

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

BOBBIE L. SIMS,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
SUPERINTENDENT MARTIN	:	
DRAGOVICH, et al.,	:	
Defendants	:	NO. 95-CV-6753

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**JUNE 7, 1999**

The Court of Appeals permitted Plaintiff Bobbie Sims' case, which the previous trial judge deemed entirely frivolous, to go forward but warned that it would not survive unless he created a record consisting of more than his own conclusions. Plaintiff, however, generally has failed in that endeavor; his case consists almost entirely of speculation factually grounded in little more than ordinary prison administration. Presently before the Court is Defendants' Motion for Summary Judgment. For the reasons that follow, Defendants' motion is granted in part.

**I. BACKGROUND**

Plaintiff, serving a life sentence for first degree murder, was transferred from the State Correctional Institution at Pittsburgh ("Pittsburgh") to the state prison at Mahanoy ("Mahanoy") in May 1995. Although Pittsburgh is a level 4 maximum security prison and Mahanoy is only level 3, Plaintiff enjoyed greater liberties at Pittsburgh than he would at Mahanoy in one respect: at Pittsburgh Plaintiff received "Z-Code" status, which entitled him to be celled by himself. Plaintiff apparently received this status because he is unable to live in close quarters with another prisoner; he states he is "inarguable unamendable to celling with another prisoner." (Pl.'s Resp. Defs.' Mot. Summ. J. at 4 (fifth actual page)). Despite this arrangement, however, Plaintiff did

not find his time at Pittsburgh entirely to his liking, and has sued various Pittsburgh officials in the District Court for the Western District of Pennsylvania. Both the Z-Code status and his law suit are central to the case here.

Plaintiff's arrival at Mahanoy was preceded by a call from Pittsburgh warning that Plaintiff was an escape threat, and so Plaintiff was placed in administrative segregation for the first seven days of his stay at Mahanoy. The investigation into this warning yielded inconclusive results, and Plaintiff was released from administrative custody. On his way back to the general prison population, Plaintiff engaged two Corrections Officers ("COs") in a discussion about whether he again would receive the Z-Code status. As a result of this conversation, one of the COs, Officer McNeal, issued misconduct 669545 against Plaintiff. McNeal claimed Plaintiff lied that Defendant Judy Kleiman approved his Z-Code status. Defendant Mary Canino found Plaintiff guilty of this misconduct, and the Periodic Review Committee ("PRC") sustained Canino's finding. Plaintiff claims Kleiman's involvement with the misconduct and the affirmance by the three PRC members, Robert Novoteny, Edward Klem, and Kleiman, were in retaliation for his suit against the Pittsburgh officials.

Plaintiff next pressed the Z-Code issue with Unit Manager Philip Duck. In support of this claim Plaintiff provides several prisoner's affidavits, each generally casting Duck as the aggressor. According to Duck, however, Plaintiff threatened his life, refused to obey his order, and used profanity, and for each of these reasons Duck issued misconduct 640907 against Plaintiff. Canino, after a hearing, found Plaintiff guilty and this time sanctioned him, ordering Plaintiff to serve ninety days in disciplinary custody. Plaintiff alleges that during this hearing, Canino said she didn't like trouble makers and those who file law suits. (Sims Dep. at 58-59.)

Plaintiff alleges Duck, Canino, the PRC members, and Superintendent Dragovich, who affirmed the PCR, all acted in retaliation for his suit against the Pittsburgh officials.

While in disciplinary custody, Plaintiff repeatedly requested, but never received, his legal materials concerning the Western District law suit. He eventually was allowed to examine his belongings, held in the property room while he was in disciplinary custody, and at that time discovered that his litigation file for the Western District law suit was missing, as well as other papers that included grievances.<sup>1</sup> He reported this to Klem, Novotney, and Dragovich, who promised to investigate. Mooney interviewed Plaintiff about the loss a few days later, and then ordered a search of Plaintiff's cell. Because those carrying out the search discovered legal materials, Mooney issued misconduct 699026, which charged Plaintiff with lying to an employee. Plaintiff protested that these papers all related to his criminal case, not the civil case against the Pittsburgh officials, but Canino nevertheless found him guilty and sentenced him to sixty days disciplinary custody time, four times the fifteen days potentially permitted under prison guidelines. Plaintiff alleges Canino again repeated that Plaintiff was a trouble maker and had filed a law suit. The PCR affirmed Canino's findings and sanction, but Dragovich reduced Plaintiff's sentence to fifteen days. Plaintiff alleges Mooney issued the misconduct, Canino found him guilty, the PCR affirmed Canino, and Dragovich failed to reverse Canino all in retaliation for his suit.

Plaintiff also alleges Duck and Kleiman deprived him of his Z-Code status in retaliation for the suit, and that Canino and Dragovich retaliated against him for his threatened suits against

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<sup>1</sup>Plaintiff alleges Duck was seen leaving his cell with a file that Plaintiff believes contained his legal materials, and that Defendants James McGrady ("McGrady") and Vince Mooney ("Mooney") conspired with Duck toward this end.

them. Plaintiff claims Mooney and McGrady retaliated against him for his Pittsburgh suit by placing him in administrative segregation when he first arrived at Mahanoy. Further, he believes Duck's alleged confiscation of his legal papers and the conspiracy between Duck, Mooney, and McGrady violated his First Amendment right of access to court.

The final act of retaliation Plaintiff alleges concerns the destruction of his typewriter. Plaintiff claims to have packaged it appropriately, but found it destroyed when it arrived in Pittsburgh after Plaintiff's transfer back to that institution. Although it is unclear which of the Defendants he believes is responsible, (see Pl.'s Sur-Rebuttal Reply to Defs.' Reply at 4-5), Plaintiff does allege this too was done in retaliation, id. at 5.

## **II. DISCUSSION**

### **A. The Summary Judgment Standard.**

Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"; the applicable substantive law determines what facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party is entitled to every favorable inference that can be drawn from the record. Sharrar v. Felsing, 128 F.3d 810, 817 (3d Cir. 1997). In the case of a pro se party, the Court will view his allegations less stringently than those composed by a lawyer. See Milhouse v. Carlson, 652 F.2d 371, 373 (3d Cir. 1981). Even a pro se nonmovant, however, may not avoid summary judgment by relying on evidence that is merely colorable or not significantly probative, Anderson, 477 U.S. at 249-50, and similarly may not rely on mere allegations, general denials, or vague statements, Quiroga v.

Hasbro, Inc., 934 F.2d 497, 500 (3d Cir.), cert. denied, 502 U.S. 940 (1991).

**B. Plaintiff's First Amendment Claims Against Defendants.**

Plaintiff has brought this action pursuant to 42 U.S.C. § 1983, under which he must demonstrate that: (1) the conduct complained of was committed by a person acting under the color of state law; and (2) the conduct deprived Plaintiff of rights secured by the Constitution or federal law. West v. Atkins, 487 U.S. 42, 48 (1988). Defendants do not dispute their obvious status as state actors, (Defs.' Mem. Supp. Mot. Summ. J. at 17), and so the Court's analysis will focus on whether Defendants deprived Plaintiff of his constitutional rights. Plaintiff alleges two First Amendment based rights were violated: his right of access to court, and his right to seek redress in the courts without suffering retaliation. Each of these claims presents significant evidentiary hurdles for Plaintiff to clear to avoid summary judgment. As the Court will discuss, Plaintiff has cleared these hurdles but once.

**C. Plaintiff's Denial of Access to Court Claim Against Duck, Mooney, and McGrady.**

Plaintiff claims Duck denied him access to court by taking the files relating to the Western District suit. Mooney and McGrady, Plaintiff alleges, also violated this First Amendment right by conspiring with Duck. Plaintiff, however, cannot carry the heavy burden to withstand summary judgment on this claim because he has failed to show he suffered an actual injury. The Supreme Court recently imposed this requirement on prisoners claiming denial of access to court, see Lewis v. Casey, 518 U.S. 343, 349 (1996), and Plaintiff cannot meet this requirement because his suit has not been suspended or even delayed. After he discovered those documents were missing, Plaintiff sought the assistance of the district court, which immediately

and freely helped Plaintiff recover the pleadings, motions, and documents produced during discovery in the defendants' possession. (Defs.' Mem. Supp. Mot. Summ. J. at 12.) While Plaintiff states he never did recover his personal research, (Sims Dep. at 73-74), he never makes any showing at all that this loss impeded his access to the court, (see Pl.'s Resp. Defs.' Mot. Summ. J. at 14-16). Without this showing, Plaintiff cannot maintain his denial of access to court claim, cf. Reynolds v. Wagner, 128 F.3d 166, 183 (3d Cir. 1997), and Defendants' motion for summary judgment on this claim is granted.

**D. Plaintiff's Claims Surrounding Misconduct 669545.**

Plaintiff faces another stringent standard on his retaliation claims. Because of many prisoners' propensity to wield retaliation claims when confronted with disciplinary action, district courts must view prisoners' retaliations claims with sufficient skepticism to avoid becoming entangled in every disciplinary action taken against a prisoner. See Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996); Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995), cert. denied, 516 U.S. 1084 (1996). To prevail, Plaintiff must prove that: (1) he engaged in a protected activity; (2) state actors, here the prison officials, retaliated; and (3) the protected activity caused the state actors' retaliation. See Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997). Many circuits' skepticism of these claims is manifested by their employment of the "but for" test to determine causation, but in this Circuit the Court of Appeals favors the "substantial motivating factor" test. Compare Peterson v. Shanks, 149 F.3d 1140, 1144 (10th Cir. 1998) (apparently rejecting the "reasonable relationship" test articulated in Frazier v. Dubois, 922 F.2d 560, 562 (10th Cir. 1990)), and Foster v. Delo, 130 F.3d 307, 308 (8th Cir. 1997), and Johnson v. Rodriguez, 110

F.3d 299, 312 (5th Cir.), cert. denied, 118 S. Ct. 559 (1997), and McDonald v. Hall, 610 F.2d 16, 18-19 (1st Cir. 1979) with Anderson, 125 F.3d at 163, and Keenan v. City of Phila., 983 F.2d 459, 466 (3d Cir. 1992), and Allah v. Stachelek, No. 95-7593, 1998 WL 281930, at \*13 (E.D. Pa. May 29, 1998), and Wood v. Cohen, No. 96-3707, 1998 WL 88387, at \*8 (E.D. Pa. March 2, 1998). See also Brooks-Bey v. Kross, No. 94-7650, slip op. at 8 n.1 (3d Cir. July 24, 1995) (unpublished opinion) (rejecting the “but for” test explicitly).

Plaintiff fails to show he could sustain his burden of showing his suit substantially motivated Kleiman’s and the PCR members’ actions. At a minimum, Plaintiff had to create a record establishing Defendants’ knowledge of Plaintiff’s suit and connecting that knowledge to the disciplinary action. The sole proof Plaintiff offers, however, is the disciplinary action. Plaintiff fails to substantiate his claim that Kleiman caused McNeal to issue the misconduct, and therefore his allegation remains nothing more than conjecture, even after a lengthy discovery period. Moreover, Plaintiff presents no evidence whatsoever that the PCR members were driven to affirm Canino’s decision by their knowledge of the suit. So far as the record reflects, the PCR members affirmed those findings because they accepted Canino’s credibility determinations. Summary judgment on these claims is appropriate in view of Plaintiff’s unsupported conclusions and vague allegations.

**E. Plaintiff’s Claims Surrounding Misconduct 640907.**

Plaintiff also fails to create a record that persuades the Court he could prevail at trial on his retaliation claims regarding misconduct 640907. To survive summary judgment on his claim against Duck, Plaintiff had to show Duck acted against Plaintiff substantially because of Plaintiff’s suit. Plaintiff, however, merely offers affidavits that serve only to dispute Duck’s

version of the events, not to demonstrate either retaliation or Duck's substantial motivation. Similarly, Plaintiff was required to demonstrate Canino was substantially motivated by his suit to find him guilty and sanction him, but again all he has shown, even accepting that Canino said she knew of his suit, was that she accepted Duck's account over Plaintiff's. Plaintiff's claims against the PCR members and Dragovich, not even supported as well as his claim against Canino, are deficient for the same reasons. Defendants are entitled to summary judgment on these claims.

**F. Plaintiff's Claims Surrounding Misconduct 699026.**

Plaintiff's claims generally do not withstand summary judgment because he has failed to create a record rebutting the allegations underlying the misconducts. The same is not true here; the record reveals a genuine issue of material fact exists regarding Defendants' substantial motivation for this disciplinary action. Summary judgment on his misconduct 699026 claims is inappropriate.

Plaintiff received misconduct 699026 for lying about stolen legal materials. The record clearly shows that Plaintiff specified which of his materials was missing, and that he never deviated from his claim that those materials related to his Western District suit. (See Sims Dep. at 78-83; Misconduct Hearing Appeal to PCR; Appeal to Dragovich.) While it is conceivable that those who searched the cell mistook, at first glance, the discovered papers for those Plaintiff claimed were missing, those two sets of documents are distinct on their face. Plaintiff's specificity, coupled with the facial differences between the missing and discovered documents, raise a genuine issue of material fact regarding Mooney's substantial motivation. The Court also finds a genuine issue of material fact exists regarding Canino's, the PCR members', and Dragovich's substantial motivations, given the opportunity each enjoyed to rationally and

deliberately review Plaintiff's claims and compare the documents. This conclusion is reinforced by Canino's alleged statement that she did not like trouble makers like Plaintiff and those who file law suits, the dramatic departure of Canino's sanction from that allowed under the inmate handbook, and Defendants' alleged repeated declaration that they "play team ball." (Sims Dep. at 34-35, 83, 105, 109.) Defendants' motion for summary judgment is denied with respect to these claims.<sup>2</sup>

**G. Plaintiff's Retaliation Claims Regarding His Placement in Administrative Segregation, Denial of Z-Code Status, and the Destruction of His Typewriter.**

Defendants' motion, however, will be granted on Plaintiff's remaining retaliation claims. Plaintiff claims he never would have been transferred to Mahanoy, a level 3 institution, if Pittsburgh administrators suspected he would escape. At the same time, however, Plaintiff claims a low level Pittsburgh official began the rumor with a call to Mahanoy, (see Pl.'s Resp. Defs' Mot. Summ. J. at 8), thereby undermining his claim that the Mahanoy officials had no basis to believe he would escape. Additionally, Plaintiff offers no proof that, upon his arrival at Mahanoy, Mooney and McGrady knew of his law suit, and so Plaintiff cannot meet his burden of showing retaliation occurred.

Plaintiff also claims he was deprived of Z-Code status in retaliation for his suit, but this claim rests on the erroneous belief that Z-Code status is permanent. It is not, (Duck Aff. ¶ 5), and therefore he was never deprived of anything because he never was entitled to it. More to the point, Plaintiff again fails to establish he was double-celled, like most other prisoners, because of

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<sup>2</sup>As Defendants correctly point out in their memorandum, Plaintiff is barred, to whatever extent he seeks them, from recovering damages against Defendants in their official capacities by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 678 (1974).

the Western District suit.

Finally, Plaintiff claims his type writer was destroyed in retaliation for his suit. Unfortunately, he does not allege which Defendant destroyed it. Because he cannot attribute this act to any Defendant, and because he has not named an institutional defendant that conceivably could ultimately be liable, the Court must grant summary judgment on this claim.

An Order follows.

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Plaintiff,	:	
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v.	:	
	:	
SUPERINTENDENT MARTIN	:	
DRAGOVICH, et al.,	:	
Defendants	:	NO.: 95-CV-6753

**ORDER**

AND NOW, this 7th day of June, 1999, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 5), Plaintiff's response thereto, Defendants' reply, and Plaintiff's Sur-Rebuttal Reply, it is hereby **ORDERED**:

1. Defendants' motion is **GRANTED** in part;
2. Judgment is entered in favor of Defendants Phillip Duck, Vince Mooney, and James McGrady and against Plaintiff on his claim of denial of access to court;
3. Judgment is entered in favor of Defendants Judy Kleiman, Robert Novotney, and Edward Klem and against Plaintiff on his claims surrounding misconduct 669545;
4. Judgment is entered in favor of Defendants Phillip Duck, Mary Canino, Edward Klem, and Robert Novotney and against Plaintiff on his claims surrounding misconduct 640907;
5. Judgment is entered in favor of Defendants Mooney and McGrady and against Plaintiff on his claim of retaliatory placement in administrative segregation;
6. Judgment is entered in favor of Defendants Phillip Duck and Judy Kleiman and against Plaintiff on his claim of retaliatory denial of Z-Code status;
7. Judgment is entered in favor of Defendants and against Plaintiff on his claim of retaliatory destruction of his typewriter;

8. Defendants' motion for summary judgment is **DENIED** with respect to the following claims: Plaintiff's retaliation claims relating to misconduct 699026, brought against Defendant Mooney, Defendant Canino, Defendant Klem, Defendant Novotney, Defendant Kleiman, and Defendant Dragovich; and

9. Plaintiff's renewed Motion for Appointment of Counsel (Doc. No. 51) again is **DENIED**.

BY THE COURT:

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JAMES MCGIRR KELLY, J.