IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY CHARLES,

Plaintiff,

v.

SGT. REICHEL and
LT. PONTO,

Defendants.

OPINION AND
ORDER

01-C-276-C

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Plaintiff Jerry Charles is a Wisconsin prisoner presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendants Reichel and Ponto are employees of the Wisconsin Department of Corrections assigned to the Oshkosh Correctional Institution. Plaintiff contends that defendants retaliated against him for filing an inmate complaint alleging misconduct against defendant Reichel. Jurisdiction is present. 28 U.S.C. §§ 1331, 1343(a)(3).

Presently before the court are defendants' motion for summary judgment and plaintiff's motions for an extension of time in which to file a cross motion for summary

judgment; for "delay of judgment" pursuant to Fed. R. Civ. P. 56(f); and for appointment of counsel. Because I find that plaintiff failed to exhaust his administrative remedies as to defendant Ponto and cannot show that he would have been treated differently if he had not filed a grievance against defendant Reichel, defendants' motion for summary judgment will be granted. Plaintiff's motions will be denied.

An initial comment on plaintiff's responses to defendants' proposed findings of fact is necessary. On February 26, 2002, plaintiff filed responses to defendants' motion for summary judgment that were not in compliance with this court's procedures to be followed on motions for summary judgment. In particular, in a number of instances plaintiff failed to cite evidence in the record supporting his version of disputed facts. Further, where plaintiff did cite evidence, the purported evidence was questionable because it consisted of photocopies of affidavits rather than original affidavits. Plaintiff was granted an extension of time in which to cure the defects in his submissions. This came on top of the two enlargements of time plaintiff had already received in which to oppose defendants' summary judgment motion. Plaintiff has attempted to cure the defects in his submissions but has not been entirely successful. He has still not submitted the original copies of the affidavits he obtained from three of his fellow inmates. Instead, he has submitted his own affidavit in which he swears under penalty of perjury that the copies of the affidavits he submitted are true and correct. Ordinarily, I would find this procedure insufficient. In this case, however,

the accuracy of the affidavits is not critical to a decision on defendants' motion. I will assume that the averments are true. Plaintiff's larger problem is that he has never set out his version of the disputed facts in this case in his own sworn affidavit. This is true even though plaintiff was told that when disputing defendants' facts, he was to "state his own version of the fact[s], and cite to specific evidence in the record that supports his version of the fact[s]." Order entered February 27, 2002, dkt. #34, at 2. Rather, in his response to defendants' proposed findings of fact, petitioner cited frequently to defendants' affidavits. Plaintiff cannot dispute defendants' version of the facts by citing to the facts in defendants' own affidavits. Finally, when plaintiff cites the affidavits he submitted from fellow inmates, the affidavits do not always support the proposition for which he is citing them. Accordingly, the bulk of defendants' proposed findings of fact must be considered undisputed.

From the facts proposed by the parties, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Jerry Charles is an inmate who is currently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Defendant Lieutenant Vern Ponto is a supervising officer at Oshkosh Correctional Institution, responsible for insuring security, discipline and order at Oshkosh Correctional Institution. Among his duties are the

supervision of correctional officers and sergeants on assigned shifts; insuring the safety and security of staff, inmates and the public; conducting security and safety inspections of the institution; holding disciplinary hearings for inmates who receive conduct reports; and insuring that prejudice, unfairness and harassment of staff or inmates is not tolerated.

Defendant Sergeant Raymond D. Reichel is employed as the second shift sergeant in the P building at Oshkosh Correctional Institution. He is supervised by defendant Ponto. Defendant Reichel is responsible for insuring the security, custody, control and treatment of inmates at Oshkosh Correctional Institution. His duties include, among other things, searching and screening inmates' personal belongings and living quarters for contraband; watching for inmate behavioral problems for referral to appropriate staff; inspecting inmate quarters for violations of security; reporting orally to supervisors and disciplinary committees regarding inmates and incidents; and writing conduct and incident reports. Defendant Reichel assumes total responsibility for post operations in P building on his shift.

On February 21, 2001, corrections officer Traci Gagne wrote a conduct report charging plaintiff with disobeying orders, disruptive conduct and violations of institution policies and procedures, in violation of various sections of Wisconsin's administrative code. On March 1, 2001, defendant Reichel was on duty as the second shift supervising sergeant in P building at Oshkosh Correctional Institution. The second shift runs from 2:30 p.m. to 10:30 p.m. On the same day, defendant Ponto was on duty as the supervising line officer

at the prison. At some time during the afternoon of March 1, two inmates told defendant Reichel that plaintiff was circulating a petition among inmates, alleging an intimate relationship between Reichel and another corrections officer (apparently officer Gagne). Pursuant to Wis. Admin. Code § 303.20, titled "Group resistance and petitions," circulating a petition is an offense against institutional security under certain circumstances. Petitions are considered a major offense because they may lead to gang resistance, riots and violence.

When defendant Reichel learned from the two inmates about the alleged petition, he reported it to his supervisor, defendant Ponto, who told Reichel that he would take no action on the basis of inmate rumors, but that if the unidentified inmates submitted their allegations in writing he would have to look into them and take any appropriate action. At some time after the two inmates' first conversation with defendant Reichel, they approached Reichel again and gave him written documentation of their allegations in the form of "Interview Request Slips." At some time during the afternoon or early evening hours of March 1, 2001, defendant Reichel told defendant Ponto that the two inmates had given Reichel written information regarding their allegation. (There is no indication in defendants' proposed findings of fact or affidavits that defendant Ponto ever saw the interview request slips). At that time, defendants Reichel and Ponto discussed the alleged petition and the steps necessary to investigate and resolve the matter. Both were concerned about the allegations and the implications they held for prison security.

In the early evening hours of March 1, 2001, defendant Ponto was the P building hearing officer for minor conduct reports. At that time, he held a hearing on the conduct report that corrections officer Gagne had issued on February 21, 2001, regarding plaintiff. Defendant Ponto found plaintiff guilty of disruptive conduct and imposed a punishment of 10 days' building confinement. After the hearing, plaintiff told defendant Ponto that defendant Reichel was harassing him.

Defendant Ponto decided to place plaintiff in "Temporary Lock Up" while the allegations regarding the petition were investigated. Defendant Ponto also wanted to remove plaintiff from P building pending investigation of his complaints regarding defendant Reichel. At this time, defendant Ponto directed defendant Reichel to search plaintiff's cell for contraband or any document resembling a petition or pertaining to group resistance. Defendant Ponto also directed defendant Reichel to have plaintiff's property packed for transfer to the temporary lockup unit in accordance with prison policy and procedure. Defendant Ponto and another officer escorted plaintiff to W building where he was put into temporary lockup at approximately 7:39 p.m.

Defendant Reichel searched plaintiff's cell for contraband, petitions or any gang-related materials, but did not find any prohibited materials or documents resembling a petition. While defendant Reichel and a second officer were taking inventory of plaintiff's property in preparation for its transfer to the temporary lockup unit, the second officer

called defendant Reichel's attention to a copy of an inmate complaint written by plaintiff containing allegations against Reichel. The complaint, number OSCI 2001-6899, was signed by plaintiff on February 28, 2001, and alleged that defendant Reichel was harassing him with the help of "Staff C.O. Gacne" (I assume that this is a reference to Officer Gagne) and that Reichel and "Gacne" were having an intimate relationship. Plaintiff's complaint was dismissed on March 5, 2001. Afterwards, Lieutenant Ponto ordered plaintiff released from temporary lockup because of a lack of evidence to support the allegations of plaintiff's complaint. Plaintiff was not returned to P building upon his release, but was housed in a different building in the prison.

On March 6, 2001, plaintiff submitted offender complaint number OSCI 2001-7369 relating to a complaint against defendant Reichel for reading a copy of the institutional complaint plaintiff had prepared against defendant Reichel and Officer Gagne.

DISPUTED FACTS

Defendant Reichel maintains that he first became aware of plaintiff's offender complaint that alleged misconduct against him after plaintiff was sent to temporary lockup, when the complaint was brought to Reichel's attention by a fellow officer while they were inventorying plaintiff's property for shipment to the temporary lockup unit. Plaintiff asserts that earlier in the day, before he was sent to temporary lock up, he told two inmates in

defendant Reichel's presence that he was filing a complaint against Reichel for harassment and that he did so as he was preparing to drop the complaint in the box designated for such grievances in P building.

OPINION

Defendants argue that plaintiff did not exhaust his administrative remedies against defendant Ponto on his claim of retaliation and that in any event plaintiff's complaint fails to state a retaliation claim against defendant Ponto, that defendant Reichel did not retaliate against plaintiff and that defendants are entitled to qualified immunity.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

A. Defendant Ponto

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility

until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that the exhaustion requirement applies to retaliation claims, Smith v. Zachary, 255 F.3d 446, 450-52 (7th Cir. 2001), and that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The court of appeals has stated that "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey, 196 F.3d at 733. Wisconsin inmates must follow the administrative exhaustion procedure set out in Wis. Admin. Code § DOC 310.04, which provides that "[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310.12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14."

Defendants contend that plaintiff has not exhausted his administrative remedies as to defendant Ponto because the inmate complaint plaintiff filed on March 6, 2001, alleges retaliation against defendant Reichel, but not defendant Ponto. I agree that the complaint does not allege retaliation against defendant Ponto. The complete text of complaint number OSCI 2001-7369 reads as follows:

> Sgt. Reichel came and conducted a room search on 3-1-01 around 5:50 pm. I stood outside the door and observed everything that he searched. He came across 2 copies of 'ICI' that I filed previously. He read them and I immediately told James Perry in P-Bldg. Rm. #95 that he's reading copies of my ICI. Around 7:00 pm I was going on a minor ticket for 'doorway visiting' and Sgt. Reichel was called in the ticket hearing room and said that I was disruptive doing the 'doorway visiting.' After being found guilty I was placed in TLU for 'lying on staff' by Lt. Ponto. If he wouldn't never read my copies of the ICI I would not be TLU. Complaint system is suppose to be private.

If this complaint alleges retaliation at all, it alleges it against defendant Reichel, not defendant Ponto. The "he" in the next to last sentence is a clear reference to defendant Reichel. In other words, plaintiff alleges that if defendant Reichel had not read his inmate complaint, Reichel would not have seen plaintiff's allegation (regarding the intimate relationship between Reichel and another officer) that plaintiff believes formed the basis for his placement in temporary lockup on March 1, 2001. Even construed liberally, the complaint includes only one allegation involving defendant Ponto: that Ponto placed plaintiff in temporary lockup when he was informed of plaintiff's allegations regarding the intimate relationship. Plaintiff's offender complaint does not suggest, much less explain,

how this amounts to retaliation by defendant Ponto or what might have motivated Ponto to retaliate against plaintiff. Plaintiff points to the allegations in the institutional appeal he filed when his offender complaint was dismissed, a copy of which he attached to his summary judgment brief. See dkt. #29, at Ex. 6. However, the allegations in plaintiff's appeal are nearly identical to those contained in his offender complaint and provide no better basis for finding that plaintiff exhausted his administrative remedies against defendant Ponto.

I conclude that plaintiff failed to exhaust his administrative remedies against defendant Ponto before filing this suit. Accordingly plaintiff's claims against defendant Ponto will be dismissed. The dismissal will be without prejudice because the Wisconsin Administrative Code allows an inmate complaint investigator to accept a late complaint for good cause. Wis. Admin. Code § DOC 310.09(3). However, if plaintiff tries to exhaust his administrative remedies with respect to defendant Ponto by filing an inmate complaint against him involving the same allegations he has made in this lawsuit and the complaint examiner dismisses that complaint as untimely, then plaintiff will be barred from filing his claim again in this court.

Because plaintiff's claims against defendant Ponto will be dismissed for plaintiff's failure to exhaust his administrative remedies, I need not consider defendant Ponto's arguments that plaintiff's complaint fails to state a retaliation claim against him, that he did

not retaliate against plaintiff and that he is entitled to qualified immunity.

B. Defendant Reichel

Defendant Reichel argues that the undisputed facts establish that he did not retaliate against plaintiff and that in any case he is entitled to qualified immunity. A prison official who takes action against a prisoner in retaliation for the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); Babcock v. White, 102 F.3d 267, 274 (7th Cir. 1996). "Prisoners have a constitutional right of access to the courts that, by necessity, includes the right to pursue the administrative remedies that must be exhausted before a prisoner can seek relief in court. Thus, a prison official may not retaliate against a prisoner because that prisoner filed a grievance." DeWalt, 224 F.3d at 618 (citations omitted). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right or to survive a motion for summary judgment, plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred,'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)), rather than simply alleging the ultimate fact of retaliation. Benson, 761 F.2d at 342. Finally, "the ultimate question is whether events would have transpired differently absent the retaliatory motive." Babcock, 102 F.3d at 275. Because I conclude

that defendants' undisputed evidence shows that plaintiff would not have been treated any differently if plaintiff had never filed a grievance against defendant Reichel, defendants' motion for summary judgment will be granted.

1. Defendant Reichel's version of the facts

At some time during the afternoon of March 1, 2001, two inmates told defendant Reichel that plaintiff was circulating a petition among inmates alleging an intimate relationship between Reichel and another officer. When defendant Reichel learned from the two inmates about the alleged petition, he reported it to defendant Ponto, who told Reichel that he would take no action on the basis of inmate rumors but that if the unidentified inmates submitted their allegations in writing he would have to look into them and take appropriate action. Shortly thereafter the two inmates put their allegations in writing. During the afternoon or early evening hours of March 1, defendant Reichel told defendant Ponto that he now had written documentation regarding the petition allegations and the two discussed steps necessary to investigate and resolve the matter. Next, in the early evening, defendant Ponto, acting in his capacity as a hearing officer, held a hearing in P building on a conduct report plaintiff had received on February 21, 2001. After the hearing, plaintiff told defendant Ponto that defendant Reichel had been harassing him.

At this point, defendant Ponto decided to place plaintiff in temporary lockup while

investigating the allegations regarding the petition and plaintiff's allegations against defendant Reichel. Defendant Ponto then directed defendant Reichel to search plaintiff's cell for any document resembling a petition or pertaining to group resistance and to have plaintiff's property packed for transfer to the temporary lockup unit. Defendant Ponto and another officer escorted plaintiff to temporary lockup at approximately 7:39 p.m. When defendant Reichel searched plaintiff's cell he did not find any prohibited materials or documents resembling a petition, but later, while defendant Reichel and a second officer were taking inventory of plaintiff's property in preparation for transferring the property to the temporary lockup unit, the second officer called defendant Reichel's attention to a copy of an inmate complaint written by plaintiff containing allegations against Reichel and another officer. According to defendant Reichel, to the best of his recollection this was the first time he had seen a copy of plaintiff's inmate complaint that accused him of misconduct.

2. Plaintiff's version of the facts

Because plaintiff has not properly contested the bulk of defendants' proposed findings of fact, defendants' version of the facts must be considered largely undisputed. However, viewing the facts in the light most favorable to plaintiff, he has submitted evidence sufficient to create a factual dispute whether defendant Reichel had a motive to retaliate against him.

Defendant Reichel maintains that he first became aware of plaintiff's inmate complaint accusing him of misconduct *after* plaintiff had been sent to temporary lockup. However, plaintiff has submitted the affidavits of two inmates who aver that defendant Reichel was within hearing distance earlier in the day when plaintiff, on his way to deposit his complaints in the inmate complaint box, told the inmates that he was filing a complaint against defendant Reichel for harassment. Thus, it is disputed whether defendant Reichel knew that plaintiff had filed a grievance against him before plaintiff was placed in temporary lockup. This is important because plaintiff must establish a chronology of events from which retaliation can be inferred.

I note that plaintiff has been given the benefit of the doubt with regard to the viability of his fellow inmates' affidavits. First, the inmate affiants aver that the events described in their affidavits took place on March 2, 2001, while plaintiff has consistently alleged that the retaliatory conduct itself took place on March 1, 2001. If defendant Reichel learned of the complaint plaintiff filed against him on March 2, as the affidavits indicate, then his alleged retaliatory conduct, which took place on March 1, preceded his motive to retaliate. Second, the inmates' affidavits are not notarized. Rather, plaintiff has submitted a separate notarized affidavit in which *he* swears that the inmates' affidavits are "true and correct." Because plaintiff is proceeding pro se, I have overlooked these defects.

3. Retaliation

However, even assuming that plaintiff has successfully created a factual dispute as to whether defendant Reichel had a motive to retaliate against him, plaintiff's failure to point to proper evidence in the record supporting the rest of his account is fatal. Plaintiff must establish that "events would have transpired differently absent [defendant Reichel's] retaliatory motive." Babcock, 102 F.3d at 275. Here, plaintiff has presented no evidence suggesting that he would have been treated any differently if defendant Reichel had been left in the dark about the grievance plaintiff had filed against him or indeed if plaintiff had never filed a grievance against Reichel. Plaintiff has submitted no evidence that would support an inference that defendant Reichel lied about receiving information from two inmates regarding the alleged petition. For instance, plaintiff has not asserted that he never prepared a petition regarding defendant Reichel or that he never circulated one among his fellow inmates. Rather, plaintiff merely points out that defendants never found one. On the other hand, defendant Reichel has submitted a sworn affidavit attesting to the fact that he was told about the petition by two inmates, both verbally and in writing, and that these allegations prompted the chain of events that ended with petitioner being placed in temporary lockup. If defendant Reichel did receive such information, as the undisputed facts suggest, then it would be both logical and consistent with his job duties for him to report the information to his supervisor, defendant Ponto. In turn, defendant Ponto's decision to place plaintiff in

temporary lockup pending investigation of the petition allegations as well as plaintiff's harassment allegations against defendant Reichel would be equally logical and consistent.

If plaintiff is arguing that defendant Reichel decided to report the rumors he had heard about the alleged petition to defendant Ponto in order to get plaintiff in trouble, plaintiff has not suggested why defendant Reichel would not have reported information about an alleged violation of Department of Corrections rules to his supervisor. In short, plaintiff has submitted no evidence from which a jury could draw the conclusion that plaintiff would not have been placed in temporary lockup had he not filed a grievance against defendant Reichel on March 1, 2001. See id.; see also Smith v. Campbell, 250 F.3d 1032, 1038-39 (6th Cir. 2001) (defendants in retaliation suit entitled to prevail on summary judgment by showing same action would have been taken in absence of protected activity).

Finally, I note that in his complaint and brief, plaintiff has argued that defendant Reichel searched his cell *before* defendant Ponto came to P building to conduct hearings. This is significant because defendants' version of the facts is that Ponto ordered Reichel to search plaintiff's cell *after* the hearing. However, plaintiff has submitted no evidence supporting his version of events. Plaintiff has submitted the affidavit of inmate Antonio Ferguson, who avers that when he returned to P building from his work assignment on March 1, 2001, defendant Reichel was searching plaintiff's cell. However, the affidavit does not say when the cell search took place, making it impossible to know whether the search occurred before

defendant Ponto decided to place plaintiff in temporary lockup, as plaintiff alleges, or after that decision was made, as defendants contend.

Because plaintiff has failed to contest defendants' evidence showing that plaintiff would not have been treated any differently if plaintiff had never filed a grievance against defendant Reichel, his retaliation claim must fail. Accordingly, I need not consider defendant Reichel's qualified immunity defense.

C. Plaintiff's Motions for Extension of Time, Delay of Judgment and Appointment of Counsel

On March 18, 2002, plaintiff filed a motion for an extension of time in which to file a cross motion for summary judgment. Dkt. #37, at 1. Plaintiff's motion will be denied because defendants will be granted summary judgment on all of plaintiff's claims.

On March 29, 2002, plaintiff filed a "Motion for Delay of Judgment on Defendants Request for Summary Judgment Pursuant to Rule 56(f) F.R.C.P. & Motion for Appointment of Counsel." Dkt. #61, at 1. In support of his Rule 56(f) motion, plaintiff makes conclusory allegations about difficulties he has had with the prison librarian but does not specifically explain how these problems have prevented him from presenting factual affidavits or other materials in response to defendants' motion. Plaintiff's Rule 56(f) motion will be denied. Because defendants' motion for summary judgment is being granted on all of

plaintiff's claims, plaintiff's motion for appointment of counsel will also be denied.

ORDER

IT IS ORDERED that

1. Defendant Vern Ponto's and Raymond D. Reichel's motion for summary judgment will be GRANTED and plaintiff Jerry Charles's claims against defendant Reichel are dismissed with prejudice;

2. Plaintiff's claims against defendant Vern Ponto are dismissed without prejudice for plaintiff's failure to exhaust his administrative remedies as to defendant Ponto;

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 16th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge