

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

SALAAM JOHNSON

Plaintiff,

v.

LIEUTENANT PRIMMER,
LIEUTENANT HANFELD,
ELLEN K. RAY AND
GARY BOUGHTON,

Defendants.

OPINION and ORDER

10-cv-316-sl

Plaintiff Salaam Johnson is a prisoner who is suing defendants Lieutenant Primmer, Ellen Ray, Lieutenant Hanfeld and Gary Boughton because he contends that they violated his First Amendment right to free speech and retaliated against him by taking away his ability to use electronics for 65 days after he filed a grievance against another prison official. Now before the court are defendants' motion for summary judgment (dkt. 60) and plaintiff's motion for sanctions (dkt. 81). For the reasons provided below, I am denying plaintiff's motion for sanctions and granting defendants' motion for summary judgment.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed:

UNDISPUTED FACTS

Plaintiff Salaam P. Johnson is a prisoner who has been incarcerated at the Wisconsin Secure Program Facility since May 6, 2008. On October 21, 2009, plaintiff filed an Offender Complaint in which he alleged that on October 18, 2009 at around 6:29 p.m., "C/O II Scullion" "sexually harassed" plaintiff by "peeking" into his cell while he was showering. Plaintiff also alleged that he had a "verbal exchange" with Scullion about the incident, and that Scullion told plaintiff that he was Sgt. J. Hill although plaintiff "personally observed" that it was Scullion.

The Offender Complaint was referred to the Warden's Office because it involved allegations of sexual misconduct by staff. Defendant Lieutenant Primmer was assigned to investigate plaintiff's claim. As part of his investigation, Primmer reviewed video surveillance showing the front of plaintiff's cell between the hours of 6 and 7 p.m. on October 18, 2009. Dkt. 63. (Plaintiff objects to the authenticity of the video surveillance. However, Primmer has authenticated the video as being a "true and correct copy" of the one he reviewed when investigating plaintiff's claim, so for that purpose the video may be considered. *Id.* at ¶ 9.)

On the video, Primmer observed Sgt. Hill going from cell to cell with a piece of paper in his hand at approximately 6:16 p.m. and Officer Hertrampf stopping at each cell to exchange clean clothes for dirty clothes between 6:22 and 6:27. Primmer observed no other staff walking up or down the range near plaintiff's cell between 6 and 7 p.m. on October 18, 2009. On October 27, 2009, relying on his review of the video, Primmer wrote a conduct report for plaintiff charging him with lying about staff.

Lying about staff can harm the staff member and affect staff morale. It can cause other staff and prisoners to question the credibility of the accused staff member, which affects the staff's ability to perform work effectively while maintaining a position of authority. In the past, inmates have deliberately made false allegations concerning corruption or sexual misconduct by staff. False allegations of sexual assault can pose security concerns.

The prison's security director reviewed the conduct report and determined that it should proceed as a major offense. On November 20, 2009, a disciplinary hearing was held on the matter. Defendant Hanfeld reviewed the conduct report written by Primmer, considered the testimony of plaintiff and reviewed the relevant video surveillance. (Plaintiff attempts to put

into dispute whether Primmer wrote the report, but the evidence he cites only disputes whether Primmer was a lieutenant or a sergeant, which is irrelevant.) Hanfeld found the statements of Primmer to be credible and found it more likely than not that plaintiff had made false statements. He found plaintiff guilty of lying to staff and ordered a disposition of 65 days of loss of electronics.

At the time plaintiff received the disposition, he was in disciplinary separation status on “step 3,” which allowed him the use of a state issued television but no magazines or newspapers. Plaintiff was still allowed to receive mail from outside the prison system, including newspaper clippings, and could still make phone calls and receive visitors.¹

OPINION

A. Restriction on Speech

First, plaintiff contends that his loss of electronics for 65 days violated his First Amendment right to free speech. In response, defendants contend that the disciplinary measure was “reasonably related to a legitimate penological interest” under *Turner v. Safely*, 482 U.S. 78, 89 (1987), and therefore not a violation of plaintiff’s free speech rights. A court should consider the four factors when deciding whether a restriction is “reasonably related to a legitimate penological interest”: (1) whether there is a “valid, rational connection” between the restriction and a legitimate governmental interest; (2) whether alternative means of exercising the right remain available to the prisoner; (3) what impact accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same

¹ Plaintiff attempts to dispute this fact by stating, “No phone calls while in WSPF. No visitors while in WSPF and mail has slowed tremendously, if received at all.” Plaintiff’s vague averment at most shows that plaintiff *did* not receive phone calls, visitors or much mail, it does not show that he *could* not.

goals without encroaching on the right to free speech. *Turner*, 482 U.S. at 89-90; *see also Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010) (applying the *Turner* factors to Waupun Correctional Institution’s ban on the role-playing game “Dungeons & Dragons”). Prisoners who challenge the reasonableness of a restrictive prison regulation bear the “weighty” burden of proving its invalidity because

[Courts] must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.

Singer, 593 F.3d at 534, quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Because of this, courts must defer to the professional judgment of prison officials even at the summary judgment stage. *Id.*

Plaintiff asserts that his loss of electronics was not reasonably related to a legitimate penological interest, but he does not attempt to address any of the *Turner* factors. Instead, he argues that he had a property interest in the state-issued television because the prison’s rules allowed only a prisoner’s own electronics to be taken away. Even assuming that plaintiff had a property interest and that defendants did not follow the prison’s rules, these facts have no bearing on whether their actions were “reasonably related to a legitimate penological interest.” In a *Turner* free speech analysis, it is irrelevant what property rights plaintiff might have had and it is irrelevant whether the prison followed its own rules when it took that property. Plaintiff’s argument suggests that plaintiff is attempting to avoid summary judgment by converting his First Amendment claim into a Due Process claim for an uncompensated taking. As explained below, any such taking claim faces other problems.

As for plaintiff's free speech claim, as defendants explain, plaintiff lost 65 days of electronics as a disciplinary measure for his having lied about staff. In *Beard v. Banks*, 548 U.S. 521, 532-33 (2006), the court found that prisons may restrict prisoners' access to informational materials, including television and radio, as part of a disciplinary program. In *Beard*, the prison's policy placed especially disruptive, violent or dangerous prisoners in a "special management unit" that included "severe" restrictions including no newspapers, magazines, television or radio and limited visits and phone calls. *Id.* at 5265-26. The Court found that there was a "valid, rational connection" between the restrictions imposed and the "penological rationales" provided by the prison, including the goal of motivating better behavior on the part of "difficult prisoners" by providing them with an incentive to behave.

In this case, the behavioral concern (lying to staff) were less severe, but so was the restriction imposed, which prohibited only electronics and only for 65 days. Such a restriction satisfies *Turner*. First, the loss of electronics is logically connected to the misconduct found: taking away plaintiff's electronics was aimed at "emphasiz[ing] the seriousness" of plaintiff's actions. Second, although removing plaintiff's television may have reduced the number of outlets by which plaintiff could stay abreast of the news, plaintiff was allowed to make phone calls and receive visitors and mail, including newspaper clippings. Thus, plaintiff did have alternative means for exercising his right to receive outside information, even if they were not, in his mind, ideal. Third, prison officials could be adversely impacted if prisoners' rights to electronics could not be used as a form of discipline: they would lose an important tool sometimes necessary to discipline prisoners, which segues here to the fourth point:, officials at WSPF do not appear to have had many other options still available to emphasize to plaintiff the seriousness of his

misconduct. Plaintiff already was on disciplinary separation status, which did not allow plaintiff direct access to magazines or papers.

In short, defendants sufficiently have shown that plaintiff's loss of electronics for 65 days was reasonably related to a legitimate penological interest, and plaintiff has done nothing to undermine that showing. Therefore defendants did not violate plaintiff's free speech rights. Accordingly, I am granting defendants' motion for summary judgment as to this claim.

B. Retaliation

Plaintiff's next claim is for unlawful retaliation. To prevail on this claim, plaintiff must show that he was engaged in a constitutionally protected activity, that defendants took actions that would likely deter a person from engaging in the protected activity in the future, and that plaintiff's protected activity was a "motivating factor" in defendant's decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

Plaintiff's theory is that defendants punished him in retaliation for having filed his offender complaint. There are multiple problems with this theory. First, plaintiff fails to identify a protected activity. He does not attempt to show that the statements he made in his offender complaint were protected, a prudent decision since these statements were found to be false and in violation of prison rules. *U.S. v. Cueto*, 151 F.3d 620, 634 n.11 (7th Cir. 1998) ("Speech which is false and misleading is not protected by First Amendment's right to freedom of speech"); *see also Watkins v. Kasper*, 599 F.3d 791, 799 (7th Cir. 2010) (speech that "violated legitimate prison rules" cannot serve as basis for free speech retaliation claim). Instead, plaintiff focuses his

retaliation claim on his act of filing of his offender complaint in the first place. But this is a distinction without a difference because “baseless litigation is not immunized by the First Amendment right to petition.” *Bill Johnson’s Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983), In other words, “litigation based on intentional falsehoods or on knowingly frivolous claims” is not protected activity. *Id.*

Plaintiff provides no reason to deem his act of filing a complaint anything other than baseless litigation arising out of falsehoods. Plaintiff claimed in his complaint that Scullion peeked at him during the shower then told plaintiff that he was Hill, but that plaintiff “observed” that it was Scullion instead of Hill. Defendants have shown that Primmer reviewed videos that established it really was Hill, not Scullion, who patrolled the range during the relevant time period. In response, plaintiff has not attempted to explain why he asserted that he “observed” that it was Scullion instead of Hill.

Even assuming plaintiff had a reasonable basis for initially accusing Scullion of peeking into his cell, and therefore had engaged in protected activity when he filed his complaint, plaintiff has no evidence whatsoever that defendants’ decision to give him a conduct report and then take away his electronics for 65 days had anything to do with the stand-alone fact that plaintiff had filed an offender complaint. The record shows that Primmer concluded that plaintiff was lying after Primmer reviewed video surveillance that contradicted plaintiff’s allegations, and that Hanfeld found Primmer more credible than plaintiff. Nothing suggests that any of defendants’ findings were unreasonable or that any defendant would have had a reason to punish plaintiff simply because he filed an offender complaint against Scullion. Everything suggests that the

defendants punished plaintiff because he knowingly filed a *false* complaint, something they were permitted to do. Defendants are entitled to summary judgment on plaintiff's retaliation claim.

C. Uncompensated Taking

As noted above, it appears that plaintiff now is attempting to assert a claim against defendants for their uncompensated taking of his television. The first problem with this attempt is that this court did not grant plaintiff leave to proceed on any such claim. Indeed, his attempts to pursue such a claim were considered and rejected *three times* at the early stages of this case.² On August 11, 2010, the court screened the complaint and denied plaintiff's request for leave to proceed on an "unjust takings" claim. Then, on September 14, 2010, the court considered plaintiff's motion for reconsideration and again rejected the claim. Finally, on October 1, 2010, the court rejected plaintiff's second motion for reconsideration.

Plaintiff has been told three times why he cannot pursue a taking claim in this lawsuit. His attempt to reanimate that claim at this stage is futile. If anything, now it is more apparent that plaintiff's taking claim was stillborn: plaintiff didn't even own the television removed from his cell during his loss of electronics. It was a state-issued television. Even if plaintiff is correct that the prison's rules did not allow state-issued televisions to be removed for loss-of-electronics dispositions, this does not give him a property interest in the television.³

² A district judge screened plaintiff's complaint and denied his motions for reconsideration because the parties had not yet consented to my jurisdiction over this lawsuit.

³ Although it does not require discussion, plaintiff's assertion seems counterintuitive: if the intent of an electronics ban is to impress upon an inmate the seriousness of his misconduct, how is this accomplished if the inmate must surrender a personal television but may keep a state-owned television?

D. Plaintiff's Motion for Sanctions

Plaintiff moves for sanctions on the ground that the copies of the affidavits and proposed findings of fact that defendants filed in this case “bore no date or competency to testify.” It is not clear what plaintiff means. The affidavits filed with the court all had been signed and dated and included statements indicating that each affiant was describing matters of personal knowledge. Perhaps plaintiff's copies lacked some of this information, although I doubt it; in any event, plaintiff does not provide any documentation that would support his inscrutable assertion. Regardless, plaintiff cannot show he was harmed by lack of “date or competency to testify.” Therefore, I am denying plaintiff's motion for sanctions.

ORDER

IT IS ORDERED that:

- (1) The motion for summary judgment filed by defendants Lieutenant Primmer, Lieutenant Hanfeld, Ellen K. Ray and Gary Boughton, dkt. 60, is GRANTED.
- (2) The motion for sanctions filed by plaintiff Salaam Johnson, dkt. 85, is DENIED.
- (3) The clerk is directed to enter judgment in defendants' favor and close this case.

Entered this 8th day of August, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge