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

DAVID W. WATTS,

Plaintiff,

v.

MARK KARTMAN, MICHAEL FERAN, MARTIN and BIRD,

Defendants.

OPINION AND ORDER

21-cv708-wmc

Under the Eighth Amendment and 42 U.S.C. § 1983, *pro se* plaintiff David Watts, a prisoner at the Wisconsin Secure Program Facility ("WSPF"), is currently suing four WSPF officials after being granted leave by this court to proceed against (1) defendant Martin for sexual harassment, and (2) defendants Feran, Bird and Mark Kartman for revealing his status as a confidential informant. Although the court has recently addressed the parties' numerous pending motions, the court will memorialize in this Opinion and Order the basis for its ruling on the defendants' motion for sanctions (dkt. #158), as well as briefly address plaintiff's request for a different placement by the DOC.

As for the motion for sanctions, the court held a hearing by Zoom to address this and other pending motions on March 2, 2023, along with other matters raised by Watts more recently. Because the court finds by a preponderance of the evidence that Watts failed to exhaust his administrative remedies, then attempted to cure that deficiency by submitting doctored documents, the court will grant defendants' motion for sanctions, finding that dismissal of this action with prejudice is appropriate. Finally, the court has

received input from the parties about Watts' proposed transfer (dkt. #212), and it sees no basis to interfere with the DOC's plan.

OPINION

I. Motion for Sanctions

"A district court has inherent power to sanction a party who 'had willfully abused the judicial process or otherwise conducted litigation in bad faith.'" *Secrease v. W. & S. Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015) (quoting *Salmeron v. Enterprise Recovery Sys., Inc.*, 579 F.3d 787, 793 (7th Cir. 2009)). Here, the defendants have the burden to prove the factual basis for seeking sanctions to a preponderance of the evidence. *See Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 778-81 (7th Cir. 2016). For the following reasons, including some already articulated at the March 2nd hearing, defendants have met this burden.

As an initial matter, there is no reasonable dispute that Watts failed to follow *any* of Wisconsin's exhaustion procedures with respect to the events that occurred in August and September of 2021, even though Watts has filed numerous unrelated inmate complaints. (*See* Ex. 1000 (dkt. #137-1) 2-3.) Instead, Watts insists that WSPF staff relentlessly stood in the way of his efforts to file an inmate complaint, which, if true, would mean that Watts exhausted all administrative procedures available to him. *See Ross v. Blake*, 578 U.S. 632, 642 (2016) ("[A]n inmate is required to exhaust those, and only those, grievance procedures that are capable of use to obtain some relief for the action complained of.") (internal quotation marks and citation omitted). As evidence of the claimed interference, Watts submitted numerous documents that he represented show

communications with WSPF staff members. (Dkt. ##140-4, 140-5, 142-1, 142-2, 142-3, 142-4, 142-5, 142-6, 144-1.) The documents Watts submitted now *appear* to show that he posed lengthy, involved questions to staff, essentially asking them to confirm that (or provide details about how) they prevented him from submitting inmate complaints. Defendants contend that Watts doctored his questions to staff so that the documents looked as though those staff members confirmed that Watts's inmate complaints were either confiscated outright or improperly processed. During the hearing, the court received strong evidence of fabrication and made the findings of fact as described below.

A. Factual findings

First, the court received testimony from three WSPF staff members who responded to Watts' communications: Jacob Cirian, Bradley Fedie and Parker Hagensick. First, WSPF's current Security Director (and a former unit manager) Cirian testified about a request slip Watts sent him on December 7, 2021 (dkt. #140-4). He also recalled that Watts wrote "what approx. time on Thurs 9-16-2021 you [and] Mr. Broadbent talked to me about my PREA issue?"; to which he responded, "I'm unsure of the exact time. However, I believe it was the afternoon." It appears that the slip Watts filed in this case was altered to include the following, more elaborate and clumsy question:

> What was approx. time on Thur 9-16-2021, you Mr. Broadbent, talked to me about my PREA issues and you and he had my complaints against you & other staff, against Mr. Kartman, you & other staff, against CO Martin, you & other staff, for the Wed 8-11-2021, Thurs 8-19-2021, and Tues 8-24-2021, incidents, and you and Mr. Broadbent, ordered me not to file any more complaints you and these other staff in those (3) incidents.

(*See id.*) Cirian testified that none of this additional language on that slip was present when he reviewed it, and that if Watts' additional statements were included, Cirian would have addressed them in his response. Cirian further testified that he never destroyed inmate complaints or ordered inmate complaints destroyed.

Watts attempted to discredit Cirian by bringing up documentation related to the merits of Watts' claims in this lawsuit. In particular, Watts tried to establish that Cirian lied in a document in which he represented that Cirian was aware that the detectives who visited WSPF had contact with other inmates. However, Cirian's testimony was consistent, and the documentation Watts submitted did not show that Cirian lied. In addition, because of the consistency of his testimony, the court found that his response to Watts' elaborate question -- to just state that he was unsure of the time -- implausible. Therefore, the court found Cirian's testimony credible.

Second, Captain Fedie testified that he reviewed and responded to a version of the document request Watts filed at Dkt. #144-1. Fedie testified that he reviewed a slip in which Watts wrote "is Ms. Ray litigation coor/ICE?" to which he responded "yes." However, the document Watts filed included an even more cumbersome question:

> [D]id Ms. Ray litigation coord/ICE, Mr. Cirian U/M Ms. Brown, did in fact order you, before I came to seg/after I came to seg. On 10-8-2021 to have staff (on 3rd shift) confiscate <u>all</u> of the complaints I filed against defendants Martin, Bird, Feran & Kartman, and send them to Mr. Cirian.

Fedie testified that none of that additional writing was on the slip when he reviewed it, and that if that additional writing was present when he reviewed it, he would not have responded by simply affirming Watts' accusation. Moreover, upon review of the slip, it is

apparent that someone changed "is" to "did." The court found Fedie's testimony credible as well, given the apparent alteration coupled with the flat "yes" Fedie provided, which would make more sense if he was responding to a simple question about Ray's roles.

Third, Officer Hagensick, as defendants' final witness, provided similar testimony about a request slip he received from Watts. Hagensick testified that when he received the slip, he answered "yes" to Watts' question "is Mr. Williams Brown (former ICE) Charlie unit manager?" The document Watts filed read as follows:

> Did CO martin, the rec. officer on Charlie Unit admit to you on several occasions he did sexually harass me, on 8-24-2021. [illegible] and that's why, he lied to DOC about it to the PREA investigator, correct? . . . did Mr. Williams Brown (Former ICE) Charlie Unit Manager, admit to you, when he was an ICE, he made sure none of my complaints against Mr. Kartman, Sgt. Feran, Cos Bird and Martin got scanned into the computer, and he sent them all to Mr. Cirian, correct?

(Dkt. #142-2.) As did Cirian and Fedie, Hagensick also testified that he would not have responded to such an accusation by simply writing "yes." And the "did" appears to have been altered from an "is," like the slip to which Fedie responded. The court found Hagensick's testimony credible, both because of his demeanor and his explanation that he would not have responded with a simple "yes" to the type of accusation raised in the slip submitted to the court.

For his part, Watts testified that his evidence is authentic and challenged the truthfulness of these declarants, essentially arguing that defendants could not *prove* that he was the person that altered the documents because it changed hands so many times within the institution. However, that argument makes little sense, since Watts filed those documents for the sole purpose of proving the truth of the questions he submitted and the

statements he received. In sum, the court found the testimony of defendants' witnesses credible,[1] while Watts was not.

Thus, at the close of the hearing, I found it more likely than not that the documents submitted as evidence during the hearing by Watts had been altered, and that Watts had deliberately altered them, but took under advisement the appropriate sanction. Though the typical sanction for fabrication in this court of evidence is dismissal of the lawsuit, the court took under advisement whether excluding Watts' fabricated evidence – thus, granting defendants' motion for summary judgment -- could be the appropriate sanction here.

B. Appropriate Sanction

"Dismissal pursuant to the court's inherent authority can be appropriate when the plaintiff has abused the judicial process by seeking relief based on information that the plaintiff knows is false." *Ramirez*, 845 F.3d at 776 (quoting *Secrease*, 800 F.3d at 4001). That being so, courts must consider other sanctions before resorting to dismissal. *Rivera v. Drake*, 767 F.3d 685, 786 (7th Cir. 2014); *see also Donelson v. Hardy*, 931 F.3d 565, 569 (7th Cir. 2019) ("[S]anctions, including dismissal, must be proportionate to the circumstances. Considerations relevant to proportionality include the extent of the

[1] Moreover, although they did not testify, defendants also submitted similar declarations from WSPF staff members Broadbent, Weadge, Walsh and Colin. (*See* dkt. ##152, 153, 154, 157.) They similarly attested that the written response they provided to Watts was different than the document Watts submitted to the court and that they have never confiscated Watts's inmate complaints or been ordered to confiscate them.

misconduct, the ineffectiveness of lesser sanctions, the harm from the misconduct, and the weakness of the case.").

As an initial matter, fabrication of evidence is sufficiently serious misconduct to merit dismissal of the case with prejudice. *See Ford v. Matushak*, No. 20-cv-1005, 2020 WL 3798868, at *4 (E.D. July 6, 2020)(unpubl.)("Manufacturing evidence and lying under oath undermine the essential truth-finding function of our system of justice."). Thus, the Court of Appeals for the Seventh Circuit has affirmed dismissals based on falsified evidence. *See Goodvine v. Carr*, 761 F. App'x 598, 602 (7th Cir. 2019) (affirming dismissal of two cases in which the plaintiff was found to have submitted false allegations in a declaration). Aside from abusing the judicial process, Watts' misconduct cost time and money, requiring the DOC and its attorneys to devote already strained resources responding to, investigating and rebutting Watts' assertions. Thus, any instance of fabrication is intolerable, but Watts' persistence in his dishonesty before, during and after the hearing is unusually egregious, leaving any sanction short of dismissal likely to be ineffective.

Merely excluding the evidence Watts submitted in opposition to defendants' motion for summary judgment would not adequately address the gravity of his misconduct. If the court were to issue that sanction, it would only dismiss this case based on the affirmative defense of exhaustion, which is no more than the appropriate result had Watts not attempted to defraud the court. Moreover, a dismissal for non-exhaustion would be without prejudice, leaving open the possibility that Watts could at least theoretically force

defendants to continue litigating his claims even after he fabricated evidence to avoid dismissal of those claims.

Further, the court has no reason to believe that a monetary sanction would have any impact because Watts is indigent, proceeding *in forma pauperis* in this lawsuit. *See Secrease*, 800 F.3d at 402 ("[T]he threat of a monetary sanction would probably not influence" the behavior of a litigant proceeding *in forma pauperis.*) (citing *Rivera*, 77 F.3d at 687). Regardless, a monetary sanction would not begin to address the time and money the DOC had to devote to combating Watts' efforts to fool the court. In sum, dismissal of this case with prejudice is the appropriate sanction.

That said, the court cannot impose a strike under 28 U.S.C. § 1915(g), which only limits a prisoner from proceeding *in forma pauperis* to circumstances in which he or she , while incarcerated or detained, brought an action that was dismissed as frivolous, malicious, or for failure to state a claim on three or more occasions. There is no language in that statute authorizing dismissal as a sanction for misconduct that does not count as a "strike," and defendants cite no authority allowing this dismissal to count as a strike, at least where the court does not find that this lawsuit was frivolous or maliciously filed. *See Hoskins v. Dart*, 633 F.3d 541 (7th Cir. 2011) (dismissals as a sanction for disobeying a court rule were not "strikes," since they were not dismissals for failure to state a claim, or because the lawsuits were frivolous or malicious). Although the dismissal of this case will not count as a strike, Watts is nevertheless advised that if his abusive filings continue in any other proceeding before the court, he will be subject to further sanctions, including a filing bar similar to that contemplated by § 1915(g).

II. Watts' Placement

Finally, defense counsel has updated the court about the DOC's plan for Watts's placement. Counsel represents that while Security Director Cirian directed Watts to submit questions about his transfer to him, Watts inexplicably declined to do so. Instead, Watts submitted several more emergency motions with this court that do not explain his failure to follow Cirian's directive or suggest that the DOC's placement plan will subject him to substantial risk of harm. (Dkt. ##214, 215, 216, 218.) None of these submissions suggest that the court should second-guess the DOC's placement decision. Regardless, having concluded that dismissal of this case with prejudice is the appropriate sanction, the court has no jurisdictional basis to interfere with the DOC's placement plan for Watts.

ORDER

IT IS ORDERED that:

1. Defendants' motion for sanctions (dkt. #158) is GRANTED, and this case is DISMISSED WITH PREJUDICE as a sanction for fabricating evidence.

2. Plaintiff's remaining motions are DENIED as moot.

3. The court takes no action with respect to the DOC's plan for Watts's placement.

4. The clerk of court is directed to enter judgment in defendants' favor and close this case.

Entered this 19th day of April, 2023.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge