IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERHARD WITTE, M.D.,

OPINION AND ORDER

Plaintiff,

03-C-0438-C

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, STEVEN B. CASPERSON, individually and in his official capacity, KENNETH R. MORGAN, individually and in his official capacity, JAMES GREER, individually and in his official capacity, DAVID E. BURNETT, M.D., individually and in his official capacity, EARL K. KIELLEY, individually and in his official capacity, SHERIDAN D. ASH, KIMBERLY K. RUSSELL, SUSAN L. NYGREN, JEAN K. CARLSON, LINDA A. MORGAN, and JAMES P. CONTE, JR.,

Defendants.

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This is a civil action for monetary and injunctive relief brought pursuant to Wis. Stat. § 895.65 and 42 U.S.C. § 1983, in which plaintiff Gerhard Witte contended that defendants Wisconsin Department of Corrections, Steven B. Casperson, Kenneth R. Morgan, James Greer, David E. Burnett, M.D., Earl K. Kielley, Sheridan D. Ash, Kimberly K. Russell, Susan L. Nygren, Jean K. Carlson, Linda A. Morgan and James P. Conte, Jr. engaged in a

conspiracy to constructively discharge him in violation of his right to free speech under the First Amendment to the United States Constitution, his right to free speech under the Wisconsin Constitution and Wisconsin's whistle blower law, Wis. Stat. § 895.65(2), and also denied him his rights to due process. I granted defendants' motion for summary judgment on the free speech and whistle blower claims in an order entered on September 17, 2004.

Defendants did not move for seek summary judgment on the due process claim, which raised questions about the continued viability of the claim. Accordingly, I directed plaintiff to advise the court whether he was still pursuing the claim and if so, to explain its nature and scope. Before the time for doing so had run, defendants advised the court that plaintiff had entered into a stipulation to the effect that his complaint alleged two causes of action, one for violations of his First Amendment rights and one for violation of his statutory rights under the Wisconsin whistle blower law, and they asked the court to dismiss the entire case. Plaintiff responded to this request by denying that the stipulation was intended to apply to the due process claim rather than being limited to the nature of his free speech and whistle blower claims. I advised the parties that I viewed the stipulation as covering only the free speech and whistle blower claims. Plaintiff submitted his response and defendants moved promptly for summary judgment. That motion is now before the court for resolution, along with defendants' motion moved for sanctions for plaintiff's failure to comply with the

court's scheduling orders on pretrial submissions.

Plaintiff has limited his due process claim to his alleged constructive discharge. He identifies his claim in these words: "Plaintiff has been deprived of constitutionally protected property without due process of law by being constructively discharged in retaliation for filing a grievance and fighting and winning the arbitration proceedings that reinstated his employment." Plt.'s Br., dkt. #73, at 2. He contends that defendants made his working conditions so miserable that no reasonable person could have been expected to put up with them.

I conclude that plaintiff cannot prevail on this claim, first, because he cannot make the showing that even if he were constructively discharged he has been deprived of due process in connection with the discharge and second, because he cannot show that the conditions under which he worked were so hostile, threatening or adverse as to rise to the level of a substantive due process violation.

From the facts proposed by the parties, I find that the following are both material and undisputed. (I assume familiarity with the facts I found to be undisputed in the September 17 order.) For the most part, I have relied on the facts proposed by defendants, which I find were not put into dispute by plaintiff. Although plaintiff responded to the proposed facts, most of his responses were off the point. For example, in response to defendants' proposed

fact that on two occasions he was investigated for possible rule violations and not disciplined as a result of the investigations, he says only that "the 'possible' rules violations were, in fact, false, baseless, or inconsequential." Plt.'s Responses, dkt. #74, at 1. In other instances, plaintiff tries to put a proposed finding of fact in dispute by citing material in the record that does not support the alleged dispute. For example, he disputes defendants' proposed fact that neither the department nor any employee has ever made public the fact of plaintiff's discipline. In response, he proposes as a fact: "insofar as [plaintiff] has been slandered repeatedly by Defendants in the workplace and throughout the entire DOC." Id. at 2. Not only is this response irrelevant, but the citations he gives to support it are based on inadmissible hearsay.

It appears that many of plaintiff's proposed facts are directed at proving that the numerous disciplinary actions to which he was subject and the way that his co-workers and supervisors treated him amounted to a constructive discharge. Such a discharge occurs when an employee is not fired but quits because the working conditions have become so intolerable that a reasonable person in her position would be compelled to resign. Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998); Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997). It is unnecessary to recount all of these facts, for at least three reasons. First, plaintiff has conceded in essence that he was not constructively discharged; he testified at his deposition that he intended to return to his job when his

doctor gave him permission to do so. Second, although the Court of Appeals for the Seventh Circuit has held that an employer must provide a hearing if it subjects an employee to a discrete employment action that is tantamount to discharge, Parrett v. City of Connorsville, 737 F.2d 690 (7th Cir. 1984), plaintiff's claim that he was constructively discharged without a hearing rests on an unwarranted and unworkable extension of the holding in that case. Plaintiff's allegations concern a series of actions over a period of time that added up to what he considers an intolerable workplace. It would not be practical to require employers to provide hearings when the alleged constructive discharge is the product of numerous incidents, none of which amounts to the equivalent of a discharge. Third, even if a preliminary hearing were required under such circumstances, plaintiff was having such a hearing when he announced his need to take a leave of absence. Accordingly, the bulk of plaintiff's proposed facts are immaterial to resolving this motion.

UNDISPUTED FACTS

Plaintiff Gerhard Witte, M.D. was hired on March 31, 1997 by defendant Department of Corrections to provide medical services to inmates at the Racine Correctional Institution. On October 1, 1998, defendant Sheridan Ash was hired as supervisor of the Health Services Unit. Plaintiff complained frequently about Ash's supervision of him.

Defendant David E. Burnett, M.D. has been the Medical Director of the Department

of Corrections since mid-2001. In that capacity, he is plaintiff's supervisor. During the summer of 2001, he spoke with defendant Steven Casperson, who was beginning his tenure as the Division Administrator of the Division of Adult Institutions of the Department of Corrections, about concerns that Burnett had with plaintiff's performance as a physician. Defendant Burnett wanted to obtain a medical examination of plaintiff to rule out any health issues that might be impairing his work. Defendant Casperson placed plaintiff on paid leave pending the completion of a medical examination to determine his fitness for work. Plaintiff did not file any grievance challenging either his paid leave or the requirement that he undergo a medical examination.

While plaintiff was still on his medical leave, defendant Burnett became aware of certain medical judgments that plaintiff had made that defendant Burnett believed were questionable. He reviewed the files and determined that they showed improper medical practices. Defendant Burnett talked with plaintiff while he was still on leave and held an investigatory interview with him to discuss the cases. Unsatisfied with plaintiff's explanation of the care he had provided, Burnett determined that the files showed grounds for discipline. In January 2002, the department held a pre-disciplinary hearing regarding the cases Burnett had identified. These cases were among the grounds on which the department discharged plaintiff in January 2002.

After the discharge, plaintiff sought arbitration through his union. He had a hearing

before a neutral arbitrator at which time he had a complete opportunity to present evidence and cross-examine witnesses on the issue of just cause. The arbitrator directed the department to reinstate plaintiff in his job and pay him all his back pay and benefits. Plaintiff has never contended that he was denied any pay or benefits to which he was entitled under the arbitrator's decision.

When plaintiff returned to work after the favorable arbitration decision, defendant Burnett supervised him closely because of his concerns about plaintiff's working relationships with the staff at Racine and his practice of medicine. Burnett provided plaintiff with written job expectations. Plaintiff met some of the expectations but not others. Burnett prepared written evaluations of plaintiff's work and provided them to plaintiff so that he would understand how Burnett viewed his performance and what Burnett wanted him to do. Plaintiff has not filed any grievance in response to the evaluations.

In the second half of 2002, defendant Burnett discovered that plaintiff had gained access to an inmate's medical records during a time when he was no longer employed by the department and without the consent of the inmate. Burnett considered this to be a violation of the inmate's right to confidentiality and filed a complaint with the Wisconsin Department of Regulation and Licensing's Medical Examining Board. In February 2003, Burnett learned that a screening panel of the board had decided not to investigate the complaint.

In the spring of 2003, plaintiff was given two letters of reprimand after the

department had conducted investigations and held pre-disciplinary hearings. The first was for threatening to file charges with the Nursing Examining Board against defendant Kim Russell and the second was for humiliating defendant Jean Carlson, a nurse practitioner. Although plaintiff could have filed a grievance over the letters and taken the matter to arbitration, he did not.

Plaintiff was given a written reprimand on May 21, 2003, because of his threat to report defendant Russell to the Nursing Examining Board. Before the reprimand was prepared, plaintiff was given an opportunity to present his position about the allegations against him in a pre-disciplinary hearing. After the reprimand, plaintiff could have filed a grievance about the written reprimand and sought arbitration under his union's collective bargaining agreement. Neither he nor his union filed such a grievance.

In the early summer of 2003, defendants Earl Kielley and Burnett conducted a investigative interview with plaintiff that focused on unsigned progress notes and orders, placing names of Health Services Unit personnel in the inmate chart, delay in seeing inmates and locking the examining room door while seeing inmates. The investigation was not disciplinary.

On July 21, 2003, plaintiff was given a written reprimand in lieu of a one-day suspension because of his conduct toward Nurse Practitioner Carlson. Before that discipline was imposed, he had an opportunity to present his position about the allegations in a pre-

disciplinary hearing. Afterward, he could have filed a grievance about the written reprimand and sought arbitration. He did not take any action.

On August 1, 2003, defendants Kielley and Burnett conducted a pre-disciplinary hearing with plaintiff on the matters they had investigated. The hearing was adjourned before it was completed when plaintiff said that he was under too much stress to continue with the meeting. He left the meeting and went on a medical leave from which he has not yet returned.

Plaintiff has not been discharged from his job as a physician at the Racine Correctional Institution. He is still an employee with permanent status who is on an unpaid leave of absence for medical reasons. As of May 20, 2004, when he was deposed, plaintiff confirmed that it was his intention to return to his job when he has recovered fully from his heart attack.

Twice during plaintiff's employment he was investigated for possible rule violations and not disciplined. The first investigation arose out of Ash's allegation that plaintiff had touched her soda pop can after performing a rectal exam; the second arose out of a complaint by defendant Kim Russell that plaintiff had breached security by telling an inmate's father that the inmate was being sent to University Hospital.

Whenever an employee with a permanent position faces discipline, the department conducts an investigation of the facts, holds a pre-disciplinary hearing with the employee and

imposes discipline only after determining that the investigation and pre-disciplinary hearing support doing so. As a permanent employee of the Department of Corrections, plaintiff is covered by a collective bargaining agreement that requires the department to have "just cause" before disciplining him. He may appeal any discipline to arbitration and have a hearing before a neutral arbitrator at which the department must produce evidence of just cause for the discipline. The employee has the opportunity to be advised of the issues for the hearing in advance, to have representation at the hearing, to present evidence and to cross-examine witnesses.

On the occasions when plaintiff has been disciplined, including the one occasion when he was discharged, no defendant has made the fact of the discipline public. No employee of the department or the department itself has made any public claim that plaintiff has engaged in immoral behavior, suggested publicly that plaintiff was of bad moral character or made any public statement that would have stigmatized plaintiff in any way.

OPINION

Although plaintiff alleged a due process violation in his complaint, he seems to be staking his entire due process claim on his contention that he has been constructively discharged by the "malicious actions of the Defendants that created a hostile work environment in which no reasonable person could continue to serve," Plt.'s Br., dkt. #73,

at 2, without explaining how defendants' actions contributed to any due process violation. He does not allege that he was denied a hearing before he was constructively discharged; in fact, he was in the middle of a hearing when he walked out, asserting that his stress prevented him from continuing. He acknowledges that he never filed a grievance on the alleged constructive discharge. Instead, he alleges that he was denied a hearing "before the Defendants created a work environment so hostile that it drove him from his job." Id. at 4. If he is arguing for a general rule that employees are entitled to hearings before their employer takes the first step in what may ultimately become a "hostile environment," he is asking for an impossible expansion of due process and one that no court has ever recognized. Certainly, Parrett v. City of Connorsville, 737 F.2d 690, 694 (7th Cir. 1984), does not stand for this proposition, despite plaintiff's reliance on it. In Parrett, the court held that the plaintiff was entitled to a hearing after defendant demoted him from chief of detectives to the uniformed force and refused to assign him any police duties. A refusal to assign an officer any duties whatsoever is an obvious constructive discharge; an angry response to a complaint or setting out performance expectations is not. The fairest reading of Parrett is that it stands for the proposition that when an employer takes a single employment action that is the functional equivalent of a discharge against an employee who has a property interest in his job, the employer is obligated to provide the affected employee a hearing reasonably contemporaneously with the employment action.

Under this reading of Parrett, plaintiff must establish a point at which he was constructively discharged. It is unclear how he plans to do this. He has testified that he intends to return to his job when his doctors give him permission to do so. Moreover, he has not identified any action by defendants that is the functional equivalent of a discharge, such as a loss of title, job duties or salary. He has not shown that any of these changed before he left on medical leave; therefore, he has no claim that he was constructively discharged. If he is alleging that his "discharge" happened at the point at which he felt the need to take medical leave, he has no possible claim for a deprivation of due process. As I have explained, he announced his medical leave in the middle of a hearing that would have provided him any due process to which he was entitled. He concedes that he would be entitled to another predisciplinary hearing whenever he returns from medical leave. Plt.'s Mem., dkt. #51, at 3. "One who has spurned an invitation to explain himself can't complain that he has been deprived of an *opportunity* to be heard." Wozniak v. Conry, 236 F.3d 888, 890 (7th Cir. 2001).

Plaintiff argues that it would have been futile for him to go through with a hearing because defendants are biased and determined to get rid of him. He ignores his entitlement to a full post-deprivation due process hearing before another neutral arbitrator. His prior experience with arbitration is evidence that he could receive broad relief in the form of reinstatement, back pay and lost benefits. Cf. Parrett, 737 F.2d at 697 (holding that

particular arbitration proceeding in that case did not satisfy requirements of due process; process was sluggish and arbitrator was unable to award Parrett his full common law damages).

That the arbitration process would deal only with whether defendants' discipline of plaintiff was justified and not with the wrongful actions of the department is not evidence of its inadequacy. Plaintiff's due process entitlement extends only to a fair and reasonably prompt determination of his discharge, not to a review of defendants' actions. He would be entitled to no more in this court. His "property" is his right to his job; if he could have shown that defendants deprived him of his job without due process, he would have been entitled to the damages attendant to that loss. He would not have been entitled to compensation for the petty harassments he contends led up to the loss of his job. Swick v. City of Chicago, 11 F.3d 85, 88 (7th Cir. 1993).

In support of his assertion that defendants would not give him a fair hearing because they were intent on discharging him, plaintiff cites Levenstein v. Salafsky, 164 F.3d 345 (7th Cir. 1998), a case in which a university doctor alleged a constructive discharge and no true process. In that case, however, the allegations of the complaint were that the university had failed to follow its own rules in numerous ways after suspending the plaintiff from his duties. Plaintiff has not proposed any facts to suggest that defendants failed to follow their usual rules and procedures in his case.

Plaintiff has not developed an argument in support of a claim that defendants violated his right to liberty without due process. Arguments not developed are considered waived. Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999). In any event, it is undisputed that defendants did not impose a stigma upon him when they disciplined him and that they have not discharged him. Without loss of employment and the kind of stigma that would foreclose other jobs in plaintiff's field, he has no actionable claim. Simpkins v. Sandwich Community Hospital, 854 F.2d 215, 218 (7th Cir. 1988). Therefore, it is unnecessary to address this issue.

In the second part of his brief, plaintiff argues that defendants' treatment of him was such an abuse of power as to shock the conscience and rise to the level of a substantive due process violation. This argument is a non-starter. As explained at great length in the September 17, 2004 opinion, plaintiff's behavior at work created problems for his co-workers and supervisors. It is not surprising that his supervisors took various disciplinary actions. It is ludicrous to argue that routine disciplinary actions could amount to a substantive due process violation. As the Supreme Court has emphasized, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). Indeed, I can think of no way in which a public employee could proceed on a claim of a violation of substantive due process for disciplinary actions that have been found not to have violated the employee's right to

procedural due process.

Plaintiff seems to be under the impression that he has some independent right to a non-hostile work environment. His right is not that broad. He is entitled to a work environment that is not hostile toward him because of his sex, race, age, disability or because of his exercise of his right to free speech. He cannot make out an actionable claim of any kind by alleging that vindictive supervisors, churlish co-workers, a constant lack of supplies and inadequate assistance made his workplace miserable, unless he ties it to a legally impermissible motive. I have found that he was not retaliated against because of his exercise of First Amendment rights and he has not alleged that sexual, racial, ageist or disability prejudices motivated his supervisors.

In summary, I conclude that plaintiff has failed to adduce facts sufficient to show that a reasonable jury could find in his favor on his due process claims. Having reached this conclusion, I need not address defendants' motion to impose sanctions in the form of dismissal of plaintiff's remaining claim for plaintiff's failure to comply with this court's scheduling order.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Wisconsin Department of Corrections, Steven B. Casperson, Kenneth R. Morgan, James

Greer, David E. Burnett, M.D., Earl K. Kielley, Sheridan D. Ash, Kimberly K. Russell, Susan L. Nygren, Jean K. Carlson, Linda A. Morgan and James P. Conte, Jr. is GRANTED with respect to plaintiff Gerhard Witte, M.D's remaining claim that he was denied due process when he was constructively discharged. Defendants' motion for sanctions is DENIED as moot. The clerk of court is directed to enter judgment for defendants on all claims and close this case.

Entered this 4th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge