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Retaliation Against Prisoners for Protected First Amendment Expression

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In [Turner v. Safley](#), #85-1384, 482 U.S. 78 (1987), the U.S. Supreme Court stated that “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government for the redress of grievances.” Prisoner’s protected [First Amendment](#) rights include the ability to have access to the courts, to file lawsuits and prison grievances, to write letters to public officials, agencies, and the media, to practice their chosen religion, to read newspapers and books, and to exercise their right of free speech.

Such rights are, of course, necessarily somewhat modified and limited by the requirements of safeguarding custody and institutional safety and security. Prison policies, which impact inmates’ constitutional rights, including First Amendment rights, are valid if they are reasonably related to legitimate penological concerns, such as safety or rehabilitation.

Under this generally deferential standard, restrictive policies are generally upheld by the courts after factoring in whether there is a valid rational connection between the regulation and the governmental interest put forward to justify it, whether there are alternative means for the inmate to exercise his rights, the impact that accommodating a right would have on prison officials, and whether there are “ready alternatives” for advancing the government’s interest in prison security.

A large and growing body of law, however, also makes it quite clear that there is no room in this legal scheme for adverse actions taken against prisoners by correctional agencies, officials, or employees motivated by retaliation for their exercising their

constitutionally protected First Amendment rights and intended to deter them from and punish them for doing so.

This article examines some of these cases and the factors that courts look at to determine whether prisoners have made out a valid claim for unlawful retaliation. At the conclusion of the article, some useful resources and references related to prisoners' First Amendment rights are listed.

Retaliation Against Prisoners for Protected First Amendment Expression

To successfully establish an actionable claim for unlawful retaliation, a prisoner must first show that he or she was engaged in an activity protected by the First Amendment. Then they must show that they faced some retaliatory action that would ordinarily chill or deter someone from engaging in the protected conduct or expression. Finally, they must prove causation—that the retaliatory act was motivated by knowledge of their First Amendment activity and intended for purposes of retaliation.

In [Dobbey v. Illinois Dept. of Corrections](#), #08-2828, 574 F.3d 443 (7th Cir. 2009), an inmate who worked as a janitor in a state prison was up early one morning, preparing breakfast trays with three other prisoners, two of them black, like himself, when they noticed five correctional officers, all white, playing cards in the main control room, referred to as the “officer’s cage.”

One of the officers got up from playing cards and allegedly hung a noose from the ceiling, swatting at it to make it swing back and forth, and then, as the prisoner described it, sat down in a chair and “crossed his arms looking crazy with evil eyes.”

Another officer took the noose down after twenty minutes. The janitor filed a prison grievance complaining of the guard’s conduct, resulting in an internal affairs investigation. The janitor then wrote letters describing the noose incident to various state officials, as well as to the news media.

A month later, disciplinary charges were filed against the janitor for allegedly disregarding orders to scrape wax off a section of prison floor. The janitor claimed that he was, in fact, scraping “diligently,” but that the officer told him, “you’re on Bullshit around here!”

The charge was upheld by a disciplinary committee and a number of sanctions were imposed, including the loss of his prison job. He was also notified that his grievance over the incident involving the noose had been denied, on the basis that there was no evidence of the noose, despite the fact that several other prisoners had also seen it.

The prisoner filed a federal civil rights lawsuit, asserting claims for both “cruel and unusual punishment” and unlawful retaliation in violation of the First Amendment. A federal appeals court, despite acknowledging the “ugly resonance of the noose, symbolic of the lynching of blacks, for black people,” as well as that a threat, which is how the plaintiff regarded the noose, can indeed rise to the level of cruel and unusual punishment, found that the action could not, under the circumstances, be reasonably taken seriously as a threat, rather than as racial harassment.

As for the retaliation claim, however, the appeals court ruled that, based on the record, it had to assume that the prisoner’s punishment for allegedly failing to scrape the wax as ordered “was indeed retaliation” for filing a grievance over and publicizing the noose incident.

The issue to be resolved, therefore, was whether the filing or publicizing was protected by the First Amendment. The court noted that there was considerable authority that the filing of any lawsuit is protected by the First Amendment as a form of petitioning the government for the redress of grievances. As filing an administrative grievance, in order to exhaust administrative remedies, is a necessary first step before a prisoner can file suit, as required by [42 U.S.C. Sec. 1997e\(a\)](#) of the Prison Litigation Reform Act, the court stated that it would seem to follow that the grievance filing would also be protected First Amendment activity.

At the same time, the court continued, it was not clear that the right to petition the government for the redress of grievances covers every non-frivolous complaint that a prisoner might make.

The court reviewed other courts’ decisions, which had defined the right to petition for the redress of grievances either narrowly as not encompassing largely “private” or “personal” disputes, or broadly as including “the minor and questionable, along with the mighty and consequential.” But the court concluded that:

“This is not the case in which to try to straighten out the law of petitioning for redress of grievances. For even if the right does not embrace purely personal grievances, still we do not agree with the district judge that the plaintiff’s grievance was merely a ‘personal gripe,’ as if he had been complaining that the prison commissary had shortchanged him for some item that he had bought. And even if it were merely that, retaliation for *uttering* it would be, *prima facie* (that is, without regard for whatever right the prison might have to suppress it), an infringement of freedom of speech, whatever the status of the ‘personal gripe’ might be as a petition for redress of grievances” (emphasis in original).

Accordingly, the prisoner could pursue his First Amendment retaliation claim.

In [Pasley v. Conerly](#), #08-2132, 2009 U.S. App. Lexis 21364 (Unpub. 6th Cir.), a court even found a viable retaliation claim based on actions allegedly taken against a prisoner in response to his threat to possibly file a grievance. A prisoner's statement that he would file and pursue a grievance against a prison employee if she failed to assist him in obtaining footlockers to store his legal papers could be constitutionally protected conduct under the First Amendment, requiring the reinstatement of his dismissed First Amendment claim that the employee unlawfully retaliated against him by taking actions that subjected him to the possibility of receiving a major misconduct ticket.

In [Haynes v. Stephenson](#), #08-3766, 2009 U.S. App. Lexis 27433 (8th Cir.), a federal appeals court upheld the award of \$1 in compensatory damages and \$2,500 in punitive damages to a prisoner on his claim that a disciplinary charge was filed against him in retaliation for his having filed a grievance against a correctional officer for allegedly cursing at him and threatening him. The trial court did not clearly err in determining that the officer would not have filed the disciplinary charge against the prisoner in the absence of a retaliatory motive. The disciplinary report accused the prisoner of having made false statements in his grievance.

Filing lawsuits against correctional officials or employees or serving as a witness in such cases is plainly protected First Amendment activity. In [Price v. Wall](#), #Civ. A. 05-3898, 428 F. Supp. 2d 52 (D.R.I. 2006), the court found that a prisoner stated a valid claim for retaliation in violation of his First Amendment rights by alleging that he was intentionally transferred to a facility lacking rehabilitation programs as punishment for his having filed a lawsuit challenging the failure of correctional officials to provide him with rehabilitation programs ordered by a court for treatment of psychological and psychiatric problems. The claim did not challenge the defendants' right, in general, to transfer the prisoner, but rather asserted that they did so, in this instance, for an improper motive. See also, [Bridges v. Gilbert](#), #07-1551, 2009 U.S. App. Lexis 5129 (7th Cir.), holding that a prisoner stated a viable First Amendment claim in alleging that prison officials retaliated against him for making a statement in support of a wrongful death lawsuit against them.

In a number of cases, courts have upheld prisoners' rights to pursue retaliation claims when they face adverse actions in response to statements they make in their outgoing correspondence. In [Pfeil v. Freudenthal](#), #07-10312, 2008 U.S. App. Lexis 12897 (Unpub. 5th Cir.), the court ruled that a prisoner in a private prison in Texas had a First Amendment right to write to the Wyoming Department of Corrections Director asking to be returned to Wyoming and complaining about the conditions of his confinement, and stated a valid claim against seven prison employees, contending that they retaliated against him for doing so. He also asserted a valid claim for unconstitutional deprivation of his funds by alleging that he was fined \$50 because he testified in another prisoner's disciplinary hearing.

And in [Berenguel v. Bell](#), #07-10066, 2008 U.S. App. Lexis 13597 (Unpub. 5th Cir.), a federal appeals court held that a trial court improperly failed to recognize that a prisoner

could have a First Amendment right to make “unflattering” statements to prison staff members in outgoing mail to his parents. The court should have analyzed whether the letters in question, which were allegedly censored and/or seized, fell within any identifiable categories of mail that presented a threat to security and order. The court ordered further proceedings on the prisoner’s claims concerning his personal correspondence, as well as on claims that he faced retaliation for statements made in the letters

Not all arguably “expressive” conduct or utterance, however, is protected by the First Amendment. In [Morgan v. Quarterman](#), #07-41064, 2009 U.S. App. Lexis 12325 (5th Cir.), for instance, a prisoner claimed that subjecting him to a disciplinary hearing for using vulgar or indecent language in a note mailed to opposing counsel violated his First Amendment rights. Rejecting this claim, a federal appeals court found that the note, which was written on toilet paper, resembled a threat and showed a “completely unjustified” disrespect for authority. It used “unacceptably vulgar” language that would not be tolerated in the free setting. Imposition of discipline for writing the note helped correct behavior that would prejudice the prisoner when he left prison.

See also [Huff v. Mahon](#), #08-6568, 2009 U.S. App. Lexis 3605 (Unpub. 4th Cir.), ruling that a prisoner had no protected First Amendment right to make disrespectful comments about prison officials in his outgoing mail to them, calling them “evil,” “unmerciful,” and “inhumane.” The court rejected the prisoner’s claim that prison officials had unlawfully retaliated against him for his statements, in violation of his First Amendment rights.

An assertion of First Amendment rights does not become a license to engage in otherwise validly prohibited activity and break the rules. In [Moulds v. Bullard](#), #08-10706, 2009 U.S. App. Lexis 18296 (Unpub. 11th Cir.), a prisoner’s claim that he was disciplined for sending a note to another prisoner, which violated a legitimate regulation, was an insufficient basis for a claim of unlawful retaliation in violation of the First Amendment.

Similarly, in [Pilgrim v. Luther](#), #07-1950, 2009 U.S. App. Lexis 14588 (2nd Cir.), an inmate accused prison officials of violating his First Amendment rights by retaliating against him for writing a pamphlet that encouraged other prisoners to engage in work stoppages. Such work stoppages, the court stated, were deliberate disruptions of prison order, and restrictions on prisoners’ rights to organize and petition were reasonable when inmate grievance procedures were available. Advocacy of such work stoppages were not entitled to First Amendment protection when less disruptive means of pursuing grievances were available.

Gang members had no First Amendment right to belong to gangs, so their transfer to the “highest security” prison in Illinois, even if in “retaliation” for gang activity, was not improper. A federal appeals court reinstated, however, claims concerning whether adequate due process was provided for prisoners transferred there, and whether certain

prisoners were transferred in retaliation for having pursued grievances and/or litigation concerning their conditions of confinement. [Westefer v. Snyder](#), # 03-3318, 2005 U.S. App. Lexis 19217 (7th Cir.).

Some courts have also found the mere expression of an opinion on relatively trivial matters to be unworthy of constitutional protection. See [Wilson v. Budgeon](#), #07-1607, 2007 U.S. App. Lexis 22086 (3rd Cir.), ruling that a prisoner's claim that he was subjected to retaliation and a "fabricated" misconduct complaint for expressing an opinion about which television channel inmates would watch was properly dismissed as frivolous. A First Amendment retaliation claim could not be based on this, as expressing such an opinion was not protected speech.

When the defendant correctional officials can show other, non-retaliatory and legitimate, motives for their actions, a prisoner's retaliation claim can be defeated. In [Soto v. Bertrand](#), #08-2540, 2009 U.S. App. Lexis 9901 (Unpub. 7th Cir.), an affidavit from another prisoner, which was the only evidence a plaintiff inmate showed of retaliation against him for filing a grievance, actually showed that officials were motivated to place him in administrative segregation by his dangerousness, not his grievance filing. They would have taken the same actions even if he had never filed the grievance, based on his gang affiliation and his long history of violent and abusive behavior. Denying the prisoner newspapers did not violate the First Amendment, but was an acceptable policy decision for officials trying to achieve legitimate goals. The court also rejected the claim that the prisoner's rights were violated by him being forced to wear a paper gown after he was found casting a string between cells to try to pass notes and other items.

In [Williams v. Brown](#), #08-16230, 2009 U.S. App. Lexis 20193 (Unpub. 11th Cir.), the court ruled that the chronology of events surrounding a prisoner's transfer to a new facility was sufficient to assert a possible claim for retaliatory transfer against a deputy warden. The prisoner claimed that the defendant transferred him for filing a grievance against him.

In [Holbrook v. Walters](#), #08-2080, 2008 U.S. App. Lexis 21679 (Unpub. 3rd Cir.), the court rejected a retaliation claim even though it appeared that a correctional employee may have had some retaliatory motives, as well as legitimate purposes, for acting against the prisoner. The prisoner's conduct in filing grievances was activity protected by the First Amendment, and there was sufficient evidence to support an inference that the unit manager of his cell block was motivated by retaliation for such grievances in placing him in administrative custody and later transferring him to a different prison. The unit manager showed, however, that the same steps would have been taken for legitimate penological reasons, regardless of the inmate's grievances, so there was no showing that retaliation caused the administrative custody or transfer.

The fact that an allegedly retaliatory action against a prisoner was later in time than his engaging in arguably protected First Amendment conduct will not suffice by itself,

however, to show motivation or causation. In [Toussaint v. Good](#), #08-3751, 2009 U.S. App. Lexis 14991 (Unpub. 3rd Cir.), for instance, while the plaintiff inmate asserted that false disciplinary reports, for which he was sanctioned, were filed against him in retaliation for his use of the grievance system, he produced no evidence of this except for the timing of the discipline, and did not show that his filing of grievances was a motivating or a substantial factor in the decision to file three misconduct reports against him. The defendants presented evidence that they had legitimate penological reasons for the filing of the reports.

And clearly, when the purportedly retaliatory action was taken either prior to the prisoner having engaged in the expressive activity, or by persons without knowledge of it, no valid claim for unlawful retaliation may be asserted. See [Pratt v. Rowland](#), #94-16370, 65 F.3d 802 (9th Cir. 1995), in which a federal appeals court overturned an injunction against the transfer and double celling of a former "Black Panther Party" leader. The trial court erred in determining that prison officials' actions were in retaliation for his media interviews when the transfer decision was made prior to the date a television interview took place, and the transfer was justified by the prisoner's own prior requests to be closer to his family. And in [Bennett v. Goord](#), #06-3818, 2008 U.S. App. Lexis 24441 (Unpub. 2nd Cir.), the court found that there was a lack of evidence that a prison employee who filed a disciplinary report against a prisoner had knowledge of his prior federal civil rights lawsuit, justifying summary judgment on the prisoner's retaliation claims.

Similarly, in [Ziemba v. Clark](#), #05-1613, 167 Fed. Appx. 831 (2nd Cir. 2006), the court concluded that the decision by a prison nurse to place a prisoner in four-point restraint was not shown to be retaliation for his prior lawsuits against other prison personnel, when there was no evidence that the nurse even knew of those lawsuits, and she was not named as a defendant in a lawsuit until after the incident

In [Alexander v. Forr](#), #06-4467, 2008 U.S. App. Lexis 18682 (Unpub. 3rd Cir.), a prisoner failed to show that his transfer to another facility was in retaliation for his pursuit of grievances, or that his grievances were denied in retaliation, rather than because the defendant officials believed that they had no merit. Additionally, the defendants presented "plausible and independent" reasons for transferring him. It was also undisputed that he had previously requested a transfer, and that the transfer moved him 200 miles closer to his home.

In [Coleman v. Beale](#), #07-CV-6219, 2009 U.S. Dist. Lexis 58465 (W.D.N.Y.), the court found that when a prisoner gave advice to a fellow inmate about how to file a grievance, he was not engaged in constitutionally protected speech. His own filing of grievances, however, as well as his statements about his intention to file grievances against a treatment program assistant, were protected speech. The prisoner failed to show, however, that the assistant retaliated against him because of the grievances, since his grievances were a response to her actions, not the cause of them.

To be actionable, the retaliatory action must have actually deprived the prisoner of some right or privilege. In [Starr v. Dube](#), #08-1322, 2009 U.S. App. Lexis 13552 (Unpub. 1st Cir.), rejecting a prisoner's claim that he had faced a false disciplinary charge in retaliation for his exercise of his First Amendment rights, the court ruled that any adversity suffered was minimal since the disciplinary charges were dropped after a week, no sanctions resulted, and the prisoner was afforded several opportunities to give his side of the facts to neutral persons.

See also [McKeithan v. Jones](#), #05-2238, 2007 U.S. App. Lexis 329 (3rd Cir.), finding that a prisoner's six-month disciplinary confinement did not violate a constitutionally protected interest, so that he could not obtain damages on his claim that a search of his cell, which resulted in finding of a homemade knife, and subsequent discipline, was retaliatory for his having filed a grievance, or that his disciplinary hearing violated his due process rights.

More substantial adverse action appeared to be present in [Pittman v. Tucker](#), #06-11454, 2007 U.S. App. Lexis 381 (11th Cir.). In a prisoner's lawsuit claiming that correctional officers made threats of physical violence against him, as well as threats of disciplinary action, to deter him from filing grievances, an officer's statement that "something drastic" would occur if the prisoner continued filing grievances, and a second officer's statement that the prisoner should "learn to play the game or have a boot put in your ass" could be found by a reasonable jury to be threats of violence aimed at retaliating against the prisoner for engaged in protected First Amendment activity.

See also, [Fogle v. Colorado Dep't of Corr.](#), #05-1405, 2006 U.S. App. Lexis 2024 (10th Cir.), finding that a prisoner who was held in administrative segregation for three years at three different Colorado prisons asserted several non-frivolous claims, including for unlawful retaliation against him for complaining about his segregation, complete denial of outdoor exercise, and denial of access to "church fellowship," and the prison law library.

Aside from the issue of civil liability, it is worth noting that the filing of administrative grievances by inmates can provide a barometer for prison or jail management as to what is happening when they are not present.

While there are difficulties and burdens associated with processing such grievances, they can also be a blessing by pointing out issues that may otherwise go unnoticed. If there is retaliation, inmates with lesser resolve will be intimidated and not file needed complaints, resulting in less knowledge by management about what is really happening in the facility, and a lessened ability to investigate and take possibly needed corrective action.

Resources and References

The following are a few useful resources and references related to the topic of this article.

Resources:

- [Access to Courts/Legal Info](#). Summaries of cases reported in AELE publications.
- [First Amendment](#). Summaries of cases reported in AELE publications.
- [Retaliation](#). Summaries of cases reported in AELE publications.
- Congressional Research Service, Annotated Constitution, [First Amendment](#)
- James P. Chapman, Illinois Institute for Community Law, [Prisoners' Rights: Retaliation](#). (2005). A 27 minute video presentation and transcript available online.

Prior Relevant Monthly Law Journal Articles

- [Access to Courts and Legal Information](#), 2007 (1) AELE Mo. L.J. 301.
- [Prisoner Mail Legal Issues](#), 2007 (6) AELE Mo. L.J. 301.
- [Legal Issues Pertaining to Inmate Telephone Use](#), 2008 (2) AELE Mo. L.J. 301.
- [Prisoners and Sexually Explicit Materials](#), 2010 (2) AELE Mo. L. J. 301

References (chronological):

- American Library Association, "[The Prisoners' Right-to-Read Statement – An Interpretation of the Library Bill of Rights](#)." (Jan.12, 2010).
- Jailhouse Lawyers' Manual, Chapter 19: "[Your Right to Communicate With the Outside World](#)," (Columbia Human Rights Law Review, 8th Edition, 2009).
- National Prison Project, ACLU, [Know Your Rights: Publications Sent by Mail](#) (2009).

- David L. Hudson Jr., “[Justice Thomas and prisoners’ freedom of expression](#),” (Oct. 8, 2007) in an online symposium “Justice Thomas & the First Amendment” at the First Amendment Center, <http://www.firstamendmentcenter.org>
- “[Regulation of an Inmate's Access to the Media](#),” U.S. Department of Justice, Office of Legal Counsel, written April 13, 2001, made available on the DOJ website 12/23/04.
- Rabun C. Sanders, Jr., and others, “[Prisoners’ First Amendment Rights Within the Institution](#),” Criminal Justice Monograph, Volume III, No.3.

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