IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER,

OPINION AND ORDER

Plaintiff,

00-C-0350-C

v.

DANIEL R. BERTRAND, JEFFREY JAEGER,
MICHAEL DELVAUX, LAURIE WEIER,
WENDY BRUNS and JENNIFER VOELKEL,

Defendants.

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This is a civil action for monetary, injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Tony Walker, a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, is proceeding on three claims of retaliation for exercising his constitutional right of free speech and access to the courts: (1) defendants Laurie Weier and Wendy Bruns disciplined him for criticizing Bruns in an inmate complaint; (2) defendants Jeffrey Jaeger, Michael Delvaux and Jennifer Voelkel disciplined him for criticizing Voelkel in a letter to Jaeger; (3) defendant Bertrand denied him out-of-cell exercise because he used the prison law library.

Defendants have filed a motion for summary judgment on all of plaintiff's claims.

They advance several reasons why they are entitled to judgment as a matter of law: (1) plaintiff failed to exhaust his administrative remedies; (2) plaintiff should have brought his claims in a petition for habeas corpus rather than an action under § 1983; (3) no reasonable jury could find that defendants retaliated against plaintiff for exercising his constitutional rights; (4) defendants are entitled to judicial immunity; and (5) defendants are entitled to qualified immunity.

Plaintiff has not responded to defendants' motion, even though plaintiff was instructed on the procedures for opposing a motion for summary judgment in the March 4, 2003 preliminary pretrial conference order and in the briefing schedule for summary judgment, which was mailed to plaintiff on May 12, 2003. Although plaintiff has failed to oppose defendants' motion, I must still determine whether the undisputed facts show that defendants are entitled to summary judgment. Doe v. Cunningham, 30 F.3d 879, 883 (7th Cir. 1994).

First, I disagree with defendants that plaintiff should have brought his claims in a petition for a writ of habeas corpus because plaintiff is not challenging the fact or length of his confinement. Second, With respect to plaintiff's claim that defendants retaliated against him for criticizing defendant Bruns, I conclude that he failed to exhaust his administrative remedies. Third, I conclude that there are no facts showing that defendant Bertrand did not retaliate against plaintiff for exercising his right of access to courts. Fourth, I conclude that

defendants' decision to discipline plaintiff for making threats and showing disrespect to defendant Voelkel was reasonably related to a legitimate penological interest. Accordingly, I will grant defendants' motion for summary judgment. It is unnecessary to decide whether defendants are entitled to immunity.

From defendants' proposed findings of fact and the record, I find that the following material facts are undisputed.

UNDISPUTED FACTS

Plaintiff Tony Walker is an inmate in the Wisconsin prison system; the events he challenges occurred while he was incarcerated at the Green Bay Correctional Institution in Green Bay, Wisconsin. Defendant Daniel Bertrand is warden of the prison. Defendant Jeffrey Jaeger was a security director. Defendants Michael Delvaux and Laurie Weier are supervising officers. Defendant Wendy Bruns is an inmate complaint examiner. Defendant Jennifer Voelkel was a correctional officer.

In September 1999, defendant Bruns received a letter from plaintiff that she considered to be disrespectful and derogatory. She issued a conduct report to plaintiff for violating Wis. Admin. Code § DOC 303.25, which prohibits "expressions of disrespect for authority." Defendant Jaeger concurred with Bruns's determination and a hearing was held before defendant Weier, who found plaintiff guilty and sentenced him to 30 days of building

confinement. Plaintiff appealed the decision and defendant Bertrand reversed Weier's decision because plaintiff's letter was not "made public."

On September 24, 1999, plaintiff filed inmate complaint number GBCI-1999-58417, complaining that defendant Bruns and Weier had punished him improperly. The inmate complaint examiner dismissed the complaint because defendant Bertrand had already reversed the finding of guilt. Defendant appealed the decision to defendant Bertrand, who affirmed the dismissal. Defendant did not appeal to the corrections complaint examiner or the office of the secretary.

On January 1, 2000, plaintiff wrote a letter to defendant Jaeger regarding defendant Voelkel:

> Yeah, yeah I know, that damn Walker again. Well relax, I'm on something personal at this moment. Your officer has caused me one too many headaches and something has to be done about this. Now you already know whom and what I am and if you punch in the right numbers on your computer, you'll also see how many times I've 1) had officers dealt with; 2) dealt with officers myself; and 3) sent the whole joint up when I got mad. I told you before that I'm not here to kick it off at all, I am trying to change my life and now I don't feel like changing anything because of your officers' actions and attitude. So if I want to become a positive individual, I have to get another ignorant officer out of my face, or rather, my sight, and that means I'll have to speak with you and this officer in your office before she says something really off the wall, and I kind of hope she does. Anyways, I want everything said in that office recorded for my personal records and, since your position allows you to administer lie detector test[s] with local law enforcement agencies, I'll take one. Believe me, I have a lot to say. If you don't take care of this by Wednesday, in the oh so tough words of your officer, "oh well."

Defendant noted on the bottom of the letter that he had given a copy to defendant Voelkel.

On the same day, defendant Voelkel received the letter from another inmate, who stated, "This guy wanted me to give this to you." After reading the letter, defendant Voelkel issued a conduct report to plaintiff under Wis. Admin. Code § 303.16 for making threats and under Wis. Admin. Code § 303.25 for showing disrespect. After reviewing plaintiff's letter, defendant Jaeger determined that plaintiff's conduct met the criteria for a "major offense" under Wis. Admin. Code § DOC 303.76. After a hearing, defendant Delvaux found plaintiff guilty of both making threats and showing disrespect. As reasons for his decision, Delvauz wrote:

> Considered inmate statement (both oral and written) and reviewed evidence (letter). Inmate does admit he wrote the letter, the wording of the letter leads me to conclude that his intentions were meant to physically harm or harass the officer, i.e., 'dealt with officers myself' & 'sent the whole joint up when I got mad' and 'if you don't take care of this by Wed. . . .' It is more than likely they are implied threats and thus he is guilty of 303.16. He admits to calling the officer an 'ignorant officer.' This is a disrespectful remark. It is more than likely meant this way and thus he is guilty of 303.25. The letter was not an official grievance and was made public when he gave it to another inmate to give to ofc.

Delvaux sentenced plaintiff to five days of adjustment segregation and 180 days of program segregation. Defendant Bertrand affirmed the decision.

On January 14, 2000, plaintiff filed inmate complaint number GBCI-2000-2424, in which he wrote that the law prohibited "Jennifer Voelkel," the "security director," and the "hearing officer" from punishing him for filing a grievance. He described in detail the events

leading up to the finding of guilt.

On April 25, 2000, plaintiff filed inmate complaint number GBCI-2000-11924, in which he alleged that he was being denied outdoor exercise because he "went to legal recreation." The inmate complaint examiner recommended that the complaint be dismissed, writing:

> The Seg Unit Handbook states that inmates use the law collection during their rec times. The Unit Manager, Mrs. Hallet, indicated to the ICE that inmates are permitted 4 hours per week out of cell as leisure time activity, which includes recreation and law library use. She further stated that if inmate Walker has a pending court case or court deadline, additional law library time can be requested by writing to her.

In June 2000, plaintiff filed a lawsuit in this court, in which he asserted several claims: Tommy Thompson conspired to keep him and other prisoners in prison past their mandatory release dates in violation of the Eighth and Fourteenth Amendments; (2) he was retaliated against in violation of the First Amendment for utilizing the inmate complaint system; (3) his placement in solitary confinement without the advice of a physician violated Wis. Stat. § 302.10; (4) the constant light in his cell violated his right to be free of cruel and unusual punishment protected by the Eighth Amendment; (5) his inability to exercise outdoors during bad weather violated his rights under the Eighth Amendment because there were no indoor exercise facilities; and (6) defendants violated the Eighth Amendment by forcing him to give up out of cell recreation because of his use of the law library. In an

opinion and order dated August 7, 2000, I denied plaintiff leave to proceed on all of his claims and dismissed the case. Plaintiff appealed and the Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002). The court concluded that plaintiff had stated a claim upon which relief could be granted with respect to his claims that (1) defendant Daniel Bertrand "denied [him] out-of-cell exercise *because* he had exercised his constitutional right to seek access to the courts" (that is, "defendants took away from him time that he could otherwise have spent exercising *without* giving up library time") and (2) defendants Wendy Bruns, Laurie Weier, Jennifer Voelkel, Michael Delvaux and Jeffrey Jaeger retaliated against him for filing grievances complaining about prison conditions.

OPINION

A. Availability of Relief under § 1983

The first issue I must address is whether plaintiff may proceed under 42 U.S.C. § 1983. Relying on Heck v. Humphrey, 477 U.S. 512 (1994), defendants argue that plaintiff should have brought a petition for a writ of habeas corpus under 28 U.S.C. § 2254 "because his liberty-based claims against them were not vindicated." I disagree. I note first that plaintiff is not proceeding on a claim that defendants deprived him of a "liberty interest" without due process of law. Rather, he alleges that defendants retaliated against him for

filing complaints and complaining about prison conditions. More important, as defendants acknowledge in their own brief, Heck requires prisoners to bring claims under § 2254 only when they are challenging the fact or duration of their confinement. In the context of prison disciplinary proceedings, the rule of Heck applies only when the sanction affects the prisoner's length of confinement such as when he loses good time credits. DeWalt v. Carter, 224 F.3d 607, 616-17 (7th Cir. 2000). In this case, plaintiff was sentenced to segregation; there is no evidence that the length of plaintiff's sentence was extended. Accordingly, plaintiff was correct in filing a civil action under § 1983 rather a petition for a writ of habeas corpus under § 2254.

B. Exhaustion of Administrative Remedies

In Perez v. Wisconsin Department of Corrections, 182 F.3d 532 (7th Cir. 1999), the court held that when a defendant in a prisoner's civil rights suit asserts the affirmative defense of failure to exhaust administrative remedies, a district court must first consider that defense before addressing the merits of the case. Defendants argue that plaintiff failed to administratively exhaust each of his claims.

With respect to plaintiff's claim that he was retaliated against for criticizing defendant Bruns, the facts show that plaintiff did not appeal the dismissal of his complaint to the corrections complaint examiner as required by Wis. Admin. § DOC 310.13. Because

plaintiff failed to follow the prison's procedural requirements for administration exhaustion, this claim must be dismissed. Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

With respect to plaintiff's claim against defendants Jaeger, Devaux and Voelkel, defendants concede that plaintiff exhausted his administrative remedies as to Voelkel. However, they argue that he has not exhausted his claims against Jaeger and Delvaux because he did not identify them by name in his inmate complaint. Instead, he referred to them by their titles, "hearing officer" and "security director." I disagree with defendants that this was insufficient. Defendants point to no regulation that requires an inmate to identify officials by name in a complaint. "When the administrative rulebook is silent, a grievance suffices if it alerts the prison to *the nature of the wrong* for which redress is sought." Strong v. David, 297 F.3d 646, 650 (7th Cir. 2003) (emphasis added). Plaintiff identified the nature of the wrong in his complaint: the conduct report he received. He also gave sufficient notice regarding the subjects of his grievance. Defendants cannot argue successfully that they could not discern which hearing officer and security director plaintiff was referring to in his complaint. Plaintiff provided more than enough context in his complaint for defendants to be put on notice to whom the complaint was directed.

Defendants do not argue that plaintiff failed to appeal the inmate complaint examiner's decision to each of the appropriate reviewing authorities. Therefore, I conclude that plaintiff successfully completed the administrative exhaustion requirements with respect

to his claim against defendants Jaeger, Delvaux and Voelkel.

Finally, defendants argue that plaintiff has failed to administratively exhaust his claim against defendant Bertrand because he did not name Bertrand in the inmate complaint and he did not allege that he had been denied recreation for retaliatory reasons. (Again, defendants do not argue that plaintiff failed to appeal the inmate complaint examiner's decision.) I disagree with defendants that plaintiff's inmate complaint was insufficient. Plaintiff identified the nature of the wrong he was challenging and he stated that he believed he was being denied exercise "because" he had used the law library. Plaintiff did not need to use the magic word "retaliation" to provide sufficient notice of the nature of his grievance. Accordingly, I conclude that plaintiff has exhausted his administrative remedies with respect to this claim.

C. Retaliation

Two of plaintiff's retaliation claims remain. First is plaintiff's claim that respondent Bertrand denied him recreation because he exercised his right of access to courts. In concluding that plaintiff had stated a claim, the court of appeals emphasized that it would be insufficient for plaintiff to show that he was "forced to choose between use of the library and exercise. Anyone who has alternative uses for the same block of time is 'forced' to choose between them." Walker v. Thompson, 288 F.3d 1005, 1008 (7th Cir. 2002).

Rather, plaintiff was required to show that "defendants took away from him time he could otherwise have spent exercising *without* giving up library time." Id. Although the facts show that plaintiff may have been "forced to choose between use of the library and exercise," plaintiff has chosen not to advance any evidence to suggest that defendants *took away* recreation time from him because he exercised a constitutional right. Accordingly, defendants' motion for summary judgment must be granted with respect to this claim.

Plaintiff's second claim is that defendants Jaeger, Delvaux and Voelkel disciplined him for criticizing Voelkel in a letter to Jaeger. There is no dispute that defendants issued plaintiff a conduct report in response to the letter he wrote. However, there is no evidence to suggest the plaintiff was disciplined simply because he complained. Rather, the facts show that he received a conduct report because of the *way* he complained about defendant Voelkel.

Much of what plaintiff wrote is unobjectionable. For example, plaintiff wrote that he was "trying to change his life" and that he wanted "to become a positive individual." The focus of the letter was that he was unhappy with defendant Voelkel's behavior and he wanted to have a meeting with her and defendant Jaeger to resolve their problems. However, he did not limit himself to an expression of dissatisfaction with the way he was treated. He also told Jaeger to check how many times plaintiff had "officers dealt with," "dealt with officers myself" and "sent the whole joint up when I got mad." Defendants concluded reasonably that this language constituted a threat in violation of Wis. Admin. Code § DOC

303.16. Even assuming that this language is protected by the First Amendment, defendants have a legitimate penological interest in curbing language that could be reasonably perceived as a threat. See Turner v. Safley, 482 U.S. 78 (1987) (regulation that impinges on prisoner's First Amendment rights must be reasonably related to legitimate penological interest). Obviously, defendants have a legitimate interest in protecting the safety of their staff and of other prisoners and in maintaining order in the prison. The language in plaintiff's letter undermined both of these interests and justified defendants' decision to discipline him.

A much closer call is presented by defendant Delvaux's decision to find plaintiff guilty of "disrespect" under Wis. Admin. Code § DOC 303.25 because he referred to defendant Voelkel as an "ignorant officer." That provision provides:

> Any person who shows disrespect to any person is guilty of an offense, whether or not the subject of the disrespect is present and even if the expression of disrespect is in writing. Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, yelling. and other acts which are made outside the formal complaint process which are expressions of disrespect for authority.

Plaintiff's letter was not part of the official complaint process. Arguably, by calling Voelkel an "ignorant officer," he was engaging in name calling. Although plaintiff has a First Amendment right to complain about prison conditions and criticize prison officials, see Wainscot v. Henry, 315 F.3d 844, 852 (7th Cir. 2003), this right does not necessarily extend to including gratuitous insults in his letters. Outside prison walls, a regulation like § 303.25 would be unlikely to survive a First Amendment challenge. See, e.g., Cohen v.

California, 403 U.S. 15 (1971) (holding that conviction under beach of peace statute for wearing jacket bearing words "Fuck the Draft"violated First Amendment). However, as plaintiff is well aware, the rights of prisoners are more constrained than non-prisoners. Defendants do not have to show that their decision was narrowly tailored to further a compelling state interest, but only that the decision was reasonably related to a legitimate interest. Defendants have a legitimate interest in prohibiting inmates from verbally abusing others. Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986) ("We can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards and each other.") In addition, they have an interest in maintaining order by prohibiting inmates from sharing insults about prison staff with each other. Plaintiff undermined this interest when he showed the letter to at least one other inmate. Plaintiff could have gotten his point across without calling Voelkel ignorant. So long as the regulation is interpreted to apply only to *disrespect* and not mere *criticism,* plaintiff has sufficient alternative means of exercising his right of free speech. Therefore, I conclude that defendants have shown that their decision to discipline plaintiff was reasonably related to a legitimate penological purpose.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED. The

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

Entered this 28th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge