IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RANDY McCAA,

Plaintiff,

v.

OPINION AND ORDER

13-cv-504-bbc

MICHEAL MEISNER, JANEL NICKEL,
DONALD MORGEN, BRAIN FRANSON,
TIM ZIEGLER, L.T. MORRISON
and TINA MARTIN,

Defendants.

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Pro se plaintiff Randy McCaa has filed a proposed complaint under 42 U.S.C. § 1983 in which he raises two claims: (1) defendants Janel Nickel and Lt. Morrison gave plaintiff a conduct report because he complained about staff misconduct, in violation of the First Amendment; and (2) defendants Donald Morgen, Tina Martin, Brain Franson, Tim Ziegler and Micheal Meisner failed to give him due process in the context of the disciplinary proceedings. Plaintiff has made an initial partial payment of the filing fee as required by 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A. Having reviewed the complaint, I conclude that plaintiff has stated a claim upon which relief may be granted with respect to his retaliation claim, but his due process claim must be dismissed.

OPINION

Plaintiff contends that defendants Nickel (the security director) and Morrison (a correctional officer) retaliated against him for filing a lawsuit in 2012 in which he complained that other prison officials had mistreated him. In particular, he alleges that officers Millonig, Bittleman and Neumaier "assaulted" him and refused to provide medical care for several hours. Although Nickel ignored several letters plaintiff wrote her about the mistreatment, she directed Morrison to conduct a "self serving investigation" shortly after finding out that plaintiff had filed the lawsuit. Morrison did not interview plaintiff or anyone other than three accused officers. After the investigation, plaintiff received a conduct report for lying about staff.

I conclude that plaintiff's allegations state a claim upon which relief may be granted under the First Amendment. Prison officials may not retaliate against a prisoner for exercising a constitutional right if the officials' conduct is sufficiently adverse to deter a prisoner of "ordinary firmness" from exercising his rights. Bridges v. Gilbert, 557 F.3d 541, 552 (7th Cir. 2009); Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). Plaintiff has constitutional rights under the First Amendment to free speech and to petition the government for redress of grievances, that include the right to file lawsuits about misconduct by prison officials. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson, 471 F.3d at 740-41. Further, the Court of Appeals for the Seventh Circuit has stated that allegations of false disciplinary charges are sufficient to show at the screening stage that the defendants' actions would deter a person of ordinary firmness from exercising his constitutional rights.

Bridges, 557 F.3d at 552.

Plaintiff should know that he will not be able to stand on his allegations at later stages in the case, but will have to come forward with specific facts showing that a reasonable jury could find in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ P. 56. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many pro se plaintiffs make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

Plaintiff will have to submit evidence either at summary judgment or at trial that defendants disciplined him because of the exercise of his constitutional rights and not for some legitimate reason. This means that he will have to prove that defendants subjected him to adverse treatment because he was complaining about staff misconduct, *not* because they believed he was lying about staff.

The Court of Appeals for the Seventh Circuit has held that false accusations made by prisoners against correctional officers are not protected by the First Amendment. Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005); Hale v. Scott, 371 F.3d 917 (7th Cir. 2004). Further, even if the allegations in plaintiff's other lawsuit are true, that would not necessarily be enough to hold defendants liable if they honestly believed that plaintiff was lying about staff. In other words, plaintiff will have to show not only that he

was telling the truth in his grievance, but that defendants *knew* that he was telling the truth. Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007). See also Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) ("[P]urpose rather than knowledge is required to impose . . . liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities."). It will not be enough for plaintiff to show that defendants acted foolishly or by mistake in disciplining him. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006). If defendants honestly believed that plaintiff's allegations were fabricated, his claim for retaliation will fail.

B. Due Process

I understand plaintiff to contend that each of the remaining defendants failed to provide due process in the context of the disciplinary proceedings that followed the conduct report. Defendant Morgen (a captain) denied plaintiff's request to call as a witness one of the officers plaintiff accused of mistreating him; defendant Martin, plaintiff's staff advocate, "failed to question the accusers" and "submit plaintiff['s] evidence"; defendants Ziegler and Franson, who presided over the hearing, "rejected mos[t] of" plaintiff's evidence; and defendant Meisner, the warden, affirmed the decision to discipline plaintiff with 210 days in segregation.

The first question is whether plaintiff was deprived of his liberty within the meaning of the due process clause. In the prison context, a prisoner is not entitled to process under

the Constitution unless he is subjected to an "atypical and significant hardship." Sandin v. Conner, 515 U.S. 472, 484 (1995). I will assume for the purpose of this screening order that a sentence of 210 days in disciplinary segregation is sufficient to meet that standard. Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009) (disciplinary segregation can trigger due process protections depending on the duration and conditions of segregation; prisoner stated a claim under the due process clause by alleging that he was placed in segregation for 240 days without due process).

The next question is whether plaintiff received the process he was due. Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has determined the process a prisoner is due before he is placed in long-term segregation. When a prisoner loses good time credits, courts have held that a prisoner is entitled to (1) written notice of the claimed violation at least 24 hours before hearing; (2) an opportunity to call witnesses and present documentary evidence (when consistent with institutional safety) to an impartial decision maker; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539 (1974); Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). However, because plaintiff did not lose good time credits, that standard does not necessarily apply in this case.

In Wilkinson v. Austin, 545 U.S. 209, 226 (2005), the Supreme Court considered the process a prisoner was due before being transferred to a "supermax" prison and concluded it was sufficient if the prisoner received notice of the reasons for the transfer and an opportunity to rebut those reasons. Because one of the conditions of the facility at issue

in Wilkinson was placement in segregation and plaintiff's only punishment in this case was placement in segregation, plaintiff would not be entitled to more process than was provided in that case. Wilkinson makes it plain that plaintiff did not have a right to an effective staff advocate, to call witnesses, to present particular pieces of evidence or even to have a hearing, so his claims against defendants Morgen and Martin cannot succeed. Id. at 228. ("Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated.").

The only allegation that could support a claim under Wilkinson is that defendants Ziegler and Franson refused to consider plaintiff's evidence because it suggests that they may have prejudged the case. Powers v. Richards, 549 F.3d 505, 511-12 (7th Cir. 2008) ("A hearing where the decisionmaker has prejudged the outcome does not comport with due process because it effectively denies the [plaintiff] the opportunity to respond to the accusations against him."). However, plaintiff admits in his complaint that the reason defendants Ziegler and Franson refused to consider "most" of his evidence was that he declined to appear at the hearing. The due process clause requires an *opportunity* to be heard; defendants gave plaintiff that opportunity but he declined to take advantage of it. Suckle v. Madison General Hospital, 499 F.2d 1364, 1367 (7th Cir. 1974) (plaintiff "cannot sue in federal court to secure a right which he declined when it was voluntarily offered to him."). Further, plaintiff does not point to any particular evidence that Ziegler and Franson had in front of them that they refused to consider, so it cannot be plausibly inferred that

Ziegler and Franson denied plaintiff an opportunity to respond to the charges against him. Because plaintiff has not stated a claim upon which relief may be granted with respect to any of the other defendants, defendant Meisner cannot be held liable for affirming their decision.

In a footnote to his complaint, plaintiff questions whether Franson should have been deciding his case because Franson is a defendant in the other lawsuit. Although that is a legitimate question, I do not understand plaintiff to be raising a separate due process claim about this issue. It seems to be an afterthought and he does not include it in the summary of his claims. Accordingly, I do not decide whether he could proceed on such a claim. Redding v. Fairman, 717 F.2d 1105, 1112 (7th Cir. 1983) (rejecting argument that due process "require[s] disqualification of all Adjustment Committee members who are defendants in unrelated civil suits for damages brought by the inmate appearing before the Committee").

ORDER

IT IS ORDERED that

1. Plaintiff Randy McCaa is GRANTED leave to proceed on his claim that defendants Janel Nickel and Lt. Morrison gave him a conduct report for filing a lawsuit in 2012 against other prison officials, in violation of the First Amendment.

2. Plaintiff's claims against defendants Donald Morgen, Brain Franson, Tim Ziegler, Micheal Meisner and Tina Martin are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. Plaintiff is obligated to pay the unpaid balance of their filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust

fund accounts until the filing fee has been paid in full.

Entered this 18th day of September, 2013.

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