

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHARLES WILSON,

Plaintiff,

ORDER

v.

06-C-585-C

KEN GREETAN, Individual Capacity; and
CAPTAIN STELLINGS, Individual Capacity,

Defendants.

In an order dated November 17, 2006, I concluded that plaintiff Charles Wilson stated a claim upon which relief could be granted on his claim that defendants Ken Greetan and Captain Stellings retaliated against him in violation of his rights to free speech and to petition the government for redress of grievances. However, I dismissed his claim against Matthew Frank because plaintiff had named Frank in his official capacity only and had not alleged that the retaliation was the result of a policy, custom or practice. In addition, I dismissed plaintiff's claims under the due process and double jeopardy clauses as legally frivolous.

Now, plaintiff has filed a document, which I construe as two motions: a motion to

reconsider the decision to dismiss the due process claim and a motion for leave to amend his complaint to add Rick Raemisch as a defendant in his individual capacity. Both of these motions will be denied.

I dismissed plaintiff's due process claim because the punishment he received, 90 days' segregation and the loss of his prison job, did not extend the duration of his confinement and was not an "atypical and significant hardship," as defined by the Supreme Court and the Court of Appeals for the Seventh Circuit. If this standard is not met, the Constitution does not require prison officials to give inmates *any* process in the context of a disciplinary decision. Sandin v. Conner, 515 U.S. 472, 484 (1995); Hoskins v. Lenear, 395 F.3d 372, 374-75 (7th Cir. 2005); Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997). In seeking to have this claim reinstated, plaintiff does not so much develop an argument as he does list a number of cases that he apparently believes support a different outcome. Unfortunately for plaintiff, none of the cases he cites supports his position:

(1) In Muhammad v. Close, 540 U.S. 749 (2004), DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) and Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999), the courts did not determine whether the prisoner was entitled to process. Rather, the question in those cases was whether the plaintiff had appropriately brought his lawsuit under 42 U.S.C. § 1983 rather than as a petition for a writ of habeas corpus. Although the prisoner in Jenkins was asserting a due process claim relating to disciplinary

proceedings that resulted in segregation, the court did not determine whether the prisoner was entitled to procedural protections. In fact, the court noted that, under Sandin, the prisoner faced “considerable hurdles before his claim may be heard on the merits” and suggested that the defendants could file a motion to dismiss for failure to state a claim. Jenkins, 179 F.3d at 28.

(2) In State ex rel. Curtis v. Litscher, 2002 WI App 172, 256 Wis. 2d 787, 650 N.W.2d 43, the court did discuss procedural requirements in the context of certain disciplinary decisions. However, the court did not consider the requirements of the *due process clause*, but rather requirements imposed by internal prison rules and state administrative regulations. If plaintiff believes his discipline violated a *state* law, he must do what the prisoners in Curtis did, which is file a petition for a writ of certiorari in state court, although the deadline for filing such a petition has likely passed. Wis. Stat. § 893.735 (imposing 45-day deadline on certiorari actions brought by prisoners).

(3) Superintendent v. Hill, 472 U.S. 445 (1985), Wolff v. McDonnell, 418 U.S. 539 (1974), Van v. Daniels, 871 F.2d 1328 (7th Cir. 1989) and Santiago v. Ware, 205 Wis. 2d 295, 556 N.W.2d 356 (Ct. App. 1996), each involved punishment that resulted in a longer sentence. The prisoners in Hill, Wolff and Van lost good time credits; the prisoner in Santiago had his mandatory release date extended. Thus, all

of these cases are distinguishable from plaintiff's situation. Under Sandin, punishment that increases the duration of confinement requires due process protections, but temporary stays in segregation do not.

The case law explaining the proper application of the due process clause cannot be described as simple or even intuitive, so I do not fault plaintiff for some confusion. Nevertheless, his motion for reconsideration must be denied.

With respect to plaintiff's motion for leave to amend his complaint to add Rick Raemisch as a defendant, the defendants have not yet answered plaintiff's original complaint, so the only question is whether a claim against Raemisch would survive screening under 28 U.S.C. § 1915. Raemisch's only connection to this case is that he was the final reviewer to dismiss a grievance in which plaintiff complained about being retaliated against for threatening to file an incident report. In cases brought under § 1983, a defendant cannot be liable in an individual capacity unless he or she either directly participated in the violation or knew about the violation and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he or she might see. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003).

I can assume that Raemisch knew that plaintiff was complaining about retaliation. However, for purposes of liability under § 1983, the question is whether Raemisch knew or at least strongly suspected that plaintiff actually was being retaliated against, that is, that

Raemisch believed that Greetan and Stellings were lying, but he approved the decision anyway. In his motion, plaintiff makes clear his inability to meet this standard. Plaintiff explains that his theory of liability is that Raemisch should have investigated defendant Greetan's disciplinary history in order to determine whether Greetan had filed false conduct reports in the past and whether Greetan had been fired from his job. Thus, plaintiff has pleaded himself out of court because he admits that Raemisch was not aware of any reason to believe that defendants Greetan and Stellings had violated his constitutional rights. Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004).

In addition, an official cannot be held liable unless he had some ability to intervene to stop the constitutional violation. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). The documents attached to plaintiff's complaint show that Raemisch was reviewing petitioner's grievance for procedural errors only. Beanstalk Group Inc. v. AM General Corp., 283 F.3d 856, 858 (7th Cir. 2002) (documents attached to complaint become part of it for all purposes). Thus, Raemisch would not have had any occasion to consider whether plaintiff was the victim of retaliation, much less approve or condone any unconstitutional conduct.

Because plaintiff does not state a claim upon which relief may be granted against

Raemisch, I must deny his request for leave to file an amended complaint.

ORDER

IT IS ORDERED that

1. Plaintiff Charles Wilson's motion to reconsider the dismissal of his due process claim is DENIED.

2. Plaintiff's motion for leave to file an amended complaint to name Rick Raemisch as a defendant is DENIED.

Entered this 29th day of November, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge