IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SYLVESTER THOMAS,

Plaintiff,

v.

JEFF HRUDKA, CHRIS HANDY,
ERIC SWIATLY and ERIC OWEN

Defendants.

OPINION AND ORDER

13-cv-15-bbc

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This is a proposed civil action for monetary relief, brought under 28 U.S.C. § 1983. Plaintiff Sylvester Thomas is a patient confined under Wisconsin's sexually violent persons statute and housed at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. Defendants Jeff Hrudka, Chris Handy, Eric Swiatly and Eric Owen are employees at Sand Ridge. Plaintiff alleges that defendants arbitrarily assigned him to a step program without disciplining a similarly situated offender, in violation of his Fourteenth Amendment rights to due process and equal protection. Plaintiff alleges also that defendants violated his First Amendment right to freedom of speech by issuing two behavioral records against him, in retaliation for plaintiff's challenging the conditions of his confinement. Before the court are plaintiff's motion to remand the action to state court and defendants' motion to dismiss the case for failure to state a claim upon which relief may be granted.

After reviewing the parties' arguments, I conclude that the action should not be remanded and the complaint should be dismissed because plaintiff's allegations fail to state a claim upon which relief may be granted.

For the purposes of this order, I accept as true the following allegations of fact. Because plaintiff is a pro se litigant, I will construe the allegations liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972).

ALLEGATIONS OF FACT AND PROCEDURAL HISTORY

Plaintiff has a history of confrontations and disputes with Sand Ridge and its staff. On April 1, 2010, he received a behavioral disposition record for fighting and engaging in disruptive behavior. On January 22, 2012, he filed a police report against Sand Ridge, alleging that staff were opening his mail outside his presence. On August 10, 2012, plaintiff filed a complaint against Sand Ridge in the Circuit Court for Juneau County, Wisconsin, challenging the conditions of his confinement.

On September 30, 2012, plaintiff received a behavioral disposition record after physically fighting with J.W., another patient. The record states:

> Patient J.W. struck patient Thomas in an unknown part of his upper body . . . Patient Thomas wrapped his arms over patient J.W.'s arms pinning them in his arm pits [sic] in a defensive manner . . . Patient J.W. could not get his arms free to strike patient Thomas again so he pushed him in to the dayroom wall . . . Patient J.W. continued to knee patient Thomas . . . Patients did eventually separate.

Behavior Disposition Record, Cpt., dkt. # 1-1, Ex. 3 (attached to complaint).

Defendants Handy, Swaitly and Owen were on the behavioral disposition record

reviewing committee. At the hearing, plaintiff stated that the record was inaccurate:

> That's not how it happened. Patient Hunt [a third patient] came downstairs while [J.W.] was ironing, and started joking around. He closed my door, and it made me mad. I hit [J.W.] when he was coming at me, then I grabbed his arms. Hunt initiated the fight, but then when staff got on Hunt that's when [J.W.] and I got into it.

Behavior Disposition Record–Hearing Information, Cpt., dkt. # 1-1, Ex. 3 (attached to complaint).

The committee found plaintiff guilty of disruptive behavior, failure to take direction and physical aggression/fighting, and assigned him to a three-week "Step Program" in the secure treatment unit. This program provides behavioral monitoring and assessment for patients who cannot control their behavior or who regularly violate the rules. Plaintiff appealed, and defendant Hrudka upheld the committee's findings and assignment.

Plaintiff filed his complaint in Wisconsin state court. Defendants filed a notice of removal under 28 U.S.C. §§ 1441(a) and 1446. Plaintiff filed a motion to remand, arguing that removal was improper because a Seventh Circuit sanction order has curtailed his ability to engage in civil litigation. The sanction order, issued November 9, 2010, states:

> Thomas has persisted in frivolous litigation despite a judicial direction that he desist. He is now fined $1,000 under Fed. R. App. P. 38. Until this fine has been paid, Thomas is prohibited from filing any new civil litigation in the federal courts of this circuit, and from filing any new documents in pending civil litigation.

Thomas v. Van Hollen, Case No. 10-C-3144 (7th Cir 2010).

OPINION

A. Motion for Remand

I understand plaintiff to be arguing that it should be his choice to have the case in state court. As an initial matter, it is questionable whether plaintiff should have been allowed to even file a motion to remand given the filing bar he faces. In any case, defendants have the statutory right to remove the case; the court clearly has jurisdiction over his constitutional claims; and plaintiff does not point to any defects in the notice of removal.

Also, plaintiff appears to argue that his Fourteenth Amendment due process rights would be violated if this court were to hear the case while he faces a filing bar. Unfortunately for plaintiff, the Court of Appeals for the Seventh Circuit has already concluded that the removal statutes confer an absolute right to remove a case, regardless whether a sanction order prevents a party from litigating in federal court. Matter of Skupniewitz, 73 F.3d 702, 705 (7th Cir. 1996); see also Von Flowers v. Canziani, 2004 WL 2810088 * 1, 2 (W.D. Wis. Dec. 3, 2004). This is because a sanction order cannot abrogate the rights of parties not involved in the earlier litigation. Matter of Skupniewitz, 73 F.3d at 705. Once the case is in federal court, however, the sanctioned party may file papers "in a purely defensive mode." Id. This compromise balances that party's right to due process with the court's interest in sanctioning persistent frivolous litigation. Id. Because plaintiff has the ability to file papers in a defensive mode, I will deny his motion to remand.

B. Motion to Dismiss

1. Equal protection

Plaintiff alleges that defendants violated his Fourteenth Amendment right to equal protection, because J.W. was not assigned to the step program. Since plaintiff does not allege discrimination based on membership in a protected class or exercise of a fundamental right, I construe this as a class-of-one equal protection claim. The unstated allegation is that defendants arbitrarily singled out plaintiff for discriminatory treatment.

Under the class-of-one equal protection theory, the government cannot apply laws and regulations differently to similarly situated people, unless there is a rational basis for the difference in treatment. Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 601-02 (2008); Thayer v. Chiczewski, 705 F.3d 237, 254 (7th Cir. 2012). Some types of state actions, however, involve "discretionary decisionmaking based on a vast array of subjective, individualized assessments." Engquist, 553 U.S. at 604. In these cases, the class-of-one theory may be inapplicable, because "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that state officials are entrusted to exercise." Id. See also Abcarian v. McDonald, 617 F.3d 931, 939 (7th Cir. 2010) ("We have interpreted Engquist to stand for the broad proposition that inherently subjective discretionary governmental decisions may be immune from class-of-one claims.").

The facts alleged in the complaint do not establish that plaintiff and J.W. were similarly situated, or that there was no rational basis for failing to assign J.W. to the step program. In any case, it is unlikely that class-of-one claims are inapplicable in this context

because officials in treatment center like Sand Ridge must retain the ability to make subjective, discretionary decisions. These considerations recently led this court to dismiss a similar class-of-one claim. Jackson v. Flieger, 2012 WL 5247275, *4 (W.D.Wis. Oct. 23, 2012) (class-of-one claim does not arise when a prisoner is treated less favorably than a prisoner accused of similar conduct, because "it is unlikely that the equal protection clause applies to the decisions plaintiff is challenging."). Therefore, I conclude that plaintiff fails to state an equal protection claim.

2. Procedural due process

Plaintiff alleges that defendants assigned him to the step program without due process, in violation of his Fourteenth Amendment right to due process. He cannot prevail on this claim, however, because he did receive due process. He was notified of his behavioral disposition record; he was present at the hearing; and he was given the opportunity to file an appeal. Given the relative leniency of the disciplinary measure, it is unlikely that additional protections are constitutionally required. Cf. Wilkinson v. Austin, 545 U.S. 209, 216-17 (U.S. 2005) (procedure for assigning inmates to highly restrictive "supermax"conditions is constitutionally sufficient where inmates receive written notice of the hearing, may attend the hearing and have the opportunity to appeal).

In any case, in order to state a claim of deprivation of a protected liberty interest, a plaintiff must allege that the disciplinary measure "substantially worsen[s] the conditions of confinement of a lawfully confined person . . . regardless of whether the confinement is

criminal or civil." Miller v. Dobier, 634 F.3d 412, 414-15 (7th Cir. 2011); see also Sandin v. Conner, 515 U.S. 472, 483-84 (2005) (due process protections are required only when the prisoner faces a deprivation of liberty that imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"). None of the alleged conditions of the step program meet this standard. The program does have stricter rules than general population housing units; for example, plaintiff was monitored and assessed, his allowable property was restricted and he could not use a computer. In Miller, however, the court held that placing a secure treatment facility patient in even more restrictive housing did not substantially worsen his conditions. Id. at 414-15 (patient had no due process cause of action arising out of his placement in "close status," where he had a curfew, limited family visits, no yard privileges, a ban from attending special events and a ban on using the library, exercise room, and typewriter). For these reasons, I conclude that plaintiff has failed to state a due process claim.

3. Retaliation

I construe this claim as plaintiff's allegation that defendants retaliated against him by falsifying the 2012 fighting charge and the 2010 behavioral disposition record, in violation of plaintiff's First Amendment right to freedom of speech. Plaintiff contends that defendants did so because plaintiff filed the January 2012 police report and the August 2012 complaint.

To establish a prima facie case of retaliation, a plaintiff must show that "(1) his

speech was constitutionally protected; (2) he has suffered a deprivation likely to deter free speech; and (3) his speech was at least a motivating factor in the [retaliatory] action." Kidwell v. Eisenhower, 679 F.3d 957, 964-65 (7th Cir. 2012) (quotations omitted). The plaintiff must offer direct or circumstantial evidence demonstrating that his speech was at least a motivating factor in the retaliation. Id. at 965. The circumstantial evidence may include "suspicious timing, ambiguous oral or written statements, or behavior towards or comments directed at other [people] in the protected group." Id. at 966 (quotations omitted). What is important is that "regardless of which type of evidence is offered, to demonstrate the required causal connection in a retaliation claim, a plaintiff must show that the protected activity and the adverse action are not wholly unrelated." Kidwell, 679 F.3d at 966 (quotations omitted).

Plaintiff cannot demonstrate this causal connection. First, the alleged retaliation concerns the issuance of the behavioral records, but defendants did not issue these records. Rather, they were responsible for disciplining defendant and for upholding that discipline. Second, plaintiff's complaint consists merely of conclusory statements. It provides no evidence linking his protected activities to the issuance of the records. To the contrary, the facts alleged suggest that there was no retaliation. There was no suspicious timing: the first record was issued before plaintiff challenged the conditions of his confinement; the second record was issued eight months after he filed the police report and six weeks after he filed the complaint. In addition, nobody told or implied to plaintiff that the records were retaliatory.

In addition, by plaintiff's own admission, the relevant parts of the second record were not false. In fact, it is plaintiff's hearing statement, not the record, that portrays him as an instigator of the fight. The record states that plaintiff held J.W.'s arms "in a defensive manner" to prevent J.W. from hitting him. Contrast this with plaintiff's statement at the hearing: "[J.W.] closed my door, and it made me mad. I hit [J.W.] when he was coming at me, then I grabbed his arms. [J.W.] when he was coming at me, then I grabbed his arms."

Also, I understand plaintiff to be alleging that defendants conspired to retaliate against plaintiff, in violation of 42 U.S.C. § 1983. As explained above, however, the facts alleged in the complaint do not suggest that defendants retaliated against plaintiff. Therefore, a necessary part of his conspiracy theory is missing.

In any case, plaintiff does not provide the supporting facts or evidence necessary to establish a conspiracy theory to support his § 1983 claim. To do so, a plaintiff must allege that "(1) a state official and private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights; and (2) those individual(s) were willful participant[s] in joint activity with the State or its agents." Reynolds v. Jamison, 488 F.3d 756, 764 (7th Cir. 2007). Conspiracy allegations are generally held to a higher standard than other allegations. Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009). A "bare conclusion" or "mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her" is insufficient to survive a motion to dismiss for failure to state a claim." Id.

Plaintiff states a "bare conclusion" that there was a conspiracy. Without supporting facts or evidence, plaintiff fails to state a retaliation claim upon which relief may be granted.

Because plaintiff fails to state any claims upon which relief may be granted in this case, I will grant defendants' motion to dismiss.

ORDER

IT IS ORDERED that

1. Plaintiff Sylvester Thomas's motion to remand this case to state court, dkt. #2, is DENIED.

2. Defendants' motion to dismiss the case, dkt. #3, is GRANTED. The clerk of court is directed to enter judgment for defendants and close the case.

Entered this 19th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge