IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TONY WALKER,
Inmate No. 0167841,

Plaintiff, ORDER

v. 01-C-095-C

DANIEL R. BERTRAND, PETER
ERICKSEN, PATRICK BRANT,
DENNIS NATZKE,

Defendants.

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This is a civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Tony Walker, who was an inmate at the Green Bay Correctional Institution, is proceeding on his claims that defendants retaliated against him for sending a letter to defendant Daniel Bertrand in which he complained about his cell assignment and for filing a lawsuit against defendant Bertrand and others.

Presently before the court is defendants' motion for summary judgment. Plaintiff has not responded to defendants' motion, even though plaintiff was instructed on the procedures for opposing a motion for summary judgment in the September 25, 2002 preliminary

pretrial conference order and in the briefing schedule for summary judgment, which was mailed to plaintiff on February 25, 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). Because I conclude that plaintiff has failed to adduce evidence that defendants retaliated against him for filing a lawsuit and because defendant's decision to discipline plaintiff for using threatening and disrespectful language was reasonably related to legitimate penological interests, I will grant defendants' motion for summary judgment.

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

UNDISPUTED FACTS

Plaintiff Tony Walker is presently confined at the Oshkosh Correctional Institution. From July 2, 1999, to December 10, 2002, he was confined at the Green Bay Correctional Institution. Defendant Daniel Bertrand is the warden at the Green Bay prison. Defendant Peter Ericksen is the security director. Defendants Dennis Natzke and Patrick Brant are supervising officers.

In 2000, plaintiff filed a lawsuit against defendant Bertrand and others, alleging that the defendants had violated his Eighth Amendment rights by failing to treat a back injury.

See Walker v. Zunker, case no. 00-C-281-C (W.D. Wis. 2000). Bertrand was served with plaintiff's summons and complaint on September 6, 2000. Defendants Ericksen, Natzke and Brant were not parties to that case and did not know it had been filed.

On October 27, 2000, plaintiff was moved to a different cell. In a letter to defendant Bertrand dated October 30, 2000, plaintiff complained about the noise in his new cell and asked to be transferred back to his previous unit. Defendant Bertand responded in writing the following day. Unsatisfied with Bertrand's response, plaintiff wrote him again in a letter dated November 2, 2000:

> Let me tell you something, I'm not dumb at all and you didn't listen to my complaints about my back pain and the uncomfortable conditions before, and now we're in court. In my complaint to you I said that I was moved to this cell hall Friday night – the 27th of October for no reason. I told you that I've had a continuous headache since I've been over here because these young hacks yell, scream and holler all day and half the night. They blast their radios at 1 and 2 o'clock in the morning. They call out game scores at 11 and 12 o'clock every night. HSU can't do shit about that!!! You said "housing assignments are decided on by security." Well why else did I write to you? You're the chief security officer of this gay ass institution. The last time I ever suffered migraines is when I was in segregation. There is hardly any noise in the back of the north cell hall. I wasn't yelling over the [illegible], causing any problems, or bothering anyone. They just moved me for the hell of it. Now you're right, you do make housing assignments and you've been informed of this problem. So either cure this foul condition by moving me back to the north away from these loud ass young punks or leave me here . . . . Common sense suggests that since my headaches are being caused by all the loud yelling, screaming and hollering in the south cell hall, the simplest way to solve the problem is to move me away from the damn noise. It only takes 5 minutes, but common sense is so hard to find in this joint. That's cool because if HSU don't do shit about it, and you don't do shit about it, I'm checking every last one of these faggots that make all the damn noise, and if one of them put their hands on me, I'll defend myself by all means necessary. Yeah

> you put me over here in retaliation for my lawsuit against you and your corrupt HSU crew. Well I have spoken.

Below his signature, plaintiff wrote:

> P.S. You also denied my Pabo catalog stating "the contents of this catalog are sexual in nature as the majority of items are devices for sexual pleasure." So damn what they have devices in the catalog!! If you knew how to read, you'd know that the damn rule describes nudity as "the showing of the human male or female" etc. DOC 309.02(14). That's your problem now – you don't follow your own rules. So the word for today is retirement. You should have been gone, laid down, off, fired and stroked a long ass time ago. I hope you hurry up and have that fatal accident on the way home.

Defendant Bertrand received the letter on November 6, 2002. After reading it, Bertrand referred it to defendant Brant for a determination whether plaintiff had violated the prison disciplinary code. Defendant Brant concluded that plaintiff had violated regulations prohibiting the making of threats and showing disrespect to any person. See Wis. Admin. Code §§ DOC 303.16 and 303.25. In the conduct report that he issued to plaintiff, defendant Brant wrote that plaintiff had shown disrespect by using the phrases "your corrupt HSU crew," "if you knew how to read," "[t]hat's your problem– you don't follow your own rules" and "you should have been gone, laid down, off, fired, and stroked a long ass time ago. I hope you hurry up and have that fatal accident on the way home soon." In addition, defendant Brant concluded that plaintiff made a threat by writing, "I'm going to be checking every last one of these young faggots that make all that damn noise and if one of them put their hands on me I'll defend myself by all means necessary."

Defendant Brant then forwarded the conduct report and the letter to defendant Ericksen pursuant to Wis. Admin. Code § DOC 303.67. Ericksen concluded that the conduct report should not be dismissed. In addition, because plaintiff had been found guilty previously of making threats and showing disrespect, defendant Erickson concluded that plaintiff's conduct should be treated as "major offenses."

After a hearing on November 27, 2002, defendant Natzke found plaintiff guilty of both making a threat and showing disrespect. In the written decision finding plaintiff guilty, defendant Natzke wrote: "Inmate is guilty of both charges based on contents of letter and I feel his threats are real and he is dangerous in general population by issuing threats to other inmates." Natzke sentenced plaintiff to five days of adjustment segregation and 180 days of program segregation because plaintiff had a poor disciplinary record, he had been found guilty of similar offenses in the past, he was aware that he was committing the offense at the time and he had a poor attitude toward the offense. Plaintiff appealed to defendant Bertrand, who affirmed defendant Natzke's decision.

OPINION

The issue in this case is not whether plaintiff received due process during the disciplinary proceedings or whether his punishment was disproportionate to his offense. Rather, the sole issue is whether defendants retaliated against plaintiff for exercising his

constitutional rights. A prison official who takes action against a prisoner to retaliate against the prisoner for exercising a constitutional right may be liable to the prisoner for damages. See Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The prisoner must prove that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275. In the context of defendants' motion for summary judgment, the court must determine whether there are any genuine issues of material fact, that is, whether a reasonable jury could find that defendants retaliated against plaintiff. Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir. 1995)(summary judgment is appropriate if court concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party").

A. Retaliation for Filing Lawsuit

With regard to the lawsuit that plaintiff filed against defendant Bertrand, defendants do not dispute that this conduct is protected by plaintiff's right of access to courts. See Tarpley v. Allen County, Indiana, 312 F.3d 895, 899 (7th Cir. 2002). However, I agree with defendants that there is insufficient evidence to permit a reasonable jury to find that defendants retaliated against plaintiff for filing the lawsuit. Although it is true that plaintiff was transferred to a different cell shortly after he filed his lawsuit, I question whether a

transfer from one cell to another without a corresponding loss of privileges constitutes "retaliation." See Pieczynski v. Duffy, 875 F.3d 1331 (7th Cir. 1989) (no claim for retaliation when defendant's conduct is "so trivial that a person of ordinary firmness would not be deterred from holding or expressing these beliefs").

Even assuming that the transfer was sufficiently severe, there are no facts showing who made the decision to transfer plaintiff. It is well established that liability under § 1983 must be based on the defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Id. Furthermore, even if it could be reasonably inferred that defendant Bertrand or one of the other defendants was involved in the decision, there are no facts suggesting that the transfer was made because plaintiff filed a lawsuit, with the exception that the transfer occurred less than two months after defendant Bertrand was served with a summons and complaint in plaintiff's earlier lawsuit. The closeness in time of the two events, without more, is not sufficient to create a genuine issue of material fact. Contreras v. Suncast Corp., 237 F.3d 756 (7th Cir. 2001) ("[A]bsent other evidence of retaliation, a temporal relation is insufficient evidence to survive summary judgment.")

Similarly, there are no facts showing that defendants placed plaintiff in segregation because of his lawsuit. Defendants Ericksen, Brant and Natzke did not even know that

plaintiff had filed a lawsuit against defendant Bertrand, so it cannot be reasonably inferred that they retaliated against him for this reason. Furthermore, the undisputed facts show that plaintiff was placed in segregation because of the language he used in his letter to defendant Bertrand. Defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants retaliated against him for filing a lawsuit against defendant Bertrand.

B. Retaliation for Complaining about Prison Conditions

With respect to the letter plaintiff wrote to defendant Bertrand, I have no difficulty in concluding that a complaint to a warden about prison conditions is protected by the right of free speech and to petition the government for redress of grievances under the First Amendment. See Wainscot v. Henry, 315 F.3d 844, 852 (7th Cir. 2003) (stating that retaliation for criticizing the government "runs counter to the most basic understandings of the First Amendment"). However, there are no facts showing that defendants disciplined plaintiff simply because he complained. Rather, the available evidence shows that plaintiff was issued a conduct report and sentenced to segregation because he used language in his letter that defendants viewed as violative of the DOC regulations because it was disrespectful and threatening. Thus, a preliminary question is whether a statement such as "I hope you hurry up and have that fatal accident" is protected by the First Amendment in the context

of a prison. See Shaw v. Murphy, 532 U.S. 223, 229 (2001) ("In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner.") It is unnecessary to make this determination, however. Even assuming that plaintiff's comments are protected speech, I cannot conclude that defendants violated plaintiff's First Amendment rights.

A conclusion that the First Amendment is implicated does not mean that defendants' actions are unconstitutional. In Turner v. Safley, 482 U.S. 78, 89 (1987), the Supreme Court held that a prison regulation that impinges on a prisoner's constitutional rights must be reasonably related to penological interests. The Court set forth four factors for courts to consider in evaluating whether this test is satisfied: (1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether the prisoner has available alternative means of exercising the right in question; (3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and (4) whether there are obvious, easy alternatives at a minimal cost.

In this case, defendants determined that the language in plaintiff's letter violated two prison regulations: Wis. Admin. Code §§ DOC 303.16 and 303.25. Wis. Admin. Code § DOC 303.16 prohibits inmates from "[c]ommunicat[ing] to another an intent to physically harm or harass that person or another." Defendants argue that threats "lead to intimidation of staff, inmates and visitors, as well as possible disruption, loss of control by staff and the

breakdown of authority." Dfts.' Prop. Find. of Fact ¶ 59, dkt. #24, at 14. This is a legitimate concern. Although plaintiff may not have meant to sound threatening when he wrote that he would be "checking" all the "faggots that make all that damn noise" and that he would "defend [him]self by all means necessary," it was reasonable for defendants to interpret it that way. Further, segregating plaintiff from the prison population was a reasonable way to prevent the perceived threat from occurring and to deter plaintiff from making similar threatening comments in the future.

Wis. Admin. Code § DOC 303.25 provides:

> Any inmate who overtly shows disrespect for any person performing his or her duty as an employee of the state of Wisconsin is guilty of an offense, whether or not the subject of the disrespect is present and even if the expression of the disrespect is in writing. Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, spitting, yelling, and other acts intended as public expressions of disrespect for authority and made to other inmates and staff. Disrespect does not include all oral or written criticism of staff members, criticism of them expressed through the mail, thoughts and attitudes critical of them, or activity in therapy groups.

Defendants argue that disrespectful behavior "can lead to the breakdown of authority and possibly a serious disturbance . . . . If the plaintiff were able to get away with the type of disrespect toward the warden set forth in his letter, other inmates may follow the plaintiff's lead resulting in widespread behavior, breakdown of authority and loss of control by staff." Dfts.' Prop. Find. of Fact ¶ 58, dkt. #24, at 14. This argument is not as strong in the context of "disrespectful" statements as it is with respect to threats, particularly when the

statement is included in a letter to a prison official that other inmates cannot see. At least one court has concluded that disciplining an inmate for using "hostile, sexual, abusive or threatening" language in a grievance was an "exaggerated response" to the need to maintain security and order. Bradley v. Hall, 64 F.3d 1276, 1281 (9th Cir. 1995). The Court of Appeals for the Seventh Circuit does not share this view, however. In Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986), the court held that prison officials did not violate an inmate's First Amendment rights when they disciplined him for sending a letter to the warden in which he called prison officers "stupid lazy assholes." The court stated: "We can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards and each other." Id. Following Ustrak, as I must, I conclude that the punishment plaintiff received has a valid, rational connection to the interest in maintaining order.

The second factor under Turner is also satisfied. Plaintiff has alternatives to exercising his First Amendment rights: he can make complaints without using disrespectful language. This is easily done so long as complaints of prisoners are not deemed to be "disrespectful" simply because they are *critical*. I note that the current version of Wis. Admin. Code § DOC 303.25 no longer includes the final sentence of the version of the regulation in effect when plaintiff was disciplined: "Disrespect does not include all oral or written criticism of staff members, criticism of them expressed through the mail, thoughts and attitudes critical of them, or activity in therapy." This is an unfortunate change. If all

criticism is considered disrespectful, then prisoners' ability to seek change within the prison becomes severely constrained and the relationship between the regulation and the need to maintain order is diminished if not extinguished. The result of this case might have been different if plaintiff had been disciplined solely for writing to defendant Bertrand, "you don't follow your own rules." Although prison officials must "remain the primary arbiters of the problems that arise in prison management," Shaw, 532 U.S. at 230, they cannot immunize themselves from legitimate dissent. In this case, however, it is clear that plaintiff's comments went well beyond criticism. Plaintiff was complaining about his cell assignment; wishing defendant Bertrand a "fatal accident" was not germane to the complaint. Thus, although an overly broad interpretation of Wis. Admin. Code § DOC 303.25 could create a constitutional concern, this concern is not implicated in plaintiff's case. He had ample alternatives to express his dissatisfaction without also expressing a wish for the warden's imminent death.

Having accepted defendants' rationale for their decision to discipline plaintiff, I must conclude that the third and fourth factors under Turner are satisfied. As defendants argue, allowing inmates to make threats and engage in name-calling could have negative effects on guards and inmates by increasing tension and undermining authority. Similarly, although defendants could choose not to discipline threatening and disrespectful behavior, they could not do so without risking their ability to maintain prison security and order.

Thus, I conclude that defendants' decision to discipline plaintiff was reasonably related to a legitimate penological interest. Defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Daniel Bertrand, Peter Ericksen, Patrick Brant and Dennis Natzke is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 1st day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge