

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RODGER LOVE,

Plaintiff,

vs.

Case No. 04-3026-JTM

VICKIE SCRIVNER,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Rodger Love, a former prison inmate, has brought this action against the prison librarian for allegedly violating his rights under the First Amendment. This matter comes before the court on defendant Vickie Scrivner's Motion to Dismiss (Dkt. No. 4). For the reasons stated below, the court grants defendant's motion.

Love is a convicted felon who at the time of the events described herein was an inmate at the Lansing Correctional Facility operated by the State of Kansas. Love, now released, resides in Topeka, Kansas.

While incarcerated at Lansing, Love was employed as a law library clerk. In late January, 2003, several law library clerks were in a dispute with a staff member, Mr. Schiedeker, regarding the proper procedure for making legal copies; this resulted in rudeness toward inmates by Mr. Schiedeker, who also screamed at an inmate named Hill.

In compliance with prison regulations, K.A.R. 44-15-101a(d)(1)(A-B), 44-15-103(a)(1), Love as prison librarian attempted an informal resolution of the dispute. On February 28, 2003, the law library clerks, including Love and Hill, met with Scrivner about the January incident and the operation of the library. At that meeting, Scrivner told Love and inmate Hill they would not have a job in the law library if they could not work with the staff. Scrivner also withdrew law library duties from Love and inmate Hill. Three days later, Scrivner told Love and Hill that their “attitudes were not needed, the complaining ends now, and that if [they], or any other inmate complains about the administration or operation of the library, they would be fired from the library.”

On March 5, 2003, Love filed a prison Grievance, #AA-2003-0717, in response to Scrivner's threat to fire Love and others. In response to Love's grievance, Deputy Warden Mr. Neve counseled Scrivner that inmates had a right to complain and that her actions were inappropriate. On March 21, 2003, in a meeting with Scrivner, Love, and Hill, Scrivner admitted making threatening statements, said she was wrong for making them, and apologized.

The record contains no further incidents containing threats or harm from Scrivner or anyone else.

On April 7, 2003, Love filed a Grievance Appeal, stating his dissatisfaction with the adequacy of the resolution by Lansing staff, specifically requesting a more severe punishment for Scrivner. William Cummings, designee of the Secretary of Corrections, in a response to Love's Grievance Appeal, found Love's Grievance Appeal “offers no evidence or argument that suggests that the response rendered by staff at the facility was wrong.” Cummings concluded: “[t]he response rendered to the inmate by staff at the facility is appropriate” and recommended no further action be taken by Lansing staff.

Love, now out of government custody, advanced a claim under 42 U.S.C. § 1983 that his First Amendment right to free speech was unlawfully infringed by Scrivner's threat of firing him. He also claims that his and other inmates' right to free speech was chilled, and seeks nominal damages in the amount of \$2,500, punitive damages in the amount of \$75,000, and declaratory judgment.

While Love claims here that certain job duties were removed from him, such claims have not been administratively exhausted. The text of Love's Grievance Appeal of April 7, 2003 shows that Love dropped such claims. Without administrative exhaustion, the claim cannot be resurrected here. Further, because Love is no longer in prison, his claim for declaratory judgment is moot. *Green v. Branson*, 108 F. 3rd 1296, 1300 (10th Cir. 1997).

This leaves Love's assertions that Scrivener's comments violated the First Amendment rights of the inmates. Love asserts that other inmates did not complain about the law library out of fear, but he provides no information, nor does he even allege, that others listened to his alleged warnings or acted upon them.

Even as to the claims of direct injury to himself, Love's assertions fail to show a First Amendment violation. Love was not terminated from his prison job, he merely asserts that he sought another job out of fear of retaliation by Scrivner. The claimed fear must be set against the uncontroverted facts that prison authorities promptly responded to Love's grievance by taking remedial action and requiring Scrivner to apologize.

Love argues that termination from his job should not be a prerequisite for maintenance of the action, citing cases such as *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001). It must be noted, however, that the injunction in *Gomez* was upheld based upon proof that prison officials, over the course of a decade,

engaged in a systematic attempt to restrict the number and availability of prison law clerks, with the purpose of restricting prisoner access to the courts. *Id.* at 1123. The district court found “repeated instances of retaliatory conduct.” *Id.* at 1125. Prison officials engaged in “repeated threats of transfer” against one prison law clerk, who eventually quit his job in the face of such complaints; the officials then repeatedly failed to investigate retaliation complaints, and refused to issue any reprimand for the officers involved. *Id.* at 1127.

The present case is markedly different. Love never quit his position. He was ordered to stop complaining on one occasion by Scrivner. Love then filed a grievance over the issue, and received virtually immediate relief, with Scrivner being ordered to apologize to the plaintiff. There is no evidence that the inmates of Lansing were ever deprived of their access to the courts. Courts must play close heed to charges of First Amendment violations, but there remains a threshold which must be met. The plaintiff must demonstrate an injury which would be one that “would chill a person of ordinary firmness from continuing to engage in that activity.” *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001) (*quoting Worrell v. Henry*, 219 F.3d 1197, 1213 (10th Cir.2000)). Here, the evidence establishes that Love’s First Amendment rights were neither objectively or subjectively violated. A person of ordinary firmness would not have been chilled by the single comment by Scrivner, a comment which was promptly withdrawn and apologized for. Further, that Love himself was never chilled by Scrivner’s directive to stop complaining is reflected in Love's response to the directive: filing another complaint, his successful grievance against Scrivner.

IT IS ACCORDINGLY ORDERED this 3d day of September, 2004, that the defendant's Motion to Dismiss (Dkt. No. 5) is hereby granted.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE