IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN DELACRUZ,

OPINION and ORDER

Plaintiff,

17-cv-59-bbc

v.

QUALA CHAMPAGNE, CHAD ENGEBREGTSEN,
ANDREW KOHLHOFF, RICHARD SCHNEITER,
JON E. LITSCHER, TIM MALCHOW, SGT. B. SCHMIDT,
CO II ARNDT, TOM POLLARD, KELLY SALINAS,
COREY SABISH, PETER JAEGER, CAPT. REDEKER,
CAPT. R. TRINRUD, STEPHANIE HENNING,
MIKE GREEN and J. PERTTU,

Defendants.

- -

Pro se prisoner and plaintiff John DeLaCruz has filed a complaint about events at the Wisconsin Correctional Center System, the Oregon Correctional Center, the Kettle Moraine Correctional Institution and the John Burke Correctional Center that allegedly arose out of a conduct report that he received in March 2016. Plaintiff does not identify the subject of the conduct report in his complaint, but he attaches documents showing that he was accused of possessing and using intoxicants. Dkt. #1-2.

Plaintiff alleges that his original conduct report was "expunged and removed from the record" (he does not say why), then "reissued" and "rescinded" before finally resulting in a finding of guilt after it was issued for a third time. Plaintiff also alleges that, while he was

challenging the conduct report and its implications, various defendants retaliated against him in various ways because of constitutionally protected conduct and speech. Plaintiff has made an initial partial payment of the filing fee in accordance with 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening. 28 U.S.C. § 1915(e)(2) and § 1915A.

Plaintiff's complaint is one long narrative that is not divided into sections or claims, so it is not obvious from the face of the complaint which claims he means to bring against which defendants. Although he identifies six "causes of action" at the end of his complaint, those consist mostly of legal conclusions without factual context. Viewing his allegations as a whole in conjunction with his "causes of action," I understand him to be raising the following claims:

(1) defendants Andrew Kohlhoff (a sergeant at the Oregon Correctional Center), Quala Champagne (the warden at the Wisconsin Correctional Center System), Tom Pollard (the security director at the Kettle Moraine Correctional Institution) and Chad Engebregtsen (a captain at the Oregon facility) retaliated against plaintiff for submitting a grievance about not receiving "temporary lock-up pay" by approving a "duplicate" conduct report after the first conduct report had been expunged, in violation of the First Amendment, the Fifth Amendment and the Wisconsin Administrative Code;

(2) defendants Tim Malchow (a teacher at the Kettle Moraine prison) and B. Schmidt (a sergeant at the Kettle Moraine prison) retaliated against plaintiff for filing grievances by "stalk[ing]" him while he was at the law library and then subjecting him to a pat down and searching his cell and property;

(3) defendant Arndt (a correctional officer at the Kettle Moraine prison) retaliated against plaintiff for filing grievances by searching "plaintiff's area" four times in four days;

(4) after the "duplicate" conduct report was "rescinded," defendant Champagne approved a third conduct report for the same alleged misconduct, but this time "multiple items . . . were 'whited-out,'" in violation of the First Amendment, Fifth Amendment and the Wisconsin Administrative Code;

(5) at plaintiff's disciplinary hearing, defendants Redeker (a captain at the John Burke facility) and Stephanie Henning (a social worker at the John Burke facility), did not give plaintiff all the process required by Wolff v. McDonnell 418 U.S. 539 (1974), in violation of the due process clause and the Wisconsin Administrative Code;

(6) when plaintiff asked defendant Corey Sabish (the corrections program supervisor at the Kettle Moraine prison) not to house him in defendant Schmidt's unit, Sabish retaliated against plaintiff by transferring him to Schmidt's unit and placing him in the same cell with a "known sexual predator," in violation of the First Amendment, the Eighth Amendment, the Prison Rape Elimination Act and the Wisconsin Administrative Code;

(7) defendant Schmidt "retaliated" against plaintiff by refusing to allow him to use the bathroom when he needed to urinate, in violation of the First Amendment;

(8) various officials who reviewed plaintiff's various administrative grievances and letters (defendants R. Trinrud, Peter Jaeger, Jon Litscher, Tom Pollard, Kelly Salinas, Richard Schneiter, Peter Jaeger, Captain Redeker and J. Perttu) refused to investigate the grievances or rejected, dismissed or denied plaintiff's grievances, in violation of the First

Amendment and the Wisconsin Administrative Code;

(9) defendants Mike Green (the security director of the Wisconsin Correctional Center System) and Peter Jaeger (the superintendent of the John Burden facility) "ignore[d]" an unspecified "procedural error" when reviewing administrative appeals of plaintiff's conduct report; and

(10) because plaintiff's March 2016 conduct report was expunged in June 2016, an April 2016 decision on plaintiff's custody level is "null and void."

In addition to these claims, plaintiff has filed what he calls a "motion for sanctions and emergency injunction." Dkt. #8. In the motion, plaintiff alleges that defendant Schmidt prohibited him from wearing his shower shoes to the restroom and then threatened to confiscate the legal work of *other* prisoners if he saw plaintiff helping them. (Plaintiff also filed a letter in which he alleged that prison officials are interfering with his medications. Dkt. #11. Because plaintiff filed the letter in both this case and another case that he filed recently, Case no. 17-cv-161-bbc (W.D. Wis.), I will address that letter in a separate order.)

For the reasons explained below, I am allowing plaintiff to proceed on the following claims:

(1) defendants Kohlhoff, Champagne, Pollard and Engebregtsen approved a "duplicate" conduct report after the first conduct report had been expunged because of plaintiff's grievances, in violation of the First Amendment;

(2) after the "duplicate" conduct report was "rescinded," defendants Champagne, Redeker and Schneiter approved a third conduct report for the same alleged misconduct

because of plaintiff's grievances, in violation of the First Amendment; and

(3) defendant Sabish transferred plaintiff to cell with a "known sexual predator" because plaintiff asked Sabish not to house him near defendant Schmidt, in violation of the First Amendment and the Eighth Amendment.

I am dismissing all other claims for plaintiff's failure to state a claim upon which relief may be granted. Finally, I am denying plaintiff's request for sanctions and an injunction.

OPINION

A. Plaintiff's Reliance on Administrative Regulations and Wisconsin Criminal Law

Plaintiff cites various provisions of the Wisconsin Administrative Code throughout his complaint. If plaintiff means to argue that defendants violated state regulations, I cannot allow plaintiff to proceed on those claims. Prison rules and regulations do not provide a right of action unless the legislature has granted such a right, Vasquez v. Raemisch, 480 F. Supp. 2d 1120, 1129 (W.D. Wis. 2007) (citing Kranzush v. Badger State Mutual Insurance Co., 103 Wis.2d 56, 74–79, 307 N.W.2d 256, 266–68 (1981)), and I am not aware of any statute that grants such a right in this case. If plaintiff believes that defendants violated state regulations, his remedy is a writ of certiorari filed in state court. Outagamie County v. Smith, 38 Wis.2d 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute expressly, action is reviewable only by certiorari).

Plaintiff cannot rely on state criminal law either. Those laws may be enforced by a

state prosecutor, but they do not provide a cause of action in a civil case and plaintiff cannot force a prosecution in this court. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("A private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Accordingly, I have not considered potential violations of these laws, rules or policies.

B. Conduct Reports

Plaintiff alleges that he received a conduct report for the same conduct three times. I do not understand him to be raising any claims about the first conduct report, which he says was expunged for reasons that he does not explain. As to the second conduct report, I understand plaintiff to be raising two claims under the Constitution against defendants Andrew Kohlhoff, Quala Champagne, Tom Pollard and Chad Engebregtsen: (1) defendants approved the conduct report because plaintiff complained about not receiving "temporary lock-up pay" that he was entitled to receive under state regulations, in violation of the First Amendment; and (2) defendants gave plaintiff the same conduct report multiple times, in violation the Fifth Amendment and "the constitutional doctrine of Collateral Estoppel."

I understand plaintiff to be raising the same claims against defendant Champagne for approving the third conduct report. In addition, I understand plaintiff to be raising a separate claim that the third conduct report was unlawful because Champagne deleted unspecified information that was included in the first two conduct reports. I will consider each theory in turn.

1. Retaliation

To prevail on a retaliation claim, a plaintiff must prove three things: (1) he was engaging in activity protected by the Constitution; (2) the defendant's conduct was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity. Gomez v. Randle, 680 F.3d 859, 866-67 (7th Cir. 2012); Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009).

As to the first element, plaintiff says that he filed a grievance in which he was asking to receive pay to which he was entitled under Wisconsin law. A prisoner has the constitutional right to complain about prison conditions and file grievances, Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006), so plaintiff has satisfied the first element at this stage of the case.

As to the second element, it is reasonable to infer at the pleading stage that a conduct report could deter a person of ordinary firmness from exercising his rights. Although the second conduct report was "rescinded," plaintiff alleges that he was placed in segregation while the disciplinary charge was pending. Jackson v. Thurmer, 748 F. Supp. 2d 990, 1003 (W.D. Wis. 2010) (placement in segregation for 45 days was sufficiently adverse to sustain First Amendment retaliation claim).

As to the third element, plaintiff cites no evidence in his complaint that any of the defendants gave him the second or third conduct report because he exercised his rights rather than because they believed that he should be disciplined for his alleged misconduct. In this

circuit, however, a conclusory allegation that defendants acted adversely because of protected conduct is sufficient to state a claim for retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). See also Henderson v. Wilcoxen, 802 F.3d 930, 933 (7th Cir. 2015) (reaffirming Higgs standard).

Accordingly, I will allow plaintiff to proceed on claims that defendants retaliated against him in violation of the First Amendment by issuing or approving the second and third conduct reports. In going forward with this claim, plaintiff should keep in mind that a claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many prisoners 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). Even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive. Sauzek v.Exxon Coal USA, Inc., 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). Plaintiff will have to come forward with specific evidence either at summary judgment or at trial that defendants disciplined him for filing grievances rather than because they believed that he violated prison rules.

2. Fifth Amendment and "doctrine of collateral estoppel"

Plaintiff does not explain his belief that his multiple conduct reports violated the Fifth Amendment, but presumably his theory is that defendants' conduct violated the double jeopardy clause. Plaintiff cannot proceed on this claim because that clause is a limit on multiple criminal prosecutions; it does not apply to prison disciplinary proceedings. Garrity v. Fiedler, 41 F.3d 1150, 1151-52 (7th Cir.1994). Accordingly, I am dismissing this claim for plaintiff's failure to state a claim upon which relief may be granted.

Plaintiff's claim under the doctrine of collateral estoppel fails as well. Collateral estoppel and res judicata (also called issue preclusion and claim preclusion) are doctrines in *litigation* that prevent a party under certain circumstances from litigating the same issue or claim multiple times. For example, the doctrine applies when a court has entered a judgment that resolved the issue or claim on the merits. Czarniecki v. City of Chicago, 633 F.3d 545, 549 (7th Cir. 2011); King v. Burlington Northern & Santa Fe Ry. Co., 538 F.3d 814, 818 (7th Cir. 2008). The doctrine does not apply in the context of prison disciplinary proceedings.

3. Differences between second and third conduct report

Plaintiff alleges that his third conduct report was an "altered and doctored copy" of the original conduct report because "multiple items" from the original were "whited out." Cpt ¶ 13, dkt. #1. Plaintiff does not identify what was omitted from the new conduct report, but he seems to believe that the changes rendered the new conduct report invalid.

Regardless whether defendants' conduct may have violated prison rules, I am aware of no provision of federal law that would prohibit prison officials from changing a conduct report and plaintiff does not cite such a law. Accordingly, I am dismissing this claim for plaintiff's failure to state a claim upon which relief may be granted.

C. Other Alleged Retaliation

Plaintiff discusses four other types of retaliation that he allegedly suffered: (1) defendants Tim Malchow and B. Schmidt "stalked" him while he was at the prison law library and then subjected him to a pat down and search of his cell and property because of plaintiff's grievance about "temporary lock-up pay"; (2) defendant Arndt searched his "area" four times in four days because of the same grievance; (3) defendant Corey Sabish transferred him to the unit where defendant Schmidt worked and placed him in the same cell as a "known sexual predator" because plaintiff asked Sabish not to house him near Schmidt; and (4) defendant Schmidt refused to allow him to use the bathroom on one occasion when he needed to urinate because Schmidt found out that plaintiff had asked Sabish not to house him near Schmidt.

1. Searches

Plaintiff does not identify any reason why defendants Schmidt, Malchow and Arndt would want to retaliate against him. He does not allege that he had filed any grievances that had anything to do with them at the time of the alleged retaliation or even that they knew

about grievances he had filed. Regardless whether it is plausible to infer at the pleading stage that defendants had a retaliatory motive, I conclude that plaintiff has failed to state a claim upon which relief may be granted because a person of ordinary firmness in plaintiff's circumstances would not be deterred by defendants' alleged conduct.

Courts in this circuit and others have held consistently that cell searches are not sufficiently adverse on their own to sustain a retaliation claim under the First Amendment. Phelan v. Thomas, No. 9:10-CV-11 (GLS/DJS), 2017 WL 519246, at *3 (N.D.N.Y. Feb. 8, 2017) ("Adverse action, as it relates to a retaliatory cell search, requires more than a search alone. Indeed, the plaintiff must demonstrate a search and 'other wrongful conduct,' such as the destruction or confiscation of property."); Holder v. Marberry, No. 2:10-CV-36-JMS-DKL, 2011 WL 4729914, at *5 (S.D. Ind. Oct. 6, 2011) ("Quite simply, the search of Holder's cell and the confiscation of contraband would not be an activity that would be of sufficient severity to deter a person of ordinary firmness from exercising his rights, especially in light of the lack of expectation of privacy in his cell and the lack of any right to contraband."). Accord Dorsey v. Fisher, 468 F. App'x 25, 27 (2d Cir. 2012) ("[A]llegations that [the defendant] ordered or otherwise conducted two searches of [the plaintiff's] cell and two searches of his person over a six-month period are insufficient to show adverse action."); Pope v. Bernard, No. 10-1443, 2011 WL 478055, at *2 (1st Cir. Feb. 10, 2011) (alleged retaliatory search of plaintiff's cell was "de minimis" because "he had no privacy expectations in his cell"); Shariff v. Poole, 689 F. Supp. 2d 470, 481 (W.D.N.Y. 2010) ("[A] cell search is not considered to be actionable under § 1983, regardless of any

retaliatory motives.").

One reason for this conclusion is that prisoners have no reasonable expectation of privacy in their cells, Hudson v. Palmer, 468 U.S. 517, 530 (1984), so prisoners can be subject to cell searches at any time with out any notice or particular justification. In that context, a cell search cannot be viewed as unusually intrusive or intimidating, at least in situations like that alleged by plaintiff in which the defendants did not destroy, damage or confiscate any of his property. Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (cell search resulting in destruction of property may be sufficiently adverse to support retaliation claim).

Plaintiff alleges that one of the cell searches was accompanied by a pat down and preceded by defendants "stalking" him at the prison law library. Like cell searches, being observed, followed and patted down by staff are ordinary incidents of prison life, so those allegations add little to plaintiff's claim. Particularly because he alleges that the conduct occurred only once and he does not allege that the pat down search was conducted in an abusive or humiliating manner, I conclude that the alleged conduct does not state a claim for retaliation.

2. Transfer

Plaintiff alleges that defendant Sabish transferred him to a different unit, not because plaintiff filed a grievance, but because he specifically asked Sabish *not* to transfer him to a unit where defendant Schmidt worked. Prisoner speech may be protected by the First

Amendment even if it is not included in a grievance and even if it does not relate to a matter of public concern. Watkins v. Kasper, 599 F.3d 791, 795-96 (7th Cir. 2010) ("[T]he public concern test developed in the public employment context has no application to prisoners' First Amendment claims."). But see Herron v. Meyer, 820 F.3d 860, 863-64 (7th Cir. 2016) (questioning why "public concern" requirement does not apply in prison context). Accordingly, it is reasonable to infer at this stage of the proceedings that plaintiff's request was protected speech.

It is questionable whether plaintiff had any right to avoid being placed near defendant Schmidt. At the time of the transfer, the only alleged conduct Schmidt had taken against plaintiff was the pat down, cell search and "stalking" in the law library, so Sabish would have had little reason to believe that Schmidt posed a danger to plaintiff. However, I need not decide that issue because plaintiff has stated a claim under both the First Amendment and the Eighth Amendment with his allegation that Sabish intentionally transferred him to a cell with a known sexual predator, even though Sabish knew that plaintiff had been the victim of a previous sexual assault.

As to the First Amendment, it is reasonable to infer at the pleading stage that being placed in a cell with someone who is likely to assault his cell mate would deter a person of ordinary firmness from exercising his rights. As to the Eighth Amendment, an official may not knowingly expose a prisoner to a substantial risk of serious harm without taking reasonable measures to protect the prisoner. Farmer v. Brennan, 511 U.S. 825, 831, 845–47 (1994). Although plaintiff admits that he was transferred out of the cell before any

assault occurred, a prisoner may state a claim under the Eighth Amendment even if the prisoner is not physically injured. Devbrow v. Kalu, 705 F.3d 765, 769 (7th Cir. 2013) ("[A] prisoner may obtain nominal damages for an Eighth Amendment deliberate-indifference violation in the absence of a compensable physical injury;."); Smith v. Peters, 631 F.3d 418, 420-21 (7th Cir. 2011) ("Prison officials who recklessly expose a prisoner to a substantial risk of a serious physical injury violate his Eighth Amendment rights."). See also Turner v. Pollard, 564 F. App'x 234, 239 (7th Cir. 2014) (prison official may violate Eighth Amendment if he "deliberately endanger[s]" prisoner's safety, even if harm does not materialize).

Plaintiff also cites the Prison Rape Elimination Act in his complaint, but that Act "does not give prisoners a personal right to sue for an official's failure to comply with the Act's requirements." Garness v. Wisconsin Dept. of Corrections, No. 15-cv-787-bbc, 2016 WL 426611, at *2 (W.D. Wis. Feb. 3, 2016). See also Ross v. Gossett, No. 15-CV-309-SMY-PMF, 2016 WL 335991, at *4 (S.D. Ill. Jan. 28, 2016) ("[N]o court that has considered the issue has found that a private right of action exists under [PREA]."). Accordingly, I cannot allow plaintiff to proceed on a claim under PREA.

3. Using the bathroom

Plaintiff alleges that, on one occasion, defendant Schmidt refused to allow him to use the bathroom because Schmidt found out that he had asked not to be housed near Schmidt. Plaintiff does not allege that he suffered any health consequences because of this conduct or

that he was otherwise subjected to a risk of serious harm. Accordingly, I conclude that Schmidt's conduct would not deter a person of ordinary firmness from exercising his rights, so this allegation does not state a claim upon which may be granted.

D. Process at Disciplinary Hearing

Plaintiff says that defendants Redeker and Henning violated his right to due process by failing to comply with all of the requirements set forth in Wolff v. McDonnell, 418 U.S. 539 (1974), at his disciplinary hearing. One problem with this claim is that plaintiff fails to describe the alleged failures. The only example he gives is that he was not permitted to call the witnesses he wanted, but he does not explain how those witnesses could have made a difference to the hearing. Pannell v. McBride, 306 F.3d 499, 503 (7th Cir. 2002) ("[P]risoners do not have the right to call witnesses whose testimony would be irrelevant, repetitive, or unnecessary.").

I need not give plaintiff an opportunity to replead this claim because it has a more fundamental problem, which is that the due process clause simply does not apply to the discipline that he received. The Constitution requires the government to provide certain process only when an individual is deprived of a "liberty interest" or "property interest" within the meaning of the due process clause. Abcarian v. McDonald, 617 F.3d 931, 941 (7th Cir. 2010). A prisoner is not entitled to process under the Constitution in all instances in which he is disciplined.

In Wolff, 418 U.S. 539, the prisoners were deprived of a liberty interest because they

lost good time credits. Although plaintiff does not identify in the body of his complaint the discipline he received, he attaches the disciplinary decision, dkt. #1-15, which shows that he received 60 days in segregation, along with a requirement to repay the medical expenses incurred because of his alleged intoxication. He did not lose any good time.

A requirement to pay for one's own medical care is not a governmental deprivation of property. If it were, any public health provider would have to provide a hearing to a patient before sending him the bill.

Placement in segregation restricts a prisoner's ability to move throughout out the prison, but the Supreme Court has held that short-term placement in segregation generally does not qualify as a deprivation of liberty within the meaning of the due process clause. Sandin v. Conner, 515 U.S. 472, 486 (1995) (short-term placements in segregation do "not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," triggering the protections of the due process clause). Although the prisoner in Sandin was in segregation for only 30 days, the Court of Appeals for the Seventh Circuit has extended the rule in Sandin to cover terms of segregation of up to three months. Townsend v. Fuchs, 522 F.3d 765, 766 (7th Cir. 2008) (two months); Hoskins v. Lenear, 395 F.3d 372, 374 (7th Cir. 2005) (two months); Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005) (three months); Thomas v. Ramos, 130 F.3d 754, 761 (7th Cir. 1998) (approximately 70 days). In more recent cases the court of appeals has emphasized that a court must consider both the length of confinement and the severity of conditions, e.g., Marion v. Columbia Correctional Institution, 559 F.3d 693, 698 (7th Cir. 2009), but

plaintiff does not allege that his conditions of segregation were "unusually harsh." id. at 697-98, so he has not plausibly alleged that he suffered a deprivation of liberty that triggered the protections of the due process clause.

Even if I assume that plaintiff was deprived of a liberty interest, he has not alleged that he was denied any process that he was due. In circumstances in which placement in segregation implicates the due process clause, a prisoner is entitled to notice of the reasons for the placement and an adequate opportunity to present his views to the official (or officials) who will decide whether to transfer him. Westefer v. Neal, 682 F.3d 679, 683-84 (7th Cir. 2012); Williams v. Brown, No. 17-cv-11-bbc, 2017 WL 782958, at *3 (W.D. Wis. Feb. 28, 2017). A prisoner in that situation is not entitled to a "full-blown hearing," the right to call witnesses, a written decision of reasons for the transfer, or even an appeal procedure. Westefer, 682 F.3d at 685-86. Plaintiff has not stated a claim upon which relief may be granted under this standard because his own allegations show that he had notice of the charges, the reasons he was being disciplined, and an opportunity to argue that he should not be found guilty.

E. Mishandling Grievances

Plaintiff alleges throughout his complaint that numerous prison officials mishandled his many grievances by refusing to consider them for procedural reasons, refusing to conduct investigations or denying the grievances on the merits. Plaintiff says that defendants' conduct has "denied [him] use of the Inmate Complaint Review System."

These allegations do not state a claim upon which relief may be granted. The Constitution does not require prisons to enact grievance procedures or to handle grievances in a particular way. Kervin v. Barnes, 787 F.3d 833, 835 (7th Cir. 2015) ("[T]he inadequacies of the grievance procedure itself . . . cannot form the basis for a constitutional claim."); Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of Owens's grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). If a prison official's misconduct prevents a prisoner from completing the grievance process, then the prisoner may be excused from the requirement in 42 U.S.C. § 1997e(a) to exhaust his administrative remedies, Kervin, 787 F.3d at 835, but that is not an issue that the court considers in a screening order. If defendants later seek dismissal of any of plaintiff's claims under § 1997e(a), plaintiff is free to raise any relevant arguments about the grievance process at that time.

F. Administrative Appeal of Disciplinary Decision

Plaintiff alleges that defendants Mike Green (the security director of the Wisconsin Correctional Center System) and Peter Jaeger (the superintendent of the John Burden facility) reviewed administrative appeals of the disciplinary decision, but they "ignore[d]" a "procedural error" and declined to overturn the decision. Plaintiff does not identify what the procedural error was, but it does not matter. As noted above, plaintiff has not stated a

claim under the due process clause and he cannot raise claims under the state disciplinary regulations in this court, so any procedural error in the decision could not provide the basis for a claim in this court.

G. Custody Classification

At the end of his complaint, under the heading "Fourth Cause of Action," plaintiff includes the following sentences: "As a result of the expungement of the conduct report on June 27, 2016, the inmate's program review action on April 6, 2016 is null and void as it was part of the disposition. Due to the above the inmate is still being housed illegally in the wrong custody level." I understand plaintiff to be contending that prison officials are violating his constitutional rights by refusing to place him in a less restrictive custody level.

Plaintiff does not identify *which* defendants are responsible for his custody level, but it is not necessary to give him an opportunity to amend his complaint because this claim has a more fundamental problem. In particular, a prisoner does not have a right under the due process clause to a particular custody designation. Moody v. Dhin aggett, 429 U.S. 78, 88 n.9 (1976). See also Meachum v. Fano, 427 U.S. 215, 224 (1976) (no due process right to avoid transfer from medium security prison to maximum security prison). Again, it may be that prison officials violated internal policies or state regulations, but plaintiff cannot rely on those to provide a cause of action in federal court.

H. "Motion for Sanctions and Emergency Injunction"

After plaintiff filed his complaint, he filed a separate motion in which he alleged that defendant Schmidt told him on one occasion that he "could not wear his shower shoes to the restroom." Dkt. #8 at 1. When plaintiff protested, Schmidt allegedly stated that, if he found plaintiff helping another prisoner do legal work, Schmidt would confiscate the documents. Plaintiff alleges that Schmidt took these actions because of this lawsuit. He asks the court to issue an "immediate injunction" that Schmidt be prevented from having any contact with him, that other officials be required "to stop turning a blind eye" to Schmidt's conduct, that Schmidt be warned that he could be criminally prosecuted and that Schmidt be transferred to a new post.

The allegations in plaintiff's motion do not come anywhere close to justifying the extraordinary relief he has requested. If it is true that defendant Schmidt violated prison policy by refusing to allow plaintiff on one occasion to wear his shower shoes to the bathroom, that is a matter to be resolved within the prison. Plaintiff does not say whether Schmidt required him to wear a different type of shoe or to go barefoot, but he does not allege that Schmidt's conduct subjected him to unsanitary conditions or harmed him in any way.

As to Schmidt's alleged threat, plaintiff does not allege that Schmidt has interfered with this lawsuit or even *threatened* to interfere in this lawsuit. If Schmidt interferes with *another* prisoner's legal work in the future, *that* prisoner can raise the matter with prison officials or with the courts. However, that issue is outside the scope of this case.

If plaintiff wishes to seek preliminary injunctive relief in the future, he must comply with this court's procedures for obtaining such relief, which I have attached to this order.

ORDER

IT IS ORDERED that

1. Plaintiff John Delacruz is GRANTED leave to proceed on the following claims:

(1) defendants Andrew Kohlhoff, Quala Champagne, Tom Pollard and Chad Engebregtsen retaliated against plaintiff for filing a grievance by approving a "duplicate" conduct report after an earlier conduct report had been expunged, in violation of the First Amendment;

(2) after the "duplicate" conduct report was "rescinded," defendant Champagne approved a third conduct report for the same alleged misconduct because of plaintiff's grievances, in violation of the First Amendment; and

(3) defendant Corey Sabish transferred plaintiff to a cell with a "known sexual predator" because plaintiff asked Sabish not to house him near defendant Schmidt, in violation of the First Amendment and the Eighth Amendment.

2. All other claims are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to defendants Richard Schneiter, Jon Litscher, Tim Malchow, B. Schmidt, CO II Arndt, Kelly Salinas, Peter Jaeger, Captain Redeker, R. Trinrud, Stephanie Henning, Mike Green and J. Perttu.

3. 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. 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.

4. Once the defendants answer the complaint, the clerk of court will set a telephone conference before Magistrate Judge Stephen Crocker. At the conference, Magistrate Judge Crocker will set a schedule for the case.

5. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless he shows on the court's copy that he has sent a copy to defendants or their attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are

unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 29th day of March, 2017.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge