IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

v.

JANEL NICKEL, TIMOTHY DOUMA, PHILIP KINGSTON, WILLIAM NOLAND, MATTHEW J. FRANK,

Defendants.

OPINION AND ORDER

05-C-232-C

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This is a civil action for declaratory and monetary relief brought pursuant to 42 U.S.C. § 1983 in which plaintiff Willie Simpson, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, contends that defendants retaliated against him for exercising his First Amendment rights. Specifically, plaintiff contends that when he initiated a lawsuit and wrote a letter relating to alleged abuse by prison staff, defendants issued him a conduct report, accusing him of lying.

According to plaintiff, in late February 2004, he filed a request for a John Doe proceeding in the Circuit Court for Portage County, Wisconsin, to investigate prison staff for allegedly physically and sexually assaulting inmate Freddie McLaurin. In addition, he

filed a group inmate complaint on the subject and posted a letter to the Wisconsin Attorney General, detailing the alleged assault on McLaurin. Plaintiff contends that defendants charged him with lying in conduct report #1485471 in retaliation for his actions.

On September 29, 2005, I denied defendants' motion to dismiss the case after finding that defendants had failed to show that plaintiff did not exhaust his administrative remedies prior to bringing suit, as is required under 42 U.S.C. § 1997e(a). However, in considering plaintiff's recent discovery motion, it has become clear that plaintiff's case should be dismissed on the court's own motion for plaintiff's failure to state a claim upon which relief can be granted, unless plaintiff can make the prerequisite showing that a state court or administrative tribunal has overturned the finding of a prison disciplinary committee that the speech he claims was protected is a lie.

To state a claim for retaliation, a plaintiff must plead three elements: he must specify a retaliatory action; name the appropriate defendants; and assert a constitutionally protected activity, the exercise of which caused the retaliation. Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005). Plaintiff has identified a retaliatory action, the issuance of conduct report #1485471. Also, he has named the defendants responsible for the action. However, although he has asserted that the act of alleged retaliation was made in response to a constitutionally protected activity, his own allegations contain contrary information. Specifically, he alleges that he was found guilty of lying and he has not alleged that the

finding was overturned.

Prisoners have protected First Amendment interests in both sending and receiving mail. Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). As long as outgoing mail does not interfere with the substantial governmental interests of security, order and rehabilitation, the mail receives First Amendment protection. If plaintiff's allegations that prison officials assaulted and sodomized inmate McLaurin have been found to be true, plaintiff's statements in his letter to the Wisconsin Attorney General, his request for John Doe proceedings in circuit court and his group inmate complaint would constitute protected speech under the First Amendment.

However, as this case demonstrates, the deceptively simple process of stating a claim can become complicated when the alleged act of retaliation is the issuance of a prison disciplinary report. Prison officials are free to issue disciplinary sanctions to prisoners who violate institutional rules. They are not permitted to issue the sanctions in retaliation for constitutionally protected actions taken by inmates. Unfortunately, the complexities of the prison environment can lead to situations in which an inmate's alleged protected action is itself a violation of prison rules. See, e.g., Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005) (retaliation claim premised on discipline report issued in response to inmate grievance containing lies); Lindell v. O'Donnell, Case No. 05-C-04-C, Order dated October 23, 2005 at 65-66 (retaliation claim premised on disciplinary report

issued for possession of material that violated prison regulation and to which plaintiff asserted First Amendment right).

Plaintiff's case bears remarkable similarity to Hasan. In Hasan, the plaintiff, Kenneth Harris, filed an inmate grievance alleging that a prison guard had tampered with his typewriter. Hasan, 400 F.3d at 1005. Prison officials investigated the allegation, found it to be groundless and issued Harris a conduct report for lying about staff under Wis. Stat. § DOC 303.271, the same regulation under which plaintiff was charged. Id. The Court of Appeals for the Seventh Circuit held that the defendants did not retaliate because they showed that their action was prompted not by Harris's exercise of his First Amendment rights, but by his lies. Id. In this case, plaintiff contends that conduct report #1485471 was issued because he filed a circuit court action and group complaint and wrote a letter to the Attorney General. Plaintiff's allegations reveal that the conduct report was issued as a result of these communications. However, plaintiff admits that defendants charged him with lying in each of these communications in violation of Wis. Admin. Code § DOC 303.271, which prohibits making false written or oral statements about staff members that affect the integrity, safety or security of the institution.

Falsehoods do not constitute protected speech and factually baseless court actions and inmate complaints are not immunized by the First Amendment right to petition. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); McDonald v. Smith, 472 U.S. 479, 484

(1985). When prison officials assert that a disciplinary report has been issued because a prison rule has been violated, federal courts "must assume" that the disciplinary sanction was issued in response to the rule violation. Hasan, 400 F.3d at 1005. Therefore, before plaintiff can state a retaliation claim in this case, he must make a threshold showing that the disciplinary finding was erroneous.

It is not within the authority of federal courts to review evidence submitted at prison disciplinary hearings and substitute its opinion for the disciplinary hearing committee's opinion whether the inmate is guilty or innocent of offenses charged in conduct reports. That is a function of state courts. To challenge the outcome of disciplinary hearings, prisoners first must appeal a disciplinary decision to the prison warden under Wis. Admin. Code § DOC 303.75(6) or Wis. Admin. Code § DOC 303.76(7). If a prisoner's appeal to the warden is unsuccessful, he may file a writ of certiorari in circuit court, seeking judicial review of the disciplinary decision. Wis. Stat. § 893.735(2). In those state court proceedings, evidence can be received and the application of state regulations re-examined. If the substance of the disciplinary action is found to be without merit, the decision can be vacated. A favorable ruling on the substance of the disciplinary report during either the prison appeal or the writ of certiorari would constitute evidence that the substance of the disciplinary report was without merit. In plaintiff's case, if his disciplinary report were vacated, he would have grounds for contending in federal court that he was unjustifiably

disciplined in retaliation for protected speech. However, if his disciplinary report stands, he has failed to make the prerequisite showing that prison officials engaged in retaliatory discipline.

In this suit, plaintiff has not alleged that his finding of guilt in conduct report #1485471 was vacated by a state court. I found in my September 29, 2005 order that defendant Kingston affirmed the disciplinary committee's decision that plaintiff lied. Therefore, unless plaintiff can show that his finding of guilt was overturned in state court, he has not stated a federal claim.

It is true that federal courts may exercise jurisdiction over state law claims when they are brought in the same case as related federal claims and "are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367; See also United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). However, before the court may exercise pendent jurisdiction, it must be clear that a federal claim exists. Without "original jurisdiction" over at least one claim, the court does not possess jurisdiction over the suit at all. 28 U.S.C. § 1915(e)(2)(B)(ii) requires the court to dismiss a case at any time if it concludes that the action fails to state a claim upon which relief can be granted. In this case, the existence of a federal claim turns on the resolution of one question: Has the disciplinary finding that plaintiff lied when he stated that McLaurin was sexually assaulted been overturned? If so, then plaintiff's

constitutional claim has a factual basis and can be heard by this court.

Because plaintiff's federal claim cannot be recognized without some proof that he did not lie, I will give plaintiff two weeks to produce evidence demonstrating that conduct report #1485471 was overturned in state court on a writ of certiorari. If he does not do so, this court is obligated to dismiss the case for failure to state a claim that defendants violated plaintiff's First Amendment rights when they issued him conduct report #1485471.

ORDER

IT IS ORDERED that plaintiff has until November 11, 2005, to produce evidence that conduct report number #1485471 has been overturned or vacated. Failure to do so will result in dismissal of his case for failure to state a claim upon which relief may be granted.

Entered this 31st day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge