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

GESA S. KALAFI-FELTON,

Plaintiff,

v.

JOANNE GOVIER and JOHN KUSSMAUL,

Defendants.

OPINION AND ORDER

11-cv-731-slc

This is a prisoner civil rights action for monetary damages and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Gesa S. Kalafi-Felton has been granted leave to proceed on his claim that two correctional officers, defendants Joanne Govier and John Kussmaul, retaliated against him for commenting to Govier that a pat search she had just performed on him had felt like a massage. Kalafi-Felton claims that his remark was a legitimate complaint about his conditions of confinement that enjoys First Amendment protection, and that the officers unlawfully retaliated against him by ending his law library time, denying him recreation that day and writing him up on fabricated conduct violations.

Before the court are the parties' cross-motions for summary judgment. I am granting defendants' motion because Kalafi-Felton cannot show either that his remark about the pat search is constitutionally protected or that it was the but-for cause of his punishment. Even if he could, defendants would be entitled to qualified immunity. For these same reasons, Kalafi-Felton's motion must be denied.

From the parties' proposed findings, I find the following facts for the purpose of deciding the summary judgment motions:

FACTS

I. Parties

At the times relevant to this case, plaintiff Gesa S. Kalafi was an inmate of the Wisconsin Department of Corrections (DOC) incarcerated at the Wisconsin Secure Program Facility located in Boscobel, Wisconsin (WSPF). He was housed in Echo-426 on the Echo Unit, which is an administrative confinement unit. Defendant John Kussmaul was a sergeant on the unit and defendant Joanne Govier was a correctional officer.

II. WSPF's Policy Concerning Pat Searches

Because the human body can be used to hide contraband, inmate searches are critical to the security of DOC's correctional institutions. Staff at DOC correctional institutions search inmates on a regular basis. These searches are a means to identify and confiscate contraband possessed by inmates, to prevent contraband from being moved from one location to another, to prevent the introduction of contraband from outside the institution and to identify any evidence of an assault, self-inflicted injury, or disfigurement on the part of inmates. Contraband is a direct threat to the safety of staff, inmates and the institution as a whole. Weapons can be used to threaten, injure or kill staff or inmates and may induce a disturbance that puts everyone in the institution at risk.

Pursuant to Wis. Admin. Code § DOC 307.17(1)(b)(4), staff at correctional institutions are to search an inmate whenever he enters or leaves the segregation unit or changes status within the segregation unit of an institution. WSPF's policy is to perform a pat search on an inmate in segregated status every time he leaves his cell. (Inmates in segregation at WSPF also

are placed in restraints when moving outside their cells). Correctional officers are trained to strive to preserve the dignity of inmates in all searches conducted.

When performing a proper pat search of an inmate's body, the officer uses both hands with fingers straight and together (bladed), to pat the prisoner thoroughly, beginning around the collar, then around the neckline, shoulders and tops of the arms, down the arms, under the armpits, the side of the torso from the armpits to the waist, down the chest, down the back from the shoulders to the waist, around the waistline, checking the elastic at the trouser waistline. The officer continues down both legs, then up the inside of each of the legs, with hands still bladed palms facing the inner thigh, patting as far up into the prisoner's groin area as possible. A properly performed pat search inevitably causes the back of the searching officer's bladed hand to have incidental contact with the inmate's genitals while the officer is patting the inner thigh; in fact, if the back of the officers hands does not touch the genitals, then the officer probably is not performing the search correctly. Next, the officer pats back down both sides of the inmate's leg and finishes by checking around the ankles.

III. The October 5, 2010 Incident

As a sergeant on Echo unit, Sgt. Kussmaul was familiar with Kalafi-Felton. On the morning of October 5, 2010, Kussmaul contacted Kalafi-Felton through his cell intercom and informed him that it was his turn for law library time. Kussmaul asked Kalafi-Felton if he wanted to go to the law library; Kalafi-Felton responded in the affirmative.

Kussmaul directed Sergeant Gebhard and defendant Officer Govier, to escort Kalafi-Felton to the law library on the Echo Unit. This library is a small, secured space that contains

a computer with access to LexisNexis and a small number of publications. Only one inmate at a time may use the law library.

Officer Govier has worked as a correctional officer at WSPF for 12 years, is familiar with the protocol for pat searches and has been trained in conducting them. After Kalafi-Felton was taken out of his cell, defendant Officer Govier applied the usual restraints then conducted a pat search. Officer Govier did not touch Kalafi-Felton's genitals or buttocks during the pat search.[1]

After the pat search, Kalafi-Felton made a comment to Officer Govier about how she had conducted the search. Although the parties dispute precisely what words Kalafi-Felton used and what he intended by his comment, it is undisputed that Kalafi-Felton compared her search to a massage or "rub down." (I will discuss this finding of fact in the opinion section, below.)

Once Kalafi-Felton was locked in the law library for his session, Officer Govier sought out Sgt. Kussmaul to report that Kalafi-Felton had made a comment to her along the lines of "Ooo, your pat search feels like a massage." Sgt. Govier, who was busy addressing other matters, asked Kussmaul to note this in Kalafi-Felton's behavior log. The behavior log is a DOC electronic information database used to document poor behavior by inmates.

Sgt. Kussmaul was troubled by Officer Govier's report of Kalafi-Felton's comment. In Sgt. Kussmaul's view, Kalafi-Felton's comment was inappropriate and disrespectful, especially since it was made to a female correctional officer. Sgt. Kussmaul understood Kalafi-Felton to be implying to Officer Govier that he was getting sexual pleasure from being pat searched.

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[1] In her affidavit, Officer Govier explained how she performs pat searches: she does *not* perform the portion of the pat search protocol that requires the bladed hand to go up to the groin bone but stops at the high thigh with her bladed hand. Officer Govier testified that she adopted this modified search procedure due in part to inmates complaining about the invasive portion of the pat search procedure that goes up to the groin bone. Typically Officer Govier's hands do not touch any portion of the inmate's genitals or buttocks. Aff. of Joanne Govier, dkt. 41, at ¶8.

Sexualizing tasks that female correctional officers regularly perform is demeaning to the officer, creates a hostile work environment and undermines that officer's authority.

On the basis of Kalafi-Felton's comment to Officer Govier and an unrelated conduct report that Kalafi-Felton had received 10 days earlier for poor behavior in the law library, Sgt. Kussmaul ordered that Kalafi-Felton be returned to his cell from the library immediately. Sgt. Kussmaul then recorded the following entry in Kalafi-Felton's behavior log: "STATED TO OFFICER WHEN GIVEN PAT SEARCH 'FEELS LIKE A MASSAGE' I/M REFUSED LAW LIBRARY AND PRIORITY TIME DUE TO BEHAVIOR." Sgt. Kussmaul also decided that Kalafi-Felton would be refused his recreation time because of his behavior.

Correctional officers went to the law library and told Kalafi-Felton to come out now because they were returning him to his cell. Kalafi-Felton refused to come out of the library. This caused Sgt. Kussmaul to go to the law library. Sgt. Kussmaul directed Kalafi-Felton to comply with the restraint procedure so that officers he could return him to his cell. Kalafi-Felton refused. He told Kussmaul to "get a white shirt," slang for a lieutenant or captain. (Although Kalafi-Felton asserts that these facts are disputed, I find that his evidence is insufficient to create a genuine dispute regarding whether he refused to exit the law library. I discuss this finding in the analysis below.)

Lieutenant Craig Tom was called to Echo Unit to address the situation. Lt. Tom had a conversation with Kalafi-Felton, after which Kalafi-Felton agreed to go back to his cell. Then, either Lt. Tom or Sgt. Kussmaul decided that Kalafi-Felton should be issued a conduct report. Kalafi-Felton was given a conduct report charging him with violating Wis. Admin. Code §§ DOC 303.24, disobeying orders, 303.25, disrespect, and 303.28, disruptive conduct. Officer Govier

was asked to write the report because the incident began with Kalafi-Felton's comment to her about the pat search.

For institutional reasons, an inmate who repeatedly disobeys orders from staff and causes a supervising officer to be called to handle the situation almost always receives a conduct report. When an inmate repeatedly refuses to follow orders to exit an area, the situation easily can deteriorate into a situation where staff has to use force to gain the inmate's compliance, an outcome that jeopardizes the safety of everyone involved. Because the security and orderly operation of a correctional institution depends on inmates following orders from staff, WSPF treats an inmate's failure to obey staff as a serious matter and therefore nearly always takes disciplinary action against the disobedient inmate. Another reason for swift, sure discipline is to deter other inmates from such disobedience in the future, which could further undermine institutional order and safety.

The conduct report filed against Kalafi-Felton narrates the incident from the time when staff came to escort Kalafi-Felton to the library until the time he returned to his cell. In the report, Officer Govier reports that Kalafi-Felton said "ooo your pat search felt like a massage." Officer Govier also wrote that after Sgt. Kussmaul went to the library and asked Kalafi-Felton to come out so he could be returned to his cell, Kalafi-Felton said "fuck you." (Kalafi-Felton denies that he said this.) However, Kalafi-Felton would not have received a conduct report had he complied with staff's initial order to return to his cell.[2]

After a full disciplinary hearing, the hearing officer found Kalafi-Felton guilty of disobeying orders and of disruptive conduct; the hearing officer found Kalafi-Felton not guilty

[2]Although Kalafi-Felton claims to dispute this fact, there is no genuine dispute. *See* Section II C., below.

of disrespect. The hearing officer found the conduct report to be credible and noted that "[a]ny inmate who disobeys a verbal or written directive from any staff member is guilty of an offense." The hearing officer imposed 300 days disciplinary separation and 30 days room confinement.

On January 12, 2012, another inmate, Dewhite Johnson, received a warning on his behavior log for making an inappropriate comment during a pat search conducted by Officer Govier before escorting Johnson to outside recreation. Johnson, however, was still allowed to participate in recreation that day.

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. Officer Retaliation against Kalafi Felton

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.
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> *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

See also 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).

A. Kalafi-Felton's Remark

Although an inmate loses a great deal of freedom upon incarceration, he does not surrender all of his First Amendment rights at the prison gate. *Bridges*, 557 F.3d at 547-48. A prisoner retains the right to complain, even informally, about his conditions of confinement, including abuse at the hands of prison staff. *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006). At the same time, however, a prisoner does not have a constitutional right to complain about anything and everything in any way that he chooses. To the contrary, he must exercise his right to complain about prison conditions in a *manner* consistent with his status as a prisoner,

that is, in a way that is consistent with legitimate penological interests. *Watkins v. Kasper*, 599 F.3d 791, 794 (7th Cir. 2010).

When determining whether a prisoner's speech is entitled to First Amendment protection, courts use the four factors identified by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Courts are to consider:

> (1) Whether a valid, rational connection exists between the restriction on speech and a legitimate government interest behind the rule;
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> (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.

See Watkins, 599 F.3d at 794–95 (citing *Bridges*, 557 F.3d at 551).

Because *Turner* dealt with a direct challenge to a prison regulation rather than a retaliation claim, not all of these factors necessarily will be relevant to determining whether a plaintiff's speech is protected by the First Amendment. *See Watkins*, 599 F.3d at 797. When considering whether a particular action is rationally related to a legitimate penological interest, courts are to 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." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

In order to decide whether Kalafi-Felton's comment to Officer Govier is protected speech, a logical starting point is to determine what Kalafi-Felton actually said. Kalafi-Felton has been

inconsistent on this point. In his verified complaint, which has the same force and effect as an affidavit, 28 U.S.C. § 1746, Kalafi-Felton averred that he told Officer Govier–twice–that her pat search "felt more like a massage than a appropriate pat search." Verified Amended Complaint, dkt. 2, ¶90. In his brief in support of his summary judgment motion, however, Kalafi-Felton quotes himself as have complained to Officer Govier at the time that her pat search was "inappropriate, unnecessary, sexual in nature, and that there is a difference between a pat search and a rub down." Plt's. Br. in Supp. of Summ. Judg. Motion, dkt. 25.

There are two problems with Kalafi-Felton's recharacterization of his comment. First, statements in a brief are not evidence. Although Kalafi-Felton cites his affidavit as evidentiary support, he never specifies in his affidavit the exact words he said to Govier. All he says is that Govier conducted a pat search on him that was "sexual by contact and in nature, inappropriate and unnecessary" and that he objected to the "inappropriate, unnecessary pat search." This testimony describes the search and his reaction to it, but it does not purport that this is what Kalafi-Felton actually said to Officer Govier. Accordingly, the only sworn testimony from Kalafi-Felton regarding what he actually said is what he swore to in his verified complaint: that Govier's search felt more like a massage than an appropriate pat search.

Second, even if I were to construe Kalafi-Felton's affidavit as averring that he *told* Govier that her search was "sexual by contact and in nature, inappropriate and unnecessary," it is well-settled that a party cannot evade summary judgment by submitting a later-prepared affidavit that contradicts his own prior, sworn testimony. *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168-69 (7th Cir. 1996) (citation omitted). Although this rule more typically is applied to sworn deposition testimony, in this context I see no practical distinction between a sworn deposition and a verified complaint. Indeed, a verified complaint arguably is

more binding than deposition testimony because a plaintiff chooses and frames the allegations he wishes to make in his complaint and then chooses to verify it. There is no opportunity for an antagonistic opposing attorney to put words in the plaintiff's mouth or to provoke poorly-worded responses to tough questions.

Here, Kalafi-Felton declared under penalty of perjury that he told Govier that her pat search felt more like a massage than an appropriate pat search. Indeed, an affidavit submitted on Kalafi-Felton's behalf from a fellow inmate, Kyle Boner, corroborates this. Aff. of Kyle Boner, dkt. 29, ¶3 (averring that he heard Kalafi-Felton say something to the effect of "There's a difference between a pat search and a rub down."). Accordingly, this court is to disregard Kalafi-Felton's later-offered description of his comment—which omits any reference to a massage or "rub down"—unless the two descriptions can be reconciled or plaintiff offers a plausible explanation for the contradiction. *Bank of Illinois*, 75 F.3d at 1169-70.

Kalafi-Felton does not suggest that the statements can be reconciled. Instead, he asks the court to disregard the allegations in his verified complaint, explaining that when he drafted his complaint he merely copied the allegations in the conduct report. Plt.'s Combined Br., dkt. 27, at 8-9. This explanation makes no sense. Kalafi-Felton contends that the conduct report was fabricated in retaliation for his comments. Either the conduct report is true, in which case there is no basis for his claims of fabrication, or the conduct report is not true, in which case it could not have been the basis for the allegations in Kalafi-Felton's complaint, which he declared under penalty of perjury *were* true. Both paths lead to the conclusion that Kalafi-Felton's explanation is implausible. Accordingly, I will disregard Kalafi-Felton's more recent descriptions of his comment to Officer Govier and hold him to his sworn allegations in his verified complaint.

When these allegations are compared to defendants' allegations, they overlap substantially. According to Govier, Kalafi-Felton said that her pat search "felt like a massage." According to Kalafi-Felton, he told Officer Govier that her pat search "felt more like a massage than an appropriate pat search." Thus, the genuine dispute between the parties is not so much about what Kalafi-Felton said, but what he meant.

Defendants argue that, by commenting to Officer Govier that her pat search felt like a "massage," Kalafi-Felton was acting in a confrontational manner or making inappropriate sexual innuendo and that in either case, such remarks are not protected by the First Amendment. Kalafi-Felton, on the other hand, denies that his comment was meant to be disrespectful or suggestive; he says he was merely voicing a legitimate complaint to an inappropriate pat search. In his brief, he goes so far as to characterize Officer Govier's search as a sexual assault, arguing that defendants could not have a legitimate penological interest in a sexual assault victim remaining silent while being assaulted. Therefore, argues Kalafi-Felton, his remark to Officer Govier is constitutionally protected.

Although Kalafi-Felton's argument would be worthy of serious consideration if there were any evidence that he was a sexual assault victim, there is no such evidence. Notably, although Kalafi-Felton has described Officer Govier's search in various conclusory terms (e.g., inappropriate, unnecessary, sexual by contact and in nature), he has never testified as to what Officer Govier actually did during the search that was sexual, inappropriate or unnecessary. Kalafi-Felton cites *cases* involving guards who allegedly grabbed an inmate's genitals and buttocks, but he stops short of swearing that Officer Govier's search was so intrusive.

Defendants, on the other hand, have supported their contention that the search was proper with Officer Govier's affidavit, in which she swears that she did not touch Kalafi-Felton's

genitals or buttocks. As defendants point out, even though they notified Kalafi-Felton of this evidentiary problem in their brief and submitted Officer Govier's affidavit, Kalafi-Felton still has not responded with anything other than his vague and conclusory statements that the search was "inappropriate and unnecessary" and "sexual by contact and in nature."

Although Kalafi-Felton is entitled on summary judgment to have all reasonable inferences drawn in his favor, as noted above he must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co.*, 475 U.S. at 586. Rather, he must show that the record, taken as a whole, could lead a rational trier of fact to find in his favor. Here, Kalafi-Felton's vague allegations would not allow a reasonable jury to conclude that Officer Govier is lying when she says she did not touch Kalafi-Felton's genitals or buttocks. As the Court of Appeals for the Seventh Circuit has noted,

> We often call summary judgment the "put up or shut up" moment in litigation, by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case. And by evidence, we mean evidence on which a reasonable jury could rely.
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> *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010).

Further, as the court noted in *Payne v. Pauley*, 337 F.3d 767, 772–73 (7th Cir. 2003),

> [T]he Federal Rules of Civil Procedure require the nonmoving party to 'set forth specific facts showing that there is a genuine issue for trial.' Conclusory allegations, unsupported by specific facts, will not suffice.
>
> *Id*. at 772-73, quoting Fed. R. Civ. P. 56(e).

If Kalafi-Felton truly had been sexually assaulted as he now alleges, then he should be able to say precisely what it is that Officer Govier did. He has not done so. This failure leaves unrefuted Officer Govier's testimony as to where and how she did and did not touch Kalafi-Felton.

Thus, it is irrelevant to the resolution of this lawsuit whether an inmate who is sexually assaulted during a pat search has a First Amendment right to complain about the assault to the officer conducting the search. The relevant question in this case is whether an inmate who is subjected to pat search in which the officer does not touch his genitals or buttocks has a First Amendment right to comment to the searching officer that her search felt "like a massage" or "rub-down."

In considering this question, at the summary judgment stage I will construe Kalafi-Felton's remark in the light most favorable to his position: for the purposes of summary judgment only, I deem Kalafi-Felton to have made a genuine complaint about the aggressiveness of Officer Govier's pat search as opposed to an intentionally lewd or disrespectful comment. Even so, I agree with defendants that Kalafi-Felton's remark is not entitled to First Amendment protection.

As Kalafi-Felton acknowledges, routine pat searches of inmates are critical to maintaining the security of the institution. These searches must be thorough in order to detect concealed contraband, including weapons. Maintaining security is the paramount objective of an institution. *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). Furthermore, pat searches may be performed by male and female guards alike. *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990) (prisoner does not retain privacy interest in being free from opposite-sex searches).

Defendants make a persuasive case that permitting inmates to complain directly to the correctional officer about the way he or she conducts pat searches is inconsistent with institutional security because it creates a risk that officers will perform pat searches that are not thorough. A correctional officer who is confronted directly about his or her pat search technique may become intimidated into relaxing the search (or perhaps the next one) and avoid checking

the groin area, where contraband can be hidden and later retrieved by the inmate.[3] Indeed, Officer Govier's testimony that she has adopted a modified pat search procedure in response to inmate complaints lends credence to defendants' concerns. Thus, prohibiting such complaints is rationally related to the institution's legitimate penological interest in maintaining security.

Furthermore, an inmate who believes that he was subjected to an inappropriate pat search has other means of complaining apart from confronting the searching officer directly. He can complain to a supervisor or file a formal complaint through the inmate grievance process. *Accord Watkins,* 599 F.3d at 796 ("Instead of openly criticizing Kasper's directives during a meeting with other law clerks, Watkins could have taken the less disruptive approach of filing a written complaint.").[4] Additionally, the facts suggest that the institution typically assigns more than one correctional officer to escort an inmate, which reduces the risk of improper searches.

Finally, to find that the First Amendment protects contemporaneous verbal complaints by inmates about pat searches in cases where the inmate claims to have been searched in an "unnecessary and inappropriate" manner, as Kalafi-Felton alleges here, would create an exception that swallows the rule. As defendants point out, such a policy would invite abuse by savvy inmates who would simply tailor their backtalk in order to thwart staff attempts to discipline

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[3] *See, e.g., United States v. Freeman*, 691 F.3d 893,896 (7th Cir. 2012) (strip search reveals bag of crack cocaine concealed between suspect's buttocks); *United States v. Durham*, 211 F.3d 437, 439 (7th Cir. 2000) (suspect hid crack cocaine in his underwear); *United States v. Navarrete*, 125 F.3d 559, 560 (7th Cir. 1997) (suspect hid 225 grams of heroin near his groin).

[4] Kalafi-Felton argues that his verbal complaint to Govier was consistent with legitimate penological interests because the inmate grievance form encourage inmates to "talk to appropriate staff" and attempt to resolve the issue before filing a grievance. This argument is unpersuasive. For the reasons discussed in the preceding paragraph, the "appropriate staff" in the case of a pat search is not the officer who is conducting the search while that officer is conducting the search. That's because the most likely outcome of such a conversation would be a dispute of the sort that is at the heart of this lawsuit.

them for inappropriate or disrespectful comments during pat searches.[5] Indeed, given the incidental touching of genitals that is *expected* to occur when an officer performs a pat search properly, a court ruling that an inmate who thinks he was touched "inappropriately" has a green light to complain to the searching officer likely would make such complaints the norm. This, in turn, would increase the pressure on correctional staff, increase the likelihood of relaxed pat searches, and increase the risk of breakdowns in discipline and security.

For all of these reasons, I find that regardless whether it constituted sexual innuendo, Kalafi-Felton's verbal remark to Govier that her pat search was like a massage or rub down is not protected by the First Amendment. Accordingly, his retaliation claim fails. This could be the end of the court's order, but in the interest of completeness, I will address the remaining elements of Kalafi-Felton's First Amendment claim:

B. Causation

Kalafi-Felton complains of three allegedly retaliatory actions by defendants: 1) cutting his law library time short; 2) denying him one session of recreation time; and 3) issuing a "fabricated" conduct report that resulted in 300 days segregation and 30 days room confinement.

As an initial matter, I agree with defendants that the first two of these actions do not give rise to a First Amendment claim. Even if retaliatory, not all adverse actions are significant enough to trigger First Amendment protection. *Bridges*, 557 F.3d at 552; *Bart v. Telford*, 677

[5] One can envision chaos on the units of the sort generated by Monty Python's "Oscar Wilde Sketch," in which Oscar Wilde and James Whistler compete to insult the Prince of Wales to his face, then let the other attempt to explain away the insult as actually a complement.

F.2d 622, 626 (7th Cir. 1982). A one-day denial of law library and recreation time is not sufficient to support a retaliation claim because it would not be likely to deter a person of ordinary firmness from exercising his rights protected under the First Amendment. *Accord Bridges*, 557 F.3d at 555 ("single retaliatory charge that is later dismissed is insufficient to serve as the basis of a § 1983 action"); *Burgos v. Canino*, 358 Fed. Appx. 302, 307 (3d Cir. 2009) (urinalysis, harassment, threats, temporary inconveniences, and denial of recreation did not rise to level of adverse action against prisoner); *Starr v. Dube*, 334 Fed. Appx. 341, 342–43 (1st Cir. 2009) (retaliatory filing of disciplinary charge that was dismissed one week later does not constitute adverse action); *Morris v. Powell*, 449 F.3d 682, 685–86 (5th Cir.) (prisoner's retaliatory job reassignment from commissary to kitchen for one week, with one day spent in unpleasant pot room, not sufficiently adverse to satisfy adverse action requirement), *cert. denied*, 549 U.S. 1038 (2006); *Ingram v. Jewell*, 94 Fed. Appx. 271, 273 (6th Cir. 2004) (neither loss of an extension cord, cost of cord, nor 14 days of lost privileges constitutes adverse action that would deter prisoner of ordinary firmness from filing grievances); *Jones v. Greninger*, 188 F.3d 322, 325–26 (5th Cir. 1999) (restriction of inmate to five hours per week in law library not sufficiently adverse to rise to level of constitutional claim); *Polansky v. Wrenn*, 2012 WL 5878384, *3 (D.N.H. Oct. 16, 2012) (occasional denials of access to law library, delays in availability of for-purchase items, and being required to pay for copies of documents were *de minimis* adverse acts insufficient to support retaliation claim); *Potter v. Fraser*, 2011 WL 2446642, *8 (D.N.J. June 13, 2011) (plaintiff's allegations that certain defendants searched his cell on two occasions, threw his t-shirt in garbage and confiscated his commissary purchases, in retaliation for filing grievances, were not sufficiently adverse actions); *Tejada v. Mance*, 2008 WL 4384460, *7 (N.D. N.Y. Sept. 22, 2008) (denial of one hour of outdoor exercise not sufficiently

adverse to give rise to First Amendment claim); *Bartley v. Collins*, 2006 WL 1289256, *7 (S.D.N.Y. May 10, 2006) (filing of misbehavior reports that result in temporary loss of various privileges such as permission to visit commissary found to be *de minimis*).

Thus, the only relevant adverse action was the issuance of the conduct report and the resulting punishment. Defendants argue that Kalafi-Felton has failed to meet his burden of showing that his comment to Officer Govier was a "motivating factor" in the issuance of the conduct report, and even if he could meet that burden, he has not adduced any evidence to counter defendants' evidence showing that the conduct report would have been issued regardless of the comment to Govier. Because I agree with defendants on this latter point, I do not address the former.

Defendants have produced evidence that Kalafi-Felton would have been issued a conduct report regardless of his comments to Officer Govier because he refused to follow staff orders to leave the law library and return to his cell. Sgt. Kussmaul testified that to preserve institutional discipline and security, staff almost invariably issues a conduct report to an inmate who repeatedly disobeys orders from staff to the point that a supervising officer needs to be called to handle the situation. Sgt. Kussmaul further explains that situations where an inmate repeatedly refuses to follow orders to exit an area can easily deteriorate to the point that staff is left with no alternative but to use physical force to move the inmate, a course that jeopardizes the safety of staff and inmates. Because the security and orderly operation of a correctional institution depends on inmates following staff orders, an inmate's failure to obey staff is taken seriously and nearly always subject to disciplinary action. Failure to discipline an inmate who disobeys staff would embolden other inmates to test the limits of disobedience, leading to further deterioration of institutional order and safety.

According to defendants, it is for these reasons—and not for his comment to Officer Govier—that Kalafi-Felton was issued a conduct report. Sgt. Kussmaul testified that if Kalafi-Felton had simply complied when the officers first told him to return to his cell, then the only discipline he would have received for his comment was the notation in his behavior log and the termination of his rec and library time. Only after Kalafi-Felton exacerbated the conflict by insisting that a "white shirt" talk to him that the decision was made to issue a conduct report.

Because defendants have produced evidence that the same decision would have been made in the absence of any arguably protected speech, the burden shifts back to Kalafi-Felton to demonstrate that this proffered reason is pretextual and that the real reason for the conduct report was retaliatory animus. *See Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011). "At the summary judgment stage, this means a plaintiff must produce evidence upon which a rational finder of fact could infer that the defendant's proffered reason is a lie." *Id.*; *see also Thayer v. Chiczewski*, 697 F.3d 514, 529 (7th Cir. 2012) (quoting same).

Kalafi-Felton has not come forth with evidence from which a reasonable jury could conclude that this non-retaliatory explanation for the issuance of the conduct report is a lie. The only "evidence" he offers is an argument that he did not refuse to obey any "direct orders" to exit the law library. S*ee* Plt.'s Response to Defs.' PPFOF, No. 38. This borders on sophistry. When viewed in light of Kalafi-Felton's other evidence, set forth in the next paragraph, this response can only be viewed as a dispute over whether the orders the officers gave him were "direct." This does not create a dispute over whether the officers gave him any orders at all.

Specifically, in his Proposed Findings of Fact, Kalafi-Felton acknowledges that the two officers sent to the library told him that he "must return to his cell;" Kalafi-Felton states that instead of doing what he was told, he asked to speak to Sgt. Kussmaul. Plt.'s PPFOF, dkt. 26,

##11-12. *See also* Verified Amended Complaint, dkt. 2, ¶91 ("Kussmaul told J. Govier and Barr to immediately get Kalafi-Felton out the law library and escort him back to cell for his comment . . . and for his behavior a week prior.") Kalafi-Felton further avers that: when Sgt. Kussmaul came to the library front, Sgt. Kussmaul told him that he was "going back to his cell for his comments to Govier;" that Kalafi-Felton felt that Sgt. Kussmaul was abusing his authority; and that, in response to Sgt. Kussmaul, Kalafi Felton asked to speak to a supervisor. Plt.'s PFOF, dkt. 26, ¶¶14-15.

In light of these admissions, Kalafi-Felton's insistence that he never refused a "direct order" to exit the library fails to create a genuine factual dispute. As defendants point out, under Wis. Admin. Code § DOC 303.24, an inmate commits a conduct violation when he disobeys a "verbal or written directive or order from any staff member," whether "direct" or not. *See* appendix note to § 303.24 ("Under this section, the staff member giving the order need not say, 'I am giving a direct order'"). The undisputed facts show that officers and then a sergeant told Kalafi-Felton that he had to leave the library and return to his cell and both times he refused. Thus, the only arguable dispute here—whether anyone gave Kalafi-Felton a "direct" order—is completely irrelevant to his persistent disobedience and therefore immaterial to the legal analysis.

The only other evidence of pretext offered by Kalafi-Felton is his contention that he never said "ooo" to Govier or "fuck off" to Kussmaul, as documented in the conduct report. According to Kalafi-Felton, defendants fabricated these statements, which is evidence of retaliatory motive. As defendants point out, however, even if Kalafi-Felton's assertions were true, these facts are only relevant to the allegation in the conduct report that Kalafi-Felton violated Wis. Admin. Code § DOC 303.25, disrespect. Kalafi-Felton was found not guilty of

violating § DOC 303.25. Therefore, his punishment did not arise from and was unrelated to these disputed facts. Accordingly, Kalafi-Felton's retaliation claim fails. *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (if retaliation not but-for cause of conduct report, "the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind.") (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287(1977)). *See also Bridges*, 557 F.3d at 555 (single retaliatory charge that is later dismissed is insufficient to serve as basis of § 1983 action).

In sum, even construing all facts and reasonable inferences in Kalafi-Felton's favor, there is no genuine dispute that Kalafi-Felton would have been issued a conduct report and would have been disciplined based on his failure to leave the law library, regardless of any retaliatory animus that the defendants may have harbored because of his comment to Officer Govier. Accordingly, defendants are entitled to summary judgment. *Massey v. Johnson*, 457 F.3d 711, 720 (7th Cir. 2006) (summary judgment appropriate where court can say without reservation that a reasonable finder of fact would be compelled to credit the defendant's non-retaliatory explanation).

C. Qualified Immunity

Finally, let's assume, *arguendo*, that Kalafi-Felton's comment to Govier is protected by the First Amendment and also was the but-for cause of his discipline. Defendants still prevail on their summary judgment motion because they are entitled to qualified immunity.[6] "Qualified

[6] Although qualified immunity would not prevent Kalafi-Felton from obtaining injunctive relief against defendants, *Hannemann v. Southern Door County School Dist.*, 673 F.3d 746, 758 (7th Cir. 2012) (defense of qualified immunity does not protect defendants from action for injunctive relief), I can discern nothing in his prayer for injunctive relief—which appears in an omnibus complaint from which these claims were severed—that pertains directly to these defendants. To the extent Kalafi-Felton is

immunity protects public officials from liability for damages if their actions did not violate clearly established rights of which a reasonable person would have known." *Catlin v. City of Wheaton*, 574 F.3d 361, 365 (7th Cir. 2009) (citations omitted); *see also Fleming v. Livingston County*, 674 F.3d 874, 879 (7th Cir. 2012) (quoting same). To determine whether a right is clearly established, courts must look at the right in a "particularized" sense, rather than "at a high level of generality;" however, it is not necessary that the very action in question previously have been held unlawful. *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011)(quoting *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 377 (2009); *Brosseau v. Haugen*, 543U.S. 194, 199 (2004)). The basic question is whether the state of the law at the time gave defendants reasonable notice that their actions violated the Constitution. *Id*.

Because "the purpose of qualified immunity is to protect public officials from guessing about constitutional developments at their peril, the plaintiffs have the burden of showing that the constitutional right was clearly established." *Gonzalez v. City of Elgin*, 578 F.3d 526, 540 (7th Cir. 2009) (citing *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008)). To meet his burden, Kalafi-Felton must come forward with "a clearly analogous case establishing a right to be free from the specific conduct at issue." *Smith v. City of Chicago*,242 F.3d 737, 742 (7th Cir. 2001). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In the absence of a case factually similar to the one at bar, defendants are entitled to qualified immunity unless the alleged

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seeking a prison transfer, his request would be denied for the same reasons expressed in the order denying his motion for a preliminary injunction, dkt. 62.

misconduct constitutes an obvious violation of a constitutional right. *Wernsing v. Thompson*, 423 F.3d 732, 749 (7th Cir. 2005).

Here, Kalafi-Felton has not identified a case involving facts similar to those at issue in this case. The closest he comes is *Wilson v. Greetan*, 571 F. Supp. 2d 948, 959-960 (W.D. Wis. 2007), a case from this court in which Judge Crabb found that an inmate's statement, "You're corrupt," to a correctional officer was a matter of public concern that enjoyed First Amendment protection. That case, however, is not clearly analogous to this one for a number of reasons. First, in *Bridges*, 557 F.3d at 551, decided two years later, the Court of Appeals for the Seventh Circuit disavowed the use of the public concern test used by Judge Crabb in favor of the *Turner* penological interests test. Second, in *Wilson*, Judge Crabb recognized that if the *Turner* test was used, the prisoner's "statement criticizing a supervisor and made directly to him could implicate security concerns," *id.* at 959-60, but she did not reach this question because defendant had not advanced any argument that disciplining the plaintiff for his speech would be justified under *Turner*. *Id*. at 960. Third, *Wilson* did not involve a statement made contemporaneously with a pat search.

The other cases cited by Kalafi-Felton are cases in which a prisoner claimed that an officer violated the Eighth Amendment by groping the inmate's genitals and buttocks. Plt.'s Combined Br., dkt. 47, at 6. As previously discussed, this case involves no such facts.

Conversely, defendants and this court have identified a number of cases holding that the First Amendment does not protect confrontational remarks made by prisoners directly to prison officials because of the remarks' disruptive potential. For example, in *Watkins,* 599 F.3d at 797, the court found that the First Amendment did not protect an inmate law clerk's statements criticizing the law librarian's policies restricting the ability of inmate clerks to provide legal

assistance to other inmates, where he made the statements openly during a meeting with the librarian at which other prisoner law clerks were present. The court found that "[b]y openly challenging [the librarian's] directives in front of other prisoner law clerks, Watkins impeded her authority and her ability to implement library policy," and that the advocacy on behalf of his fellow inmates made his complaints "particularly disruptive to [the librarian's] legitimate policy interests." *Id*. *See also 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); *Garrido v. Coughlin*, 716 F.Supp. 98, 99-101 (S.D.N.Y. 1989) ("verbal confrontation" of officers over their treatment of another inmate not protected conduct); *Pollard v. Baskerville*, 481 F.Supp. 1157, 1160 (E.D. Va.1979) (accusation that guard brought in contraband not constitutionally protected speech); *Craig v. Franke*, 478 F. Supp. 19, 21 (E.D. Wis. 1979) (accusation that prison official was drunk not protected speech).

Although none of these cases involve a contemporaneous complaint about a pat search, they support the notion that an inmate may be disciplined for openly confronting an officer about a policy, practice or particular conduct. Given this state of the law, the defendants in this lawsuit could not have been on notice that it was unlawful to discipline Kalafi-Felton for telling Govier immediately after the pat search that her pat search felt like a massage or rub down. Accordingly, the defendants are entitled to qualified immunity.

ORDER

IT IS ORDERED that:

(1) Plaintiff Gesa S. Kalafi's motion for summary judgment, dkt. 24 is DENIED.

(2) The motion of defendants for summary judgment, dkt. 38 is GRANTED.

Entered this 6th day of December, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge