attorneys, Marc Neff and George Goldstein,² (one of whom he had submitted on May 11, 1998) for addition to his telephone list; he was advised by Miranda that telephone list additions could be submitted only on the first through the fifth day of every month. On July 21, 1998, Rivera re-submitted the same request to defendant Frank Dillman ("Dillman"), and was advised to follow the directions of Miranda. On July 23, 1998, Rivera filed two grievance reports, one referring to his attempts to add his attorneys to his telephone

¹ This notation is somewhat ambiguous because Rivera listed two attorneys, Marc Neff and Carroll Cedrone, on the form.

² Rivera did not include Carroll Cedrone on this submission; the reason is not on record.

list, and the other regarding an incident with prison guard, defendant C.O. I Bolanis ("Bolanis") for not permitting Rivera his evening meal that day.

On August 1, 1998, Rivera again submitted the name of attorney George Goldstein, along with other individuals,³ to be added to his telephone list. Miranda returned the request on August 4, 1998; again all submissions were approved except "attorney." On August 8, 1998, and August 11, 1998 Rivera filed grievance reports complaining of the lack of response to his July 23 grievances regarding the telephone number submissions.

Rivera alleges that these incidents constituted violations of his rights secured under the First, Sixth, Eighth, and Fourteenth Amendments. As Rivera is proceeding pro se, the factual allegations in his complaint must be construed as liberally as possible. Gittlemacker v. Philadelphia County, 413 F.2d 84, 87 n.3 (3d Cir. 1969); cert. denied, 396 U.S. 1046, 90 S. Ct. 696 (1970); Youse v. Carlucci, 867 F. Supp. 317, 318 (E.D. Pa. 1994). Applying this more deferential standard, Rivera's allegations can be grouped under the following § 1983 claims: (1) denial of access to the courts and counsel in violation of the First, Sixth, and Fourteenth Amendments; (2) retaliation for the exercise of First Amendment rights; and (3) cruel and unusual punishment in violation of the Eighth Amendment.

³ Attorney Marc Neff did not appear on this submission.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065, 109 S. Ct. 1338 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Random v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only "if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

II. Rivera's Constitutional Claims

Rivera has requested declaratory and monetary relief against all defendants, both individually and in their official capacities. To the extent that Rivera requested damages against defendants in their official capacities, his claims are barred by the Eleventh Amendment. See Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 361 (1991).

A. Denial of Access to the Courts and Counsel

Prisoners have a well-established, but limited, right of access to the courts. The right encompasses claims of civil rights violations. Wolff v. McDonnell, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 2974 (1974). Bounds v. Smith, 430 U.S. 817, 823, 97 S. Ct. 1491, 1495 (1977) held that "meaningful access to the courts is the touchstone," but "the inmate must go one step further and demonstrate that the alleged shortcomings in . . . the legal assistance program hindered his efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351; 116 S. Ct. 2174, 2180 (1996). A prisoner must allege both an interference with his access to the courts and an actual injury resulting therefrom to state a cognizable claim under Section 1983. Oliver v. Fauver, 118 F.3d 175, 177-78 (3d Cir. 1997).

Rivera makes several related claims regarding access to his attorneys and the courts: Edward Pogirski ("Pogirski") was responsible for opening and tampering with his legal mail; Miranda refused to add attorneys to his telephone list; Dillman refused to allow Rivera to call his attorney; and Forr and Chesney failed to respond to Rivera's grievances about the phone lists.

1. Legal Mail

Rivera claims that interference with his legal mail resulted in denial of his access to the courts guaranteed under the First and Fourteenth Amendments. Rivera alleges that some legal correspondence was removed and never given to him, but a prisoner

must "demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded." Lewis, 518 U.S. at 352, 116 S. Ct. at 2181 (footnote omitted). As Rivera has not alleged any actual injury resulted from opening his legal mail, his claim for a denial of access to the courts based on the defendants' mail processing will be dismissed.

2. Access to Counsel

Rivera claims that his inability to contact his attorney denied him access to the courts; this claim is sufficient to withstand a motion to dismiss. Included within the right to meaningful access to the courts is the right of prisoners to contact their attorneys.

In his complaint, Rivera makes general reference to injury resulting from his inability to contact his attorney by telephone. (Pl's Compl., Appeal from Initial Review, at 4)(prison staff prevented him from calling his attorney "at a very crucial phase of my criminal litigation; preparation of an Appeal Brief to the Superior Court of Pennsylvania and the fact that I had just hired my Attorneys' [sic] firm to handle the case, as my input is on [sic] of the most important factors of my case!"). In his Brief in Opposition to Defendants' Motion to Dismiss, Rivera makes the more specific allegation that his inability to call his lawyer prevented him from raising a potentially viable issue on appeal that resulted in its waiver. (Pl's Br. Opp'n Mot. Dismiss at 9).

Rivera is proceeding pro se, so the additional allegations in the response are considered an amendment to the complaint. Johnson v. Hill, 910 F. Supp. 218, 220 & n.2 (E.D. Pa. 1996); Nitzberg v. Elder Pharmaceuticals, 1993 WL 114446, *1 (E.D. Pa. Apr. 12, 1993). Even without his more specific reference, Rivera has alleged an injury sufficient to withstand a motion to dismiss. The court "must presume that general allegations embrace those specific facts that are necessary to support the claim." Nwaebo v. Reno, 1996 WL 421961, *4 (E.D. Pa. July 18, 1996).

It is not clear if alternative means were available to Rivera as his request on July 21, 1998 to contact his attorney was denied without explanation. But cases holding that preventing an inmate from contacting his attorney is actionable only when the inmate had no alternative means of communication apply an unnecessarily constrained view of the right of access to counsel. See, e.g., Williams v. ICC Committee, 812 F. Supp. 1029, 1034 (N.D. Cal. 1992). Alternative means of access are relevant in determining the reasonableness of a prison regulation; they are not dispositive. Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262 (1987).

Over three months elapsed between Rivera's initial attempt to add his attorney to his telephone list and permission to call his attorney.⁴ The prison regulations regarding the Automated Inmate Telephone System permitted new telephone numbers to be added during

⁴ It is not clear whether any of Rivera's requests to add attorneys Cedrone, Neff, or Goldstein to his telephone list were ever approved; the court assumes that none of the requests were.

the first five days of each month. A Unit Manager receiving timely submissions was apparently authorized to approve all additions except attorneys, who had to be independently verified. The prison may be able to establish that these procedures were reasonably related to penological interests and did not unduly interfere with an inmate's ability to access the courts. However, Rivera has alleged sufficient facts that, if proven, may constitute an unconstitutional infringement on his right of access secured by the First, Sixth, and Fourteenth Amendments. Rivera's claims that Miranda and Dillman denied his constitutional right to court access based on his inability to call his attorney, causing waiver of a viable appellate issue, survive this motion to dismiss.

3. Response to Grievance Reports

Plaintiff alleges that his constitutional rights were violated because defendants Forr and Chesney "refused to respond to [the] grievance[s]" he filed.⁵ (Compl., Statement of Claim, ¶ 9). "Prisoners are not constitutionally entitled to a grievance procedure and the state creation of such a procedure does not create any federal constitutional rights." Wilson v. Horn, 971 F. Supp. 943, 947 (E.D. Pa. 1997), aff'd, 142 F.3d 430 (3d Cir. 1998);

⁵ Among the defendants, Rivera has also named Robert Bitner ("Bitner"), J. Harvey Bell ("Bell"), and Pete Otto ("Otto") as defendants in this action, although the only specific factual allegations he makes against them is that they heard appeals from his grievances. The fact that Chesney, Bitner, Bell, and Otto were involved in the appeals from Rivera's grievances is insufficient for liability under 42 U.S.C. § 1983. Wilson, 971 F. Supp. at 947. Rivera also named John/Jane Doe and Jane Doe #2 as additional defendants, but makes no allegations against unnamed individuals other than those involved in the grievance appeals process. These claims will be dismissed.

see, also, Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994), cert. denied, 514 U.S. 1022, 115 S. Ct. 1371 (1995); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), cert. denied, 488 U.S. 898, 109 S. Ct. 242 (1988); McGuire v. Forr, 1996 WL 131130, *1 (E.D. Pa. Mar. 21, 1996), aff'd, 101 F.3d 691 (3d Cir. 1996). A prisoner's First Amendment right of access to the courts is not compromised by the failure of the prison personnel to respond to plaintiff's grievances. See, e.g., Flick v. Alba, 932 F.2d 728, 729 (8th Cir. 1991). Rivera's claim that Forr and Chesney failed adequately to respond to his grievance reports will be dismissed.

B. Retaliation Claim

Rivera alleges four specific incidents of retaliation⁶ by prison officials: (1) Kustko verbally harassed him on June 16, 1998 in retaliation for Rivera's grievance report against Miranda; (2) Forr threatened him with a groundless disciplinary action in retaliation for Rivera's grievance complaints about the telephone lists; (3) Miranda refused to add his attorneys to his phone list in retaliation for an earlier grievance against her; and (4) Bolanis, refusing to permit him to leave his cell for the evening meal on July 23, 1998, stated "Now, go and file a grievance on that!" (Compl., Statement of Claim, ¶ 10). The first two claims will be dismissed.

⁶Defendants treat Rivera's retaliation claims as additional denial of court access claims. If Rivera intended such claims, they would be dismissed. See Part II.A.3.

Retaliation prompted by "the exercise of a constitutionally protected right is in itself a violation of constitutional rights." Isenberg v. Wigen, 1995 WL 121560, *1 (E.D. Pa. Mar. 21, 1995) (citing Milhouse v. Carlson, 652 F.2d 371, 374 (3d Cir. 1981)). An act of retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act taken for different reasons would have been proper. Drexel v. Horn, 1997 WL 356484, *6 (E.D. Pa. June 20, 1997) (Shapiro, J.). The retaliation must be in the form of concrete actions; verbal threats or abuse, without more, will not suffice. Id. at *7 & n.3 (citations omitted); Wilson v. Horn, 971 F. Supp. 943, 948 (E.D. Pa. 1997), aff'd, 142 F.3d 430 (3d Cir. 1998). The verbal retaliation claims against Kustko and Forr will be dismissed.

The claims against Miranda and Bolanis allege concrete action in retaliation for the exercise of protected First Amendment rights: refusal to add to a telephone list and deprivation of a meal.⁷ To state a claim of retaliation, the plaintiff must allege he was engaged in a constitutionally protected activity, the defendants retaliated against him, and the protected activity was the cause of the retaliation. Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997). Filing grievance reports against prison

⁷The retaliatory acts need not be severe to be actionable under Section 1983. See Anderson v. Horn, 1997 WL 152801, *4, *9 (E.D. Pa. Mar. 28, 1997) (claim that prison officials denied inmate a supply bag over the weekend in retaliation for testifying sufficient to withstand motion for summary judgment, and noting that this temporary deprivation would not state an Eighth Amendment claim); Quinn v. Cunningham, 879 F. Supp. 25, 28-29 (E.D. Pa. 1996), aff'd, 85 F.3d 612 (3d Cir. 1996), (denying summary judgment on the claim that prisoner was refused overtime pay in retaliation for filing a grievance).

officials is protected First Amendment activity.⁸ See, e.g., Hill v. Blum, 916 F. Supp. 470, 473-74 (E.D. Pa. 1996)(prison officials cannot retaliate against a prisoner for exercising his First Amendment rights by filing an administrative grievance); Quinn, 879 F. Supp. at 27-28. Rivera must prove that his filing grievance reports was a "substantial or motivating factor" in the decisions by Miranda and Bolanis, Keenan v. City of Philadelphia, 983 F.2d 459, 466 (3d Cir. 1992), but he has sufficiently alleged retaliatory conduct; the retaliation claims against Miranda and Bolanis are sufficient to withstand the motion to dismiss.

B. Eighth Amendment Claim

Rivera makes two possible Eighth Amendment claims, the first arising for a lost meal and the second for verbal abuse.⁹ Rivera alleges that defendants did not allow him to have his evening meal on July 23, 1997. As an unconstitutional condition of confinement under the Eighth Amendment,¹⁰ this claim is dismissed as de minimis. See, e.g., Guttridge v. Chesney, 1998 WL 248913 (E.D. Pa.

⁸Defendants argue there can be no First Amendment violation for retaliation when there is no constitutionally assured right to grievance procedures, but liability for infringement of an avenue of expression afforded to inmates is different than a requirement that such an avenue be established or maintained. See Anderson, 1997 WL 152801 at *9 & n.3.

⁹ If Rivera is seeking damages for independent claims of mental and emotional injury, see, e.g., Pl's R. Mot. Dis. at 4 (claiming defendants' behavior "damages a man[']s psyche" and was "mental and emotional torture"), those claims are dismissed. Under 42 U.S.C. § 1997e(e), "[n]o federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a showing of physical injury." 42 U.S.C. § 1997e(e) (1998). See also Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997). Plaintiff's complaint contains no allegation that he suffered physical injury.

¹⁰Rivera's claim that this action by Bolanis was part of a pattern of retaliation against him for filing grievances remains.

May 8, 1998) (failure to provide plaintiff with a blanket between April and June not a constitutional violation); Wilson v. Horn, 971 F. Supp. 943 (E.D. Pa. 1997), aff'd, 142 F.3d 430 (3d Cir. 1998), (cold, mice-infested cell not an Eighth Amendment violation); Tinsley v. Vaughn, 1991 WL 95323 at *4 (E.D. Pa. May 29, 1991) (confining prisoner to cell and suspending shower privileges for twelve days not a constitutional deprivation); Jones v. Kurtz, 1988 WL 100801 (E.D. Pa. Sept. 23, 1988) (complaint that plaintiff was denied right to shower for three days dismissed as frivolous).

Rivera also alleges that defendants were "verbally abusive." (Compl., Statement of Claim, ¶ 5). There is no liability under § 1983 for verbal abuse alone. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997). Verbal harassment or threats by a prison officer to an inmate, without a reinforcing act, will not state a § 1983 claim. Maclean v. Secor, 876 F. Supp. 695, 698 (E.D. Pa. 1995). Rivera's claim alleging verbal harassment will be dismissed.

CONCLUSION

Rivera has pled numerous factual allegations regarding actions taken by prison officials. These allegations, "however inartfully pleaded," Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595 (1972), state claims under 42 U.S.C. § 1983 for denial of access to counsel and the courts secured under the First, Sixth, and Fourteenth Amendments, for retaliation for the exercise of First Amendment rights, and for cruel and unusual punishment prohibited

by the Eighth Amendment. Rivera's claim against Miranda and Dillman for denial of access to the courts arising from his inability to add his attorney to his approved telephone list or call his attorney and his claims for retaliation against Miranda and Bolanis for exercise of his First Amendment rights state cognizable claims under Section 1983. All Rivera's other claims will be dismissed.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK RIVERA : CIVIL ACTION
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JOSEPH CHESNEY, JAMES FORR, ROBERT BITNER, J. :
HARVEY BELL, PETE OTTO, JOHN/JANE DOE, JANE DOE #2, :
EDWARD POGIRSKI, JOANNE MIRANDA, FRANK DILLMAN :
C.O. III LIEUTENANT BARNES, C.O. II SERGEANT :
KUSTKO, and C.O. I BOLANIS : No. 97-7547

ORDER

AND NOW, this 15th day of September, 1998, upon consideration of Defendants' Motion to Dismiss for Failure to State a Claim and Plaintiff's Brief in Opposition to the Motion, it is hereby **ORDERED** that defendants' motion to dismiss for failure to state a claim for which relief can be granted is **GRANTED** in part and **DENIED** in part:

1. Defendants' motion to dismiss all claims for monetary damages against the defendants in their official capacities is **GRANTED**.

2. Defendants' motion to dismiss all claims against defendants Chesney, Bitner, Bell, Otto, John/Jane Doe, and Jane Doe #2 is **GRANTED**.

3. Defendants' motion to dismiss plaintiff's claim against Pogirski for denial of court access based on treating his legal mail as regular mail is **GRANTED**.

4. Defendants' motion to dismiss plaintiff's claim against Miranda and Dillman for denial of court access based on his inability to contact his attorney is **DENIED**.

5. Defendants' motion to dismiss plaintiff's claim against Forr and Chesney for denial of court access based on failure of defendants to respond to plaintiff's grievance reports is **GRANTED**.

6. Defendants' motion to dismiss plaintiff's claim for retaliation for plaintiff's exercise of constitutionally protected rights is **GRANTED** as to defendants Kustko and Forr, and **DENIED** as to defendants Miranda and Bolanis.

7. Defendants' motion to dismiss plaintiff's claim for cruel and unusual punishment based on one missed meal is **GRANTED**.

8. Defendants' motion to dismiss plaintiff's claim for cruel and unusual punishment resulting from verbal abuse is **GRANTED**.

9. Defendants Miranda, Dillman, and Bolanis are ordered to file an answer within ten (10) days.

10. The caption is amended to read:

Frank Rivera

v.

Joanne Miranda, Frank Dillman,
and C.O. I Bolanis.

Norma L. Shapiro, J.