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

GESA S. KALAFI-FELTON,

Plaintiff,

v.

PETER HUIBREGTSE, GARY BROUGHTON, BRIAN KOOL, MELANIE HARPER, and DAVID GARDNER,

Defendants.

OPINION AND ORDER

11-cv-480-slc

This is an action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Gesa Kalafi-Felton, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has been allowed to proceed on his claim that various officials at the institution removed him from the High Risk Offender Program (HROP) and moved him to another housing unit in retaliation for sending the Warden's Office a February 10, 2010 letter complaining about Deputy Warden Boughton's decision on an earlier inmate complaint.

Before the court are the parties' cross-motions for summary judgment, dkts. 30, 47. Because I agree with defendants that plaintiff's February 10, 2010 letter does not enjoy constitutional protection, I am granting summary judgment in their favor and denying plaintiff's motion.

From the parties' summary judgment submissions, I find the following facts to be material and undisputed for the purpose of deciding the instant motion:

A. Parties

Plaintiff Gesa Kalafi-Felton is an inmate at the Wisconsin Secure Program Facility located in Boscobel, Wisconsin (WSPF).

At the times relevant to this action, defendant Peter Huibregtse was the Warden at WSPF and defendant Gary Boughton was the Deputy Warden. David Gardner was a Supervising Officer 2 (captain) and was sometimes designated as Acting Security Director. Defendant Brian Kool was a Corrections Unit Supervisor. Melanie Harper was a social worker at the institution.

B. The High Risk Offender Program

Inmates on administrative confinement status at WSPF may participate voluntarily in a program called the High Risk Offender Program (HROP). The program's purpose is to provide inmates with an opportunity to focus on programming and education and to show improvement in their behavior, attitudes and thinking, so that they may eventually transfer back to General Population.

Progression in the HROP occurs in three color-coded phases, Red, Yellow and Green, with Red the most restrictive phase and Green the least restrictive. As inmates progress from one phase to the next, they are offered different programming and fewer restrictions on their movement. It takes a minimum of 15 months to complete all three phases of the program.

To track each inmate's progression through the HROP, the Unit Team conducts ongoing assessments and makes recommendations using a form called a Risk Assessment Information Guide (RAIG). The Unit Team's recommendations are reviewed by the Security Director or Acting Security Director and finally by the Warden's Office. At the times relevant to this lawsuit, Deputy Warden Boughton was the official in the Warden's Office charged with final decision-making authority with respect to Unit Team recommendations concerning inmates in the HROP. Although defendant Huibregtse had general supervisory authority over WSPF

operations, he did not supervise the day-to-day operations of the Unit Team or the programming recommendations for inmates.

C. Plaintiff's Participation in the HROP

Plaintiff began the HROP program on September 30, 2008. His Unit Team was composed of defendants Kool and Harper and various correctional officers and supervisors who interacted with him. (These correctional officers and supervisors changed during the time plaintiff was in the HROP.) Defendants Kool and Harper participated in all of plaintiff's Unit Team meetings, with the exception of the May 2009 meeting, which Kool missed. Defendant Boughton reviewed each of plaintiff's RAIG forms, which were signed by Harper or Kool, and had the final say regarding any team assessments and recommendations during the time plaintiff was in the HROP.

During the course of his participation in the HROP, plaintiff demonstrated an atypical amount of negative behavioral issues. Terminology used to describe plaintiff's behavior during his participation in the HROP include words such as "rude," "argumentative," "demanding," "inappropriate" and "disrespectful."[1] The Unit Team asked plaintiff to attend at least three Unit Team meetings to discuss his negative behavior and attitude and to give him feedback on how his behavior could affect his progress through the program.

[1] Many of these behavior problems were noted on plaintiff's "face card," a behavior log maintained by the correctional officers and others on duty who interacted with plaintiff on the unit. Although plaintiff asserts that many, if not all, of these negative reports were false, it appears that none were of these reports were entered by any of the defendants in this case. *See* Exh. A. to Aff. of Kalafi-Felton, dkt.69-1. The salient point for purposes of this suit is that defendants had reason to believe from the reports that they were receiving that plaintiff was not exhibiting the behaviors they expected him to exhibit in order for plaintiff to advance in the HROP.

On February 4, 2010, the Unit Team decided that plaintiff was not ready to be promoted from phase Yellow to Green. Instead, the team members spoke to plaintiff personally: they informed him that they were concerned with his continuing negative behaviors and they advised him that he needed to improve his behavior if he was to progress through the program. Boughton approved of the team's recommendation on February 9, 2010. Boughton had been reviewing plaintiff's RAIGs and was familiar with his lack of progression through the Yellow phase.

Less than a week later, on February 10, 2010, plaintiff sent Boughton a letter concerning a previously-rejected inmate complaint. The letter reads:

> Deputy Warden Boughton:
>
> Received your decision today 2/10/2010, on complaint 2010-2444. You ruled the ICE appropriately rejected complainant complaint for being previously address[ed].
>
> This clearly shows you did know [sic] investigation, whatsoever. The complaint the ICE staff . . . is referring to is #2010-1030 which was [moot] because the "Swahili Book" was returned. This had nothing to do with the 94 pages of material taken by Capt. Brown, which he still has. This "computerized signature" on this decision is a sham just like the ICE process is. I'll bet you never even seen or read my complaint because any idiot could see the issue has never been address[ed], because Capt. L. Brown still has my material, so, how has the issue been address[ed], please inform me.

Plaintiff had complained and used the Inmate Complaint Review System process many times while he was in the HROP, filing 33 offender complaints between January 1, 2009 and February 15, 2010. Boughton made decisions on 21 of these 33 complaints. In spite of his awareness of plaintiff's frequent use of the ICRS process, Boughton never used this knowledge against plaintiff with respect to his participation in the HROP.

Defendant Boughton was troubled, however, by plaintiff's February 10, 2010 letter. In Boughton's view, the letter, particularly plaintiff's use of the term "idiot," was disrespectful. Moreover, it indicated that plaintiff was not making progress in improving his thought processes, his ability to deal with authority, or his attitude and interactions with others, even though plaintiff had been given many opportunities in the preceding 18 months to do so.

Respect for authority is an essential component of managing a correctional institution. Disrespect by an inmate toward an authority figure in a corrections setting can lead to a breakdown in the system as a whole. Corrections staff are responsible for the well-being and safety of co-workers, inmates and members of the public, who may be on institution grounds. To that end, inmates must respect the ability of staff to enforce rules, make decisions and operate the facility as deemed appropriate. Also, the ability to interact respectfully with authoritative figures is important to the inmate's success upon release to the community.

Defendant Boughton brought plaintiff's letter to the attention of defendant Kool, who agreed that it showed that plaintiff was not taking the Unit Team's concerns about his behavior seriously and that he was continuing to demonstrate a lack of respect for authority. Kool, in turn, brought plaintiff's letter to the attention of the Unit Team. The Unit Team subsequently decided to terminate plaintiff from the HROP. On February 12, 2010, plaintiff was transferred from Echo Unit to Foxtrot Unit.[2] Defendants cannot recall why plaintiff was transferred; plaintiff says he was transferred because he had been terminated from the HROP.

[2] The parties dispute whether the Unit Team met on February 11, 2010, before plaintiff was transferred, or on February 12, 2010, after he was transferred. As discussed below, this dispute is not material.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Warden Huibregtse's Lack of Personal Involvement

Before addressing the merits of plaintiff's retaliation claim, I address briefly the question whether defendant Huibregtse had any personal involvement in the decision to remove plaintiff from the HROP in February 2010. It is a "well-established principle of law that a defendant must have been 'personally responsible' for the deprivation of the right at the root of a § 1983 claim for that claim to succeed." *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866, 869 (7th Cir. 2011). There is no concept of supervisory strict liability under § 1983, *Harris v. Greer*, 750

F.2d 617, 618 (7th Cir. 1984); rather, a supervisor is personally responsible for unconstitutional conduct by underlings only if the supervisor knew about the conduct and facilitated it, approved it, condoned it or turned a blind eye to it. *Matthews v. City of East St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012).

Defendant Huibregtse asserts that he has no recollection of participating in the decision to remove plaintiff from the HROP, and prison records do not indicate that he was involved in this decision in any way. Plaintiff has not pointed to any affirmative evidence in the record showing Huibregtse's involvement and has not responded to this argument in his brief. Accordingly, because there is no evidence showing any personal involvement by defendant Huibregste, he is entitled to summary judgment on plaintiff's claim.

III. Retaliation

Prison officials may not retaliate against an inmate for his exercise of a constitutionally-protected right. *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). "To prevail on a First Amendment retaliation claim, [plaintiff] must ultimately show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was 'at least a motivating factor' in [defendant's] decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009) (citations omitted); *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). If a plaintiff shows that his protected activity was a motivating factor in the defendant's retaliatory action, then defendants still may prevail if they can establish that they would have taken the same action even if plaintiff had not engaged in the protected conduct.

Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); *Spiegla v. Hull*, 371 F.3d 928, 943 (7th Cir. 2004).

When considering whether a prisoner's speech is protected by the First Amendment, courts employ the standard established in *Turner v. Safley*, 482 U.S. 78, 89 (1987), under which a prison regulation that impinges on prisoners' constitutional rights is valid if "reasonably related to legitimate penological interests." *Watkins v. Kasper*, 599 F.3d 791, 794 (7th Cir. 2010). In applying the *Turner* standard to a First Amendment retaliation claim, the court examines whether the prisoner engaged in speech in a manner consistent with legitimate penological interests. *Watkins*, 599 F.3d at 794–95 (citing *Bridges*, 557 F.3d at 551). In *Turner*, the Supreme Court identified four factors relevant to this question: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) whether accommodation of the asserted constitutional right will have negative effects on guards, other inmates or prison resources; and (4) whether there are obvious, easy alternatives at a de minimis cost. *Turner*, 482 U.S. at 89-91. Because *Turner* dealt with a direct challenge to a prison regulation rather than a retaliation claim, not all of these factors will necessarily be relevant to the question of whether a plaintiff's speech is activity protected by the First Amendment. *See Watkins*, 599 F.3d at 797.

Plaintiff's right to communicate with the warden's office about the grievance process is not at issue in this lawsuit. Plaintiff certainly had the right to utilize the process, and prison authorities may not retaliate against a prisoner for having utilized the process. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). The question here is whether plaintiff was

impermissibly punished for having used disrespectful language in the letter. The answer is "no."

It is settled that prison officials may discipline inmates for insolent and disrespectful behavior. In *Ustrak v. Fairman*, 781 F. 2d 573, 579 (7th Cir. 1986), for example, the court upheld an inmate's punishment for violating a regulation forbidding, among other things, disrespect or insolence. The inmate in *Ustrak* had written a letter describing prison officers as "'stupid lazy assholes'" and challenging them to "'bring their fat asses around the gallery at night.'" 781 F.2d at 580. The court held that "[i]f inmates have some First Amendment rights, still they have only those rights that are consistent with prison discipline . . . We can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards and each other." *Id*. *See also Wilson v. Greetan*, 571 F. Supp. 2d 948, 957 (W.D. Wis. 2007) (expressing displeasure with a prison official by calling him a disrespectful name not protected speech in prison setting); *Huff v. Mahon*, 312 Fed. Appx. 530, 2009 WL 453417 (4th Cir. 2009) (unpublished) (language contained in prisoner's letter to prison official, in which he complained of "cold, callus, cruel, evil, uncaring, unmercyful [*sic*], inhumane officials" who served as wardens, fell within Virginia Department of Corrections'"vulgar or insolent language" policy and was not protected by First Amendment); *In re Parmelee*, 63 P.3d 800, 115 Wash. App. 273, (Wash. Ct. App. 2003)(statements in written grievances calling officer "piss-ant officer," "asshole," "prick," and "shithead" not entitled to protection); *Jones v. Nelson*, 861 F. Supp. 983, 985 (D. Kan.1994) (inmate does not have right to call officer a "bitch"). *But see Moton v. Cowart*, 631 F.3d 1337 (11th Cir. 2011) (reversing district court's conclusion that officer reasonably found that plaintiff violated prison rule against disrespect by writing grievance in large capital letters).

Here, defendants have explained that respect for authority is an essential part of managing a correctional institution, both in terms of maintaining order and to promote the inmate's success upon his eventual release to the community. Plaintiff does not deny that maintaining institutional order and rehabilitating inmates are valid, rational and legitimate penological goals, nor does he argue that silencing disrespectful remarks to officials is not a rational means of promoting these goals. Likewise, he does not suggest that he had no alternative means of exercising his right to complain to the warden's office. Plaintiff could have complained about the decision on his grievance without calling the process a "sham" and without expressing his view that "any idiot" could have seen the difference between his grievances.

Plaintiff insists, however, that his letter was not disrespectful. He argues that the word "sham" is a legitimate legal term and that in using it, he was simply conveying his honestly-held belief that his previously-filed grievance had not been given serious consideration. As for his use of the term "idiot," plaintiff argues that it was not disrespectful because he said "any idiot," instead of "you idiot." Plaintiff points out that in most of the cases cited by defendants involving disrespectful comment to prison officials, the comments were made directly to or about the official, whereas here, plaintiff simply accused defendant Boughton of never seeing or reading his grievance because "any idiot" who read it could see the issues had never been addressed.

Although I agree that the term "sham" is not particularly troubling, plaintiffs' arguments with respect to his use of the term "idiot" are not well-taken. A person can exhibit disrespect towards another in many ways beyond direct name-calling. *See, e.g.*, *Owens v. Leavins*, 2007 WL 1154505 (N.D. Fla. 2007) (inmates' request that food services director provide him with her full name, name of supervisor and address of company because he would need the information in the event he was injured and filed a lawsuit reasonably viewed as disrespectful and not

entitled to constitutional protection); *Swint v. Vaughn*, 1995 WL 366056, *4 (E.D. Pa. 1995) (inmate had no constitutional right to complain about kitchen job assignment by interrupting officer who was talking on telephone). Here, the clear implication of plaintiff's letter was that Boughton—who had signed off on plaintiff's grievance, indicating that he had read the file—was an "idiot" for not having noticed that the grievance was different than one plaintiff had filed previously.[3] I agree with defendants that framing a comparison between Boughton and an idiot was disrespectful.

Although plaintiff had a general First Amendment right to raise concerns about the grievance process, he was required to do so in a *manner* consistent with his status as a prisoner. *Watkins*, 599 F.3d at 797 (citing *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004)). Read in context and keeping in mind the deference owed to prison officials on matters of prison management, *Thornburgh v. Abbot*, 490 U.S. 401, 407-08 (1989), I am satisfied that plaintiff failed to exercise his First Amendment rights in a manner that was consistent with legitimate penological interests. Accordingly, his February 10, 2010 letter to defendant Boughton is unprotected as a matter of law, which means plaintiff loses on the first prong of his retaliation claim.

For the sake of completeness, I note that even if plaintiff's February 10, 2010 letter could be said to enjoy some level of constitutional protection, his claim still would fail. Plaintiff has not introduced any evidence from which a jury could infer that defendants were motivated to terminate him from the HROP by the mere fact of his writing a letter to the warden's office as opposed to their honestly-held belief that the letter's disrespectful tone demonstrated that

[3] In fact, the fairest literal reading of plaintiff's statement is that, since "*any* idiot" could see the distinction that plaintiff was making, but Boughton could not, then Boughton was even dumber than an idiot. I'm not sure where on the spectrum of stupidity that would put Boughton, but plaintiff's assessment of his lack of intelligence still came through loud and clear.

plaintiff was not behaving as needed to remain in the HROP. As defendants point out, plaintiff availed himself of the ICRS process many times previously, with no adverse consequences. Why would plaintiff's February 10, 2010 letter be any different? Plaintiff offers no answer. All he says is that intent to retaliate can be inferred by the fact that the decision to terminate him was made during an *"ex parte"* conversation between Boughton and Kool, dkt. 63, at 12-13. This argument falls short. Not only does plaintiff fail to support his theory with much more than speculation, but even if he is correct, this fails to refute Boughton and Kool's testimony that it was not the letter itself but the disrespectful manner in which plaintiff expressed himself that motivated them to terminate him from the HROP. There is no evidence from which a jury could infer retaliatory motive. Accordingly, plaintiff's case must be dismissed.

ORDER

IT IS ORDERED that:

1. The motion of plaintiff Gesa Kalafi-Felton, dkt. 30, for summary judgment on his First Amendment retaliation claim is DENIED.

2. The motion of defendants Peter Huibregtse, Gary Broughton, Brian Kool, Melanie Harper, and David Gardner for summary judgment is GRANTED.

The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge