Bradshaw v. Burns et al Doc. 35 Att. 26

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in King v. McIntyre, N.D.N.Y., April 8, 2015

320 F.3d 346
United States Court of Appeals,
Second Circuit.

Robert DAVIS, Plaintiff–Appellant,
v.
Glenn S. GOORD; Christopher Artuz; Sabina Kaplan; John P. Keane; Mervat Makram; Frank Lancellotti; Janice Diehl; Thomas Briggs; Tim Terbush; and Thomas Egan, Defendants–Appellees.

Docket No. 01–0116.
|
Submitted Sept. 4, 2002.
|
Decided Feb. 10, 2003.
|
Amended June 25, 2003.
|
Corrected July 21, 2003.

Synopsis
Prison inmate filed cause of action under § 1983 to recover for prison officials' alleged violation of his free speech and free access rights, as well as for their alleged unlawful retaliation against him for filing prison grievance. The United States District Court for the Southern District of New York, Charles L. Brieant, J., dismissed complaint with prejudice, and inmate appealed. The Court of Appeals, Stein, District Judge for the Southern District of New York, sitting by designation, held that: (1) allegations in inmate's pro se civil rights complaint, that prison official on two occasions opened his legal mail outside of his presence, were insufficient to state a claim for denial of access to courts or violation of free speech right, and (2) complaint sufficiently alleged requisite causal connection between actions of prison officials and his earlier protected activity in filing grievance, and thus was sufficient to state First Amendment retaliation claim.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (19)

[1] Federal Civil Procedure
Clear or certain nature of insufficiency

Complaint may be dismissed for failure to state claim only if court finds that it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

17 Cases that cite this headnote

[2] Federal Civil Procedure
Prisoners' pleadings

Where prison inmate who filed civil rights complaint was proceeding pro se, court had to construe complaint with particular generosity in deciding whether it could properly be dismissed as failing to state claim. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

54 Cases that cite this headnote

[3] Constitutional Law
Legal Mail or Papers
Constitutional Law
Access to courts

Interference with legal mail implicates prison inmate's rights of access to the courts and free speech as guaranteed by the First and Fourteenth Amendments. U.S.C.A. Const.Amends. 1, 14.

173 Cases that cite this headnote

[4] Constitutional Law
Access to Courts; Right to Seek Remedy

To state a claim for denial of access to the courts in violation of Fourteenth Amendment, plaintiff must allege that defendant took, or was responsible for, actions that hindered plaintiff's efforts to pursue legal claim. U.S.C.A. Const.Amend. 14.

179 Cases that cite this headnote

Dockets.Justia.com

[5] **Constitutional Law**
Incoming Mail
Constitutional Law
Outgoing Mail

Prisoner's right to free flow of incoming and outgoing mail is protected by First Amendment. U.S.C.A. Const.Amend. 1.

141 Cases that cite this headnote

[6] **Constitutional Law**
Mail in General

Restrictions on prisoners' mail are justified, and will not violate First Amendment, only if they further one or more of the substantial governmental interests of security, order and rehabilitation, and must be no greater than is necessary or essential to protection of particular governmental interest involved. U.S.C.A. Const.Amend. 1.

65 Cases that cite this headnote

[7] **Prisons**
Communication with courts, officers, or counsel

While prison inmate has right to be present when his legal mail is opened, isolated incident of mail tampering is usually insufficient to establish Constitutional violation; rather, inmate must show that prison officials regularly and unjustifiably interfered with incoming legal mail.

412 Cases that cite this headnote

[8] **Civil Rights**
Prisons and jails; probation and parole

Allegations in inmate's pro se civil rights complaint, that prison official on two occasions opened his legal mail outside of his presence, were insufficient to state a claim for denial of access to courts, where inmate did not allege that such interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

217 Cases that cite this headnote

[9] **Constitutional Law**
Conditions, Limitations, and Other Restrictions on Access and Remedies

Mere delay in being able to work on one's legal action or communicate with courts does not rise to the level of violation of right of access to courts.

86 Cases that cite this headnote

[10] **Civil Rights**
Prisons and jails; probation and parole

Allegations in inmate's pro se civil rights complaint, that prison official on two occasions opened his legal mail outside of his presence, were insufficient to state a claim for violation of his free speech rights, where inmate alleged neither facts that would establish ongoing practice by prison officials of interfering with his mail nor facts that set forth any harm he claimed to have suffered from such tampering. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

48 Cases that cite this headnote

[11] **Federal Civil Procedure**
Pleading over

Though pro se civil rights complaint, based on two occasions on which prison official had allegedly opened inmate's legal mail outside of his presence, was insufficient to state claim for violation of inmate's free speech rights or right of access to courts, district court should have dismissed complaint without prejudice to allow inmate to amend pleading to allege requisite injury, especially where inmate alleged that prison official opened his outgoing legal mail, which was entitled to greater protection. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

120 Cases that cite this headnote

[12] **Constitutional Law**
Retaliation

Courts properly approach prisoner retaliation claims with skepticism and particular care, as virtually any adverse action taken against prisoner by prison official, even those otherwise not rising to level of constitutional violation, can be characterized as constitutionally proscribed retaliatory act. U.S.C.A. Const.Amend. 1.

234 Cases that cite this headnote

[13] **Civil Rights**
Particular Causes of Action

In order to survive motion to dismiss for failure to state cause of action, complaint for First Amendment retaliation must allege: (1) that speech or conduct at issue was protected; (2) that defendant took adverse action against plaintiff; and (3) that there was causal connection between protected speech and adverse action. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

381 Cases that cite this headnote

[14] **Constitutional Law**
Prisoners

Filing of prison grievances is activity protected by the First Amendment. U.S.C.A. Const.Amend. 1.

65 Cases that cite this headnote

[15] **Civil Rights**
Prisons and jails; probation and parole

Although allegations in prison inmate's pro se complaint, concerning hostile and disparaging comments allegedly directed at him by officials in medium-security prison to which he was transferred after filing prison grievance were de minimus, allegations that officials at previous facility sent negative message about inmate and that oficials at medium security prison denied him a high fiber diet and made him wait for medical appointment were sufficient to support inference of causal relationship between such actions and his earlier protected activity in filing grievance, and thus were sufficient to state First Amendment retaliation claim. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

28 Cases that cite this headnote

[16] **Constitutional Law**
Retaliation in general

Only retaliatory conduct that would deter similarly situated individual of ordinary firmness from exercising his or her First Amendment rights constitutes "adverse action," of kind needed to support retaliation claim; otherwise, retaliatory act is simply de minimis and outside ambit of constitutional protection. U.S.C.A. Const.Amend. 1.

399 Cases that cite this headnote

[17] **Constitutional Law**
Prisoners

In deciding whether prison officials' alleged unlawful retaliatory acts against inmate who filed a grievance qualified as "adverse action," of a kind required to support First Amendment retaliation claim, court's inquiry had to be tailored to different circumstances in which retaliation claims arise, and court had to bear in mind that inmates may be required to tolerate more than average citizens before retaliatory action taken against them is considered "adverse." U.S.C.A. Const.Amend. 1.

117 Cases that cite this headnote

[18] **Constitutional Law**
Retaliation

Insulting or disrespectful comments directed at prison inmate generally do not rise to level of "adverse action," of a kind required to support First Amendment retaliation claim. U.S.C.A. Const.Amend. 1.

45 Cases that cite this headnote

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

[19] **Constitutional Law**
Retaliation

In order to allege causal connection between protected speech and adverse action, of kind required to state First Amendment retaliation claim, plaintiff's allegations must be sufficient to support inference that speech played a substantial part in adverse action. U.S.C.A. Const.Amend. 1.

227 Cases that cite this headnote

Attorneys and Law Firms

***349** Robert S. Davis, pro se, Comstock, NY.

Allison Penn, Assistant Solicitor General, State of New York, New York, N.Y. (Caitlin J. Halligan, Solicitor General; Michael S. Belohlavek, Deputy Solicitor General; Eliot Spitzer, Attorney General of the State of New York, New York, NY, on the brief), for Defendants–Appellants.

Before: CALABRESI and B.D. PARKER, JR., Circuit Judges, and STEIN, District Judge. [1]

Opinion

STEIN, District Judge.

Davis appeals from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*) that dismissed his civil rights complaint with prejudice. Davis alleged that various personnel at two New York prisons committed medical malpractice, conspired to deprive him of his civil rights, interfered with his legal mail and retaliated against him after he filed a grievance against prison officials in 1998. On March 5, 2002, we granted Davis' *pro se* motion to proceed *in forma pauperis* as to his claims regarding interference with his legal mail and retailiation by defendants Keane, Makram, Lancellotti and Terbush, and dismissed the remaining claims as lacking an arguable basis in law or fact. We agree with the district court that Davis' complaint did not state a claim for interference with his legal mail, but we hold that Davis should have been allowed an opportunity to file an amended complaint. Moreover, we hold that Davis' complaint, read charitably, does state a claim of retaliation, and therefore the defendants' 12(b)(6) motion to dismiss should have been denied. On February 10, 2003, this panel issued an opinion in this action; the February 10, 2003 opinion is superceded by this one.

I. BACKGROUND

The following facts are as alleged in the complaint:

In May 1998, Robert Davis, then an inmate at Green Haven Correctional Facility, a New York state maximum security prison, filed a civil rights action pursuant to 42 U.S.C. § 1983 against defendants Artuz, Kaplan and other prison officials. Soon thereafter, Davis was transferred to a medium security prison, Woodbourne Correctional Facility.

Upon his arrival at Woodbourne, defendants Drs. Lancellotti and Makram—medical doctors at Woodbourne—allegedly delayed placing Davis on his “medically prescribed high fiber diet,” and instead gave him medication that, in combination with the delay, had the effect of worsening his medical condition. When Davis told Lancellotti and Makram about his worsened condition, they ignored him and told him that “they had heard all about [him].” When Davis reported the prison doctors to the prison grievance office for refusing to provide his high fiber diet, Lancellotti and Makram gave him a medical appointment and made him “sit in a prison waiting area for approximately 3 hours” before refusing to see him. They also allegedly treated Davis in a “sarcastic” ***350** and “disrespectful” manner by “calling [him] stupid,” failed to respect his medical confidentiality by sending the results of a blood test to prison administrative officials and eventually ordered the prison cafeteria to stop providing his high fiber diet.

Subsequently, Davis filed a grievance with defendant Keane, the superintendent at Woodbourne, because the grievance office, supervised by defendant Terbush, had allegedly ignored his earlier grievance against Drs. Lancellotti and Makram. In retaliation for this grievance, Keane allegedly had Davis' cell searched while Terbush “vindictively hid” the earlier grievance against the prison doctors, forcing Davis to file yet another grievance to have his prior grievance “excavated from Terbush's hidden files.” Later, when Davis filed yet an additional grievance against Lancellotti, his cell was again searched.

In addition, on one occasion defendant Diehl, the senior mailroom clerk at Woodbourne, allegedly opened a letter from Davis, addressed to a state court, outside his presence. She subsequently returned the letter to him, claiming that

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

he had failed to follow procedures for addressing legal mail; namely, that **Davis** had failed to spell out the name of Woodbourne Correctional Facility in full on his return address. On another occasion, Diehl opened incoming legal mail outside **Davis**' presence. **Davis** contends that Keane permitted Diehl to interfere with his legal mail.

Defendants moved to dismiss **Davis**' complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. On March 22, 2001, Judge Brieant issued a Memorandum and Order dismissing **Davis**' complaint, with prejudice, in its entirety. Although Judge Brieant dealt with a panoply of allegations in the complaint, only two remain at issue subsequent to our March 5, 2002 Order: whether defendants improperly interfered with **Davis**' legal mail and whether defendants retaliated against him for having filed grievances. With respect to these issues, Judge Brieant did not explicitly address **Davis**' claim of interference with his legal mail in his Memorandum and Order of March 22, 2001, and dismissed the alleged retaliation incidents as "petty charges against the management of the institution."

This appeal followed, with **Davis** contending principally that the complaint adequately sets forth claims upon which relief can be granted. Defendants contend that **Davis** failed to allege any facts showing that the incidents of interference with his legal mail prejudiced his access to the courts and that his retaliation claims do not meet the pleading standard required to allege retaliation properly.

II. DISCUSSION

A. The Legal Standards

[1] **[2]** A plaintiff's claims can be dismissed for failure to state a claim only if we find that "it 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, 2 L.Ed.2d 80 (1957). The complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema,* 534 U.S. 506, 512, 112 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002) (quoting Fed.R.Civ.P. 8(a)(2)). Moreover, because **Davis**' "complaint alleges civil rights violations and he proceeded *pro se* in the district court, we must construe his complaint with particular generosity." *Morales v. Mackalm,* 278 F.3d 126, 131 (2d Cir.2002) (per curiam) (citing *Vital v. Interfaith Med. Ctr.,* 168 F.3d 615, 619 (2d Cir.1999)). With those standards in mind, we turn to **Davis**' contentions.

*351 B. Interference with Legal Mail

[3] **[4]** Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. To state a claim for denial of access to the courts—in this case due to interference with legal mail—a plaintiff must allege that the defendant "took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim.' " *Monsky v. Moraghan,* 127 F.3d 243, 247 (2d Cir.1997) (citing *Lewis v. Casey,* 518 U.S. 343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996)); *see also Cancel v.* ***Goord****,* No. 00 Civ.2042, 2001 WL 303713, at *4 (S.D.N.Y. Mar. 29, 2001) ("[I]n order to survive a motion to dismiss a plaintiff must allege not only that the defendant's alleged conduct was deliberate and malicious, but also that the defendant's actions resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim.") (citing *Lewis,* 518 U.S. at 353, 116 S.Ct. at 2181).

[5] **[6]** In addition to the right of access to the courts, a prisoner's right to the free flow of incoming and outgoing mail is protected by the First Amendment. *See Heimerle v. Attorney General,* 753 F.2d 10, 12–13 (2d Cir.1985); *Hudson v. Greiner,* No. 99 Civ. 12339, 2000 WL 1838324, at * 5 (S.D.N.Y. Dec.13, 2000). Restrictions on prisoners' mail are justified only if they "further[ ] one or more of the substantial governmental interests of security, order, and rehabilitation ... [and] must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Washington v. James,* 782 F.2d 1134, 1139 (2d Cir.1986) (internal citations and quotation marks omitted). In balancing the competing interests implicated in restrictions on prison mail, courts have consistently afforded greater protection to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail. *See Thornburgh v. Abbott,* 490 U.S. 401, 413, 109 S.Ct. 1874, 1881–82, 104 L.Ed.2d 459 (1989); *Washington,* 782 F.2d at 1138–39; *Davidson v. Scully,* 694 F.2d 50, 53 (2d Cir.1982).

[7] While a prisoner has a right to be present when his legal mail is opened, *Wolff v. McDonnell,* 418 U.S. 539, 574–76, 94 S.Ct. 2963, 2983–85, 41 L.Ed.2d 935 (1974), an isolated incident of mail tampering is usually insufficient to establish a constitutional violation. *See* *Morgan v. Montanye,* 516 F.2d 1367, 1371 (2d Cir.1975); *Washington,* 782 F.2d at 1139. Rather, the inmate must show that prison officials "regularly and unjustifiably interfered with the incoming legal mail." *Cancel,* 2001 WL 303713 at *6 (citing *Washington,* 782 F.2d at 1139).

In *Washington,* we determined that as few as two incidents of mail tampering could constitute an actionable violation (1) if the incidents suggested an ongoing practice of censorship unjustified by a substantial government interest, or (2) if the tampering unjustifiably chilled the prisoner's right of access to the courts or impaired the legal representation received. 782 F.2d at 1139. Following *Washington,* district courts have generally required specific allegations of invidious intent or of actual harm where the incidents of tampering are few and thus the implication of an actionable violation is not obvious on its face. *See, e.g.,* *Cancel,* 2001 WL 303713 at *6 (dismissing claim where only two incidents of tampering alleged and no other indications of a continuing practice); *John v. N.Y.C. Dep't of Corrections,* 183 F.Supp.2d 619, 629 (S.D.N.Y.2002) (requiring plaintiff to allege facts that show defendants acted with invidious intent and plaintiff was harmed by the interference); *Hudson,* 2000 WL 1838324 at *5 (same); ***352** *Johnson v. Morton,* No. 95 Civ. 949, 1996 WL 518078, at *1 (E.D.N.Y. Aug. 26, 1996) (noting that "[c]ourts have consistently applied *Morgan* [*v. Montanye*] to dismiss suits by inmates alleging unconstitutional opening of their legal mail without any showing of damages"); *see also* *Lewis,* 518 U.S. at 351, 116 S.Ct. at 2180 (holding that inmate must establish actual injury, rather than "theoretical deficiency" with legal library or legal assistance program to state constitutional claim for interference with access to courts).

[8] **[9]** **[10]** Davis' allegations of two instances of mail interference are insufficient to state a claim for denial of access to the courts because Davis has not alleged that the interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions. Mere "delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation." *Jermosen v. Coughlin,* 877 F.Supp. 864, 871 (S.D.N.Y.1995) (citing *Jones v. Smith,* 784 F.2d 149, 151–52 (2d Cir.1986)). Similarly, Davis fails to state a constitutional claim for violating his right to send and receive legal mail because he alleges neither the establishment of an ongoing practice by prison officials of interfering with his mail nor any harm suffered by him from the tampering.

[11] However, the district court should have given Davis leave to amend his complaint to attempt to allege such an injury, if possible. *See* *Gomez v. USAA Fed. Sav. Bank,* 171 F.3d 794, 795 (2d Cir.1999) (per curiam) ("Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the [*pro se*] complaint gives any indication that a valid claim might be stated."). This is especially true since Davis alleges that Diehl opened his outgoing legal mail, which is subject to greater constitutional protection because of the lesser security concerns presented. *See* *Thornburgh,* 490 U.S. at 413, 109 S.Ct. at 1881–82; *Davidson,* 694 F.2d at 53. While it is unlikely that Davis will be able to sustain a constitutional claim if the letter simply was returned for an insufficient return address, [2] additional factual allegations regarding the nature of the interference could possibly establish that Davis' rights were violated and he should be given an opportunity to allege those facts. *See* *Gomez,* 171 F.3d at 795–96.

C. Retaliation

[12] **[13]** **[14]** **[15]** Courts properly approach prisoner retaliation claims "with skepticism and particular care," because "virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act." *Dawes v. Walker,* 239 F.3d 489, 491 (2d Cir.2001), overruled on other grounds by *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). *See also* *Phelps v. Kapnolas,* 308 F.3d 180, 187 n. 6 (2d Cir.2002). Thus, in order to survive a motion to dismiss a complaint, a plaintiff asserting First Amendment retaliation claims must allege "(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

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

speech and the adverse action." *Dawes,* 239 F.3d at 492. Since the filing of prison grievances is a constitutionally protected ***353** activity, **Davis** meets the first prong of the test. *See* *Graham v. Henderson,* 89 F.3d 75, 80 (2d Cir.1996); *Franco v. Kelly,* 854 F.2d 584, 590 (2d Cir.1988). We turn now to the second and third prongs of the test set forth in *Dawes v. Walker, supra.*

1. Adverse Actions

Davis alleges that after he filed a grievance against Lancellotti and Makram, the doctors continued to retaliate against him by calling him "stupid," failed to respect his medical confidentiality by sending the results of a blood test to prison officials, and again discontinued providing his high fiber diet. **Davis** alleges that defendant Terbush "underhandedly tried to hide plaintiff's grievances" against Makram and Lancellotti and that he failed to forward **Davis**' grievances to the appeals level within the required time. **Davis** states that after he filed a grievance against Terbush, Terbush further retaliated against him by speaking to him in a "hostile" manner, "burying" his grievances and discussing **Davis**' grievance with another prison official, and that Keane retaliated against **Davis**' grievance filings by ordering a "retaliatory cell search." Defendants contend that **Davis**' submissions show that his grievances against Makram and Lancellotti went through the necessary appeals, and that **Davis** has not shown that any of these actions by prison officials constituted adverse action sufficient to state a retaliation claim.

[16] **[17]** "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." *Dawes,* 239 F.3d at 493. *See also* *Thaddeus -X v. Blatter,* 175 F.3d 378, 398 (6th Cir.1999) (retaliation against an inmate must be likely to "chill a person of ordinary firmness from continuing to engage" in a protected activity). "Otherwise the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection." *Dawes,* 239 F.3d at 493. In making this determination, the court's inquiry must be "tailored to the different circumstances in which retaliation claims arise," bearing in mind that "[p]risoners may be required to tolerate more ... than average citizens, before a [retaliatory] action taken against them is considered adverse." *Id.* (quoting *Thaddeus –X,* 175 F.3d at 398).

[18] Insulting or disrespectful comments directed at an inmate generally do not rise to this level. *Dawes,* 239 F.3d at 492 (calling inmate a "rat" not a constitutional violation); *see also* *Morales,* 278 F.3d at 131. Thus, Lancellotti and Makram's "sarcastic" comments do not, without more, constitute an adverse action. Similarly, **Davis**' allegations regarding conversations between Terbush and other prison officials are speculative and complaints of Terbush's "hostile manner" are *de minimis.*

However, it is possible that there were adverse effects resulting from his not being given his high fiber diet or having to wait for a medical appointment. In addition, although his grievances against Lancellotti and Makram were eventually resolved, **Davis**' repeated efforts to surmount Terbush's alleged barriers to timely filing could be construed as efforts beyond what is reasonably expected of an inmate with "ordinary firmness." *Dawes,* 239 F.3d at 493. In other words, **Davis** should not be denied remedy because his extraordinary efforts resulted in the resolution of grievances that would have deterred a "similarly situated individual of ordinary firmness from exercising his constitutional rights." *Id.;* ***354** *Crawford–El v. Britton,* 93 F.3d 813, 826 (D.C.Cir.1996) (en banc), rev'd on other grounds, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) ("the effect on freedom of speech of retaliations 'need not be great in order to be actionable.' "); *Walker v. Pataro,* No. 99 Civ. 4607, 2002 WL 664040, at *9 (S.D.N.Y. Apr.23, 2002) (favorably contrasting *Dawes* in determining that "[t]he test, however, is not whether plaintiff ... himself was chilled (if that were the standard, no plaintiff likely would prevail, for the very commencement of a lawsuit could be used by defendants to argue that the plaintiff was not chilled) ..."). Therefore, "at this early state, the[se] allegation[s] ... must be construed as describing an adverse action," and, if the causal connection between the protected speech and the adverse action is sufficiently pled, **Davis** "should have the opportunity to develop facts that would demonstrate that [the actions] would deter a reasonable inmate from pursuing grievances." *Morales,* 278 F.3d at 131–32 (citations omitted).

2. Causal Connection Between Protected Speech and Adverse Action

Davis alleges that Makram and Lancellotti retaliated against him for filing his previous lawsuit at Green Haven by, in part, delaying his placement on his medically prescribed high fiber diet and making him wait to be seen by a doctor. These

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

actions occurred prior to **Davis** filing any grievances against them. Defendants do not dispute that they took adverse action against **Davis** but claim that the retaliation allegation must be dismissed because "plaintiff alleges no specific facts establishing a causal connection between the adverse actions taken against him by defendants at Woodbourne ... and the filing of his prior lawsuit against the Green Haven officials."

[19] In order to satisfy the causation requirement, allegations must be "sufficient to support the inference that the speech played a substantial part in the adverse action." *Dawes,* 239 F.3d at 492 (internal quotation marks and citation omitted). **Davis**' complaint alleges that the prison officials at Green Haven "sent a negative message" about him to the officials at Woodbourne, and that the adverse actions against him at Woodbourne began immediately upon his arrival. Moreover, it alleges that defendant Makram and Lancellotti "continued a retaliatory course of conduct on plaintiff (via Green Haven officials)" by, inter alia, failing to prescribe his high fiber diet, and that "Defendant Keane's actions toward plaintiff were continuous courses of 'retaliatory conduct' (via Green Haven Officials) due to prior § 1983." Though inartfully pled, these allegations are sufficient to support an inference of a causal relationship. *See, e.g., Morales,* 278 F.3d at 131 (short time frame between grievance and retaliatory action, along with allegation of the defendant's involvement, sufficed to support an inference of a retaliatory motive).

We therefore vacate that portion of the district court's judgment that dismissed plaintiff's retaliation claims against defendants Keane, Makram, Lancellotti and Terbush.

III. CONCLUSION

The district court correctly dismissed the portion of the complaint that alleged interference with plaintiff's legal mail, since the complainant did not state a claim on which relief could be granted with respect to those allegations. However, the district court should have granted **Davis** leave to replead those claims rather than dismissing them with prejudice. The district court erred in granting defendants' 12(b)(6) motion on plaintiff's retaliation claims since, charitably read, the complaint does state a claim on which relief could be granted as to those allegations. Therefore, for the reasons set forth above, we vacate the judgment ***355** and remand for further proceedings consistent with this opinion.

All Citations

320 F.3d 346

Footnotes

1 The Honorable Sidney H. Stein of the United States District Court for the Southern District of New York, sitting by designation.

2 It should be noted that defendants proffer no justification for apparently requiring that the name "Woodbourne Correctional Facility" be spelled out in full on return addresses.

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.