UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS W.S. RICHEY,

Plaintiff,

v.

D. DAHNE,

Defendant.

CASE NO. C12-5060BHS

ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION, DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before Court on the Report and Recommendation ("R&R") of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 59), Plaintiff Thomas W.S. Richey's ("Richey") objections (Dkt. 62), and Defendant Dennis Dahne's ("Dahne") objections (Dkt. 63). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

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I. PROCEDURAL AND FACTUAL BACKGROUOND

The undisputed facts are fairly simple.[1] Richey, an inmate, submitted a prison grievance that identified a prison officer as "an extremely obese Hispanic female guard . . . ." Dkt. 47, Declaration of Thomas WS Richey ("Richey Dec."), Exh. A. An officer, who is not a party to this proceeding, declined to accept the grievance and, instead, returned the grievance to Richey with an instruction to rewrite it appropriately and resubmit it within five days. *Id*. Richey rewrote portions of the grievance, repeated the language quoted above, and resubmitted the grievance. *Id*., Exh. B. An officer, who is not a party to this proceeding, refused to accept the grievance. *Id*. Instead, the officer ordered Richey to rewrite the grievance stating that "Hispanic female is adiquit [sic]. Extremely obese is un-necessary [sic] and inappropriate." *Id*.

Richey failed to rewrite and resubmit the grievance. Instead, Richey submitted an offender's kite to Dahne asking if Dahne, as the grievance coordinator, was going to process his grievance. *Id*., Exh. C. Dahne responded as follows: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn." *Id*.

These facts implicate two provisions of the Washington Department of Corrections' ("DOC") Offender Grievance Program ("OGP"). First, if the inmate's "complaint contains profane language, except when used as a direct quote," the grievance

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[1] Both parties assert that there are no disputed issues of material facts. Dkt. 46 at 1–2; Dkt. 52 at 1.

form is returned "unprocessed with a notation to rewrite it." Dkt. 52-2 at 33. Second, if an inmate "does not follow the rewrite instruction within the required timeframe" – within five days of receipt of those instructions – "the matter is considered administratively withdrawn, which is the procedural determination made when OGP deadlines are missed without reason for the delay." Dkt. 52-1 at 1; Dkt. 52-2 at 4.

On December 6, 2012, the Court granted Dahne's motion to dismiss Richey's claim for failure to state a claim. Dkt. 21. In reversing this Court's order granting Dahne's motion to dismiss, the Ninth Circuit concluded that Richey had stated a plausible claim for violation of his First Amendment right to grieve and retaliation for exercising that right and, regarding the defense of qualified immunity, provided as follows:

> Dahne seeks qualified immunity because his "actions and decisions were based on his application of Department policy and his attempt to have Richey comply with the grievance program's requirements so that Richey's complaint could be addressed." At the motion to dismiss stage, however, "it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness,'" *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)) (emphasis in original), and Richey's complaint says nothing about whether the prison had any language policy, what that policy was, and how consistently that policy was enforced. Dahne is therefore not entitled to qualified immunity at this time.

Richey v. Dahne, 624 F. App'x 525, 526 (9th Cir. 2015).

On June 27, 2016, Judge Strombom issued the R&R recommending that the Court deny Richey's motion for summary judgment and grant Dahne's motion for summary judgment because Dahne is entitled to qualified immunity. Dkt. 59. Judge Strombom concluded (1) that material questions of fact exist on Richey's First Amendment claim, Dkt. 59 at 14, (2) that material questions of fact exist on Richey's retaliation claim, *Id.* at

16, and (3) Dahne is entitled to qualified immunity because Richey's constitutional rights were not clearly established, *Id*. at 19.

On July 7, 2016, Richey filed objections arguing that his rights were clearly established at the time of the alleged violation. Dkt. 62. On July 18, 2016, Dahne responded. Dkt. 64. On July 22, 2016, Richey replied. Dkt. 66.

On July 11, 2016, Dahne filed objections arguing that there are no disputed issues of material fact and that Dahne is entitled to summary judgment that he did not violate any of Richey's constitutional rights. Dkt. 63. On July 18, 2016, Richey responded. Dkt. 65.

II. DISCUSSION

A. Standard of Review

The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

In this case, the parties have properly objected to the three main conclusions set forth in the R&R. Thus, the Court will conduct a *de novo* review of the motions.

B. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In this case, the Court agrees with Dahne that the material facts are undisputed and the matter turns on questions of law. Thus, the Court declines to adopt the R&R to the extent that it concludes that material questions of fact exist.

C. 42 U.S.C. § 1983

Section 1983 is a procedural device for enforcing constitutional provisions and federal statutes; the section does not create or afford substantive rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983, a plaintiff must demonstrate that (l) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or by the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Qualified immunity shields government officials from civil liability unless a plaintiff demonstrates: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). The Court has discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In this case, Richey asserts a First Amendment claim and a retaliation claim. To the extent that his constitutional rights may have been violated, he has simply failed to assert claims against the appropriate defendants. Pursuant to the OGP, the grievance

coordinator may return a grievance to an inmate when the "complaint contains profane language, except when used as a direct quote." *Id.* at 33. Moreover, a grievance rewrite must be submitted within five days of the directive to rewrite or the grievance will be administratively withdrawn. *Id.* at 4. Dahne didn't promulgate this policy and has limited discretion to act under this policy. Thus, Richey's claims should be asserted against the DOC, not the officer enforcing a properly enacted policy. The Ninth Circuit said as much when it stated that "Richey has stated a plausible claim that his rights were violated when the **prison** refused to process and investigate his grievance . . . ." *Richey*, 624 F. App'x 525 (emphasis added). Moreover, Dahne raised this issue on appeal, *see id.*, and in his motion for summary judgment, Dkt. 52 at 23–24. Accordingly, the Court declines to adopt the rationale in the R&R on the issue of qualified immunity and bases this order on the analysis below.

"The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability under certain circumstances." *Grossman v. City of Portland*, 33 F.3d 1200, 1208 (9th Cir. 1994). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982)). "Unlike in many [qualified immunity] cases, here the allegedly unconstitutional action undertaken by the individual defendant consists solely of the enforcement of an ordinance which was duly enacted by the city council."

Grossman, 33 F.3d at 1209. "Courts have accordingly held that the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Id.*

> As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. On the other, as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional.

Id. at 1209–10.

With regard to Richey's First Amendment claim, Dahne is entitled to qualified immunity. It is undisputed that other prison guards instructed Richey to rewrite his grievance to remove the allegedly offense language. Richey Dec. at ¶¶ 2–6. Richey did not rewrite his November 17, 2011 grievance. Instead, Richey wrote an offender's kite to Dahne asking whether his previous grievance would be processed, and Dahne responded by writing: "No, due to your decision not to rewrite as requested, your grievance has been administratively withdrawn." *Id.*, ¶ 7; *Id.*, Exh. 3. Based on these undisputed facts from Richey, Dahne did not pass upon the content of Richey's speech and, instead, merely enforced the rule that a failure to resubmit within five days constitutes an administrative withdrawal. Even if this content-neutral rule somehow violates Richey's First

Amendment rights, it was objectively reasonable for Dahne to enforce the five-day rule that a grievance that is not resubmitted is deemed withdrawn. In other words, a requirement to resubmit a grievance within five days is not "patently violative of fundamental constitutional principles . . . ." *Grossman*, 33 F.3d at 1209. Therefore, the Court grants Dahne's motion for summary judgment because he is entitled to qualified immunity.[2]

Similarly, with regard to Richey's retaliation claim, Richey argues that Dahne is liable because he repeatedly rejected Richey's grievances and demanded that Richey censor his protected speech. Dkt. 46 at 4. Dahne did not order Richey to rewrite his grievance and, therefore, this part of Richey's claim is unsupported by the undisputed facts. Moreover, Dahne enforced the rule that failure to resubmit a grievance constitutes an administrative withdrawal. The question then becomes: Would a reasonable officer consider this policy as patently violative of Richey's right to be free from retaliation? Richey argues that "the right to be free from retaliation [was] clearly established in this Circuit years before the time of [Dahne's] conduct." Dkt. 46 at 17 (citing *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009)). The Court does not disagree with the assertion that the Circuit has clearly established some relevant law. The Court, however,

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[2] The Court takes no position as to the officers that ordered Richey to rewrite his grievance or the official that promulgated the enacted grievance policies because those individuals are not parties to this action. *See* Dkt. 4. Moreover, even though the Ninth Circuit and this Court question the constitutionality of certain provisions in the OGP, Richey has not asserted a claim to enjoin the institution from enforcing these policies. Instead, Richey only seeks damages from an officer enforcing a questionable policy, Dkt. 4 at 6, which, under these circumstances, is barred by qualified immunity.

declines to take the next step in the analysis that a reasonable officer should have refused to enforce the five-day rule because it patently violates Richey's right to be free from retaliation. There are definitely constitutional problems with a system that sets up a hypothetically endless loop of rejections and revisions. However, failing to process a grievance that was not resubmitted is an entirely different matter, and no reasonable officer in Dahne's position should have declined to follow the five-day rule because it obviously violated Richey's rights. Therefore, the Court concludes that Dahne is entitled to qualified immunity on all of Richey's claims.

III. ORDER

Therefore, it is hereby **ORDERED** that the Court adopts in part and modifies in part the R&R (Dkt. 59), Richey's motion for partial summary judgment (Dkt. 46) is **DENIED**, Dahne's cross-motion for summary judgment (Dkt. 52) is **GRANTED**, and the Clerk shall enter **JUDGMENT** in favor of Dahne and close this case.

Dated this 14th day of September, 2016.

BENJAMIN H. SETTLE
United States District Judge