

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

DANIEL RYAN CURRY,

Plaintiff,

v.

SGT. REED TREFZ and
CAPTAIN DAVID GARDNER,

Defendants.

OPINION AND ORDER

11-cv-223-slc

Plaintiff Daniel Curry has filed a Rule 59(e) motion for reconsideration of this court's September 11, 2012 opinion and order granting defendants' motion for summary judgment on plaintiff's excessive force and retaliation claims. Dkt. 70. In support of the motion, Curry argues that this court should have submitted to the jury the question whether Gardner retaliated against him for accusing Trefz of sexual assault. Citing *Newson v. Frank*, 2008 WL 4282591 (E.D. Wis. Sept. 17, 2008), Curry asserts that his affidavit detailing Gardner's and Hable's threats to punish Curry with more segregation if he spoke about Trefz's alleged assault sufficiently supported his retaliation claim. In *Newson*, the district court denied defendants' motion for summary judgment on plaintiff's retaliation claim where plaintiff averred that defendants had made threatening statements to him shortly after he filed a grievance against another prison guard. *Id.* at *7-8.

Contrary to Curry's assertion, the court did consider his undisputed averment that Gardner threatened him with more segregation if he talked about the alleged sexual assault to anyone. In fact, the court found that defendants made good on Gardner's threat when it was discovered that Curry had been talking about the incident with fellow inmates. Curry's claim fails for other reasons. First, Gardner did not make the final decision to place Curry in temporary lockup (TLU); he only reported Curry's disobedience to Schwandt, who ordered Gardner to

place Curry in TLU. Second, even assuming that Gardner reported false findings to Schwandt in order to punish Curry for a filing complaint about Trefz, the only evidence of a retaliatory motive is the timing of Curry's complaint in relation to his placement in TLU. As explained in detail in the previous order, the Court of Appeals for the Seventh Circuit has held repeatedly that suspicious timing rarely suffices to show that a complaint caused the adverse action against the plaintiff.

Unlike in *Newson*, Curry's affidavit does not put Gardner's motive in dispute. Gardner legitimately threatened Curry with more segregation if he impeded the prison's investigation by discussing the alleged assault. *See* Wis. Admin. Code DOC 303.11(4)(a). It was Curry's own subsequent actions that led to his transfer to TLU. Because Curry failed to adduce any evidence of ill motive, and because Gardner's explanation for why Curry was placed in TLU is not reasonably disputed, Gardner was entitled to summary judgment on Curry's retaliation claim.

Curry also asks that the court again review the record with respect to his excessive force claim and find that Trefz should have been aware that intentionally striking inmates on the buttocks was unconstitutional. On summary judgment, Curry admitted—and a video recording confirms—that Trefz briefly touched the upper portion of his buttock/hip area for a second as Trefz tapped him to signal that the search was over. There is no evidence that Trefz used any force in conducting the pat down. As explained at length in the summary judgment order, I found that it would be a distortion to characterize Trefz's conduct in this case as excessive force or sexual assault. Curry's brief statement to the contrary does not persuade me otherwise. For all the above reasons, the motion for reconsideration is denied.

ORDER

IT IS ORDERED that plaintiff Daniel Curry's motion to alter or amend the judgment (dkt. 70) is DENIED.

Entered this 27th day of December, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge