IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TOMAS ROBINSON,

OPINION AND ORDER

Plaintiff,

04-C-193-C

v.

DIANE FERGOT,

Defendant.

- -

This is a suit for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Plaintiff Tomas Robinson is presently confined by the State of Wisconsin as a patient pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980. He alleges violations of his constitutional rights in connection with his placement in a "72-hour reassignment" after he attempted to smuggle a videotape into his room. Jurisdiction is present. 28 U.S.C. § 1331.

This matter comes before the court on defendant Diane Fergot's motion for summary judgment. For the reasons stated below, defendant's motion will be granted. In brief, plaintiff's substantive due process claim fails because he has not adduced any evidence from which a jury could conclude that his placement in 72-hour reassignment or high

management status constitutes "punishment" as that term is used in the Eighth Amendment. Also, defendant is entitled to summary judgment on plaintiff's equal protection claim because he has failed to identify any similarly situated individuals who received more favorable treatment.

Before turning to the facts, I note that many of plaintiff's responses to defendant's proposed findings of fact do not meet the requirements of this court's summary judgment procedures. In an order dated November 17, 2004, I reminded plaintiff that to properly dispute any one of defendant's proposed findings of fact, he had to "state his version of the fact and point to evidence in the record that supports his version." This requirement is also contained in this court's summary judgment procedures, a copy of which was provided to plaintiff. Nonetheless, the responses given by plaintiff to defendant's proposed findings of fact ¶¶ 26, 27, 28, 35 (first sentence), 38, 43 and 54 are not properly supported by citations to evidence in the record. Therefore, these proposed findings must be accepted as undisputed.

From the proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Tomas Robinson has been confined by the State of Wisconsin pursuant to Wisconsin's Sexually Violent Persons Law, Wis. Stat. ch. 980 since November 2002. At all times relevant to this case, plaintiff was housed at the Wisconsin Resource Center in Winnebago, Wisconsin. Currently, plaintiff is housed at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. Defendant Diane Fergot is an institution unit supervisor or unit manager at the Wisconsin Resource Center. She is responsible for the management of daily operations of assigned units, including budget, staffing, security, maintenance and unit policy development. She supervises psychiatric care supervisors, social workers and psychologists on her assigned units. In addition, she assists in developing and updating treatment programs for sexually violent persons. In June 2001, defendant began a term as the unit manager for the H17 and H18 units.

B. Wisconsin Resource Center

The Wisconsin Resource Center is the intake facility for people detained or committed under Wis. Stat. ch. 980. The facility accepts ch. 980 patients who are being treated as well as those not actively engaged in the treatment program for sexually violent persons. Its mission is to treat patients' mental illnesses and disorders using the most proactive and least restrictive approaches consistent with the treatment needs of patients and to provide a safe and humane environment for both patients and staff.

1. Initial intake and patient handbook

Every patient committed to the Wisconsin Resource Center is evaluated upon arrival and placed in a management status that is appropriate for his level of treatment and security needs. The management status of each patient is determined by a treatment team consisting of the unit manager, psychiatric care supervisor, unit psychologist, unit social worker, psychiatric care technician and recreation leader. There are six management status levels at the facility: reception/admission/orientation, high, medium, low, temporary reassignment and secure.

All patients receive a copy of the "Patient Handbook" upon admission to the facility. The handbook includes basic information along with rules and procedures that apply at the facility. Also included in the handbook are sections concerning (1) examples of misconduct for which patients can be disciplined and the standards and procedures used in disciplinary situations; (2) the process by which a patient will be recommended for a higher management status; and (3) 72-hour temporary assignments.

2. 72-hour reassignments

Patients are not placed in temporary 72-hour reassignments as a form of punishment; the reassignments are a management tool that allow the appropriate officials to investigate and assess a situation. A 72-hour reassignment could result in a disciplinary outcome

depending on the precipitating event, but the reassignment itself is not part of any disciplinary action. Patients have the right to a review of a temporary 72-hour reassignment to a higher management area and of any accompanying restrictions. The patient handbook states that reviews are performed by the treatment team within 72 hours of a recommendation, excluding weekends and holidays. It is not necessary for the entire treatment team to be present for a 72-hour reassignment review; however, it is important to maintain a team approach to the decisionmaking process during the review. The only members of the treatment team that are available during weekends and holidays are the psychiatric care technicians; thus, reviews are conducted only on non-holiday weekdays.

Patients in 72-hour reassignment may use the courtyard when staff is available to escort them. They are allowed at least one 15-minute courtyard break per shift during regular courtyard hours and one 30-minute call each day. They are not allowed to have electronics and have limited access to property and certain activities until all of the circumstances related to the patient's alleged misconduct are investigated.

3. H17 and H18 units

H17 is the admissions unit at the facility. Generally, newly admitted patients are placed on H17 and are reviewed by an admission team for assessment and development of an admission care plan. H18 is the sexually violent persons options unit; it houses patients

that have not yet been civilly committed and those that are committed but have not consented to treatment. H17 and H18 are designed to create a therapeutic living environment to encourage patients to participate in the sexually violent persons treatment program. Patients who have demonstrated an inability or unwillingness to comply with unit rules and behavioral expectations are placed on a structured, privilege-based program.

All patients placed in the H17 and H18 units are provided with a copy of the "SVP Options Unit Patient Handbook." This book contains a section entitled "High Management System," which provides a program description for patients who are placed on 72-hour reassignment pending an investigation or assessment for placement into high management status and a description of the restrictions applicable to patients on high management status. Patients in H17 placed on a 72-hour reassignment are not confined to their rooms as a matter of routine, although in some cases isolation is necessary to prevent physical harm to patients and staff, damage to property or serious disruption of the therapeutic program. However, it is used only when necessary and in a manner that preserves the patient's dignity and maintains the therapeutic environment.

C. The Videotape Incident

On November 26, 2002, plaintiff was detained under ch. 980 and admitted to the Wisconsin Resource Center. He was assigned to the H17 unit for evaluation and

assessment. On January 17, 2003, plaintiff was moved to the H18 unit because of a space availability problem. In the fall of that year, he began to participate in a class in which the patients were allowed to watch movies. Plaintiff and the other patients in the class knew that the videotapes were kept in the classroom. Shortly after joining the class, plaintiff began to inquire about being allowed to clean the classroom. His requests were denied repeatedly. On December 5, 2003, a psychiatric care technician allowed plaintiff to clean the room, unaware that he had been denied permission previously. While cleaning the room, plaintiff distracted the psychiatric care technician and hid a videotape under his shirt. After he finished cleaning, plaintiff returned to H18 where the technician pat-searched him and discovered the videotape. The technician filled out a "Patient Behavior Disposition Record" detailing the theft of the videotape. Psychiatric care supervisor John Jones placed plaintiff in a 72-hour reassignment. Plaintiff was not placed in seclusion at any time during his reassignment.

On December 10, 2003, psychiatric care supervisor Terry Gable was given plaintiff's file for the purpose of conducting a review. Gable spoke with defendant and other treatment team members concerning plaintiff's reassignment. After the review, defendant decided that plaintiff should return to the H18 unit but be restricted to high management status. Defendant imposed high management status to deter plaintiff's misconduct and to prevent further behavioral problems. She was concerned about his manipulation of staff and his

ability to develop a plan to steal a videotape from the classroom and believed that plaintiff needed a more restricted environment where he could receive the care and treatment necessary to assist him in controlling this behavior.

On the basis of her experience as unit manager at the facility, defendant believes plaintiff's placement in temporary reassignment from December 5-10 was appropriate because it was necessary for treatment team members to review the circumstances related to plaintiff's theft, the seriousness of his behavior, the context in which it occurred, the likelihood of its recurrence and the appropriate treatment and management status for plaintiff before releasing him from reassignment.

D. High Management Status

On December 10, plaintiff was released from reassignment and placed in high management status, which is a three-tiered program that utilizes a series of increased privileges to encourage and reinforce appropriate conduct or compliance with Wisconsin Resource Center rules. Phase 1 lasts for a minimum of ten days and is the most restrictive. Patients in phase 1 cannot watch television or listen to the radio. They have limited access to the dayroom and game room and are allowed only one phone call each day. However, they are allowed to attend scheduled appointments and interviews, participate in school assignments and religious services, utilize library services and have full use of the courtyard

unless otherwise specified. Phase 2 is designed for patients who have progressed successfully through phase 1 and who have shown progress in taking responsibility for their actions. In phase 2, which lasts a minimum of fifteen days, patients retain all phase 1 privileges but have increased access to the dayroom and game room, are allowed two phone calls and two visitors each day and may use televisions and radios. The final stage of high management status, phase 3, lasts a minimum of twenty days. Patients in phase 3 retain all phase 2 privileges but have increased access to the dayroom and game room and are allowed three visitors and phone calls each day. Plaintiff completed all three phases of high management status on January 24, 2004.

Plaintiff's placement in reassignment and high management status was not for the purpose of punishing him for his misconduct; those conditions were imposed to maintain safety and security at the Wisconsin Resource Center and to enable facility officials to investigate appropriate treatment that would deter further acts of misconduct. Defendant exercised her professional judgment when she consulted and advised staff regarding plaintiff's initial reassignment and when she decided to place plaintiff in high management status.

DISCUSSION

Plaintiff contends that his placement in 72-hour reassignment and high management

status violated his rights under the due process and equal protection clauses of the Fourteenth Amendment. I will discuss each contention in turn.

A. Due Process

Plaintiff asserts that his due process claim should be analyzed under the standard announced in Turner v. Safely, 482 U.S. 78 (1987), a case involving prison regulations concerning inmate marriages and correspondence. In Turner, 482 U.S. at 89, the Supreme Court held that prison regulations are constitutional if they are "reasonably related to legitimate penological interests." Turner's reasonable relationship test is not applicable to the present case, however. Plaintiff is not a prisoner; he is a patient under civil commitment. The Wisconsin Resource Center is not a correctional facility; it is an institution for the treatment of persons determined to be sexually dangerous. Thus, its policies are not designed to further penological interests.

The appropriate starting point for plaintiff's due process claim is the Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), in which the Court considered whether individuals involuntarily committed to state institutions retain substantive rights protected by the due process clause. The Court distinguished involuntarily committed persons from prison inmates, stating that the former "may not be punished at all" and "are entitled to more considerate treatment and conditions of confinement than criminals whose

conditions of confinement are designed to punish." Id. at 316, 321-22. Ultimately, the Court held that institutionalized persons have "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Id. at 324.

To determine whether one of these interests had been infringed, the Court established "professional judgment" as the standard to be used in balancing the individual's "liberty interests against the relevant state interests." Id. at 321. This standard requires courts to "show deference to the judgment exercised by the qualified professional." Id. at 322. Professional decisionmakers include persons "competent, whether by education, training, or experience, to make the particular decision at issue." Id. at 323 n.30. Day-to-day decisions that create the conditions of civil confinement may be made by employees without formal training who are subject to the supervision of qualified persons. Id. Decisions made by such professionals are "presumptively valid." Id. at 323; see also Barichello v. McDonald, 98 F.3d 948 (7th Cir. 1996); Estate of Cole v. Fromm, 94 F.3d 254 (7th Cir. 1996) (applying same standard to pretrial detainee committed to psychiatric ward). Liability arises only "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323.

Under Youngberg, the court's only role is to make certain that defendant exercised

professional judgment. Thus, in order to overcome the presumptive validity of defendant's decisions, plaintiff must present facts that indicate that defendant did not base her decisions on professional judgment. The Court of Appeals for the Seventh Circuit has stated that "professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct." Porter v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994) (quoting Shaw by Strain v. Stackhouse, 920 F.2d 1135 (3d Cir. 1990)). (I assume that in Porter, the court meant to define *lack* of professional judgment in those terms).

Before analyzing plaintiff's due process claim, I believe it is important to make clear that not all restraints or restrictions imposed by officials at civil institutions automatically constitute "punishment" in the constitutional sense. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court examined the due process protections applicable to pretrial detainees, a group that, like the involuntarily committed, may not be subjected to punitive conditions of confinement. The Court stated that "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." Id. at 537. In determining whether a condition or restriction is punitive, the critical question is "whether the disability is imposed for the purpose of punishment or whether it is but an

incident of some other legitimate governmental purpose." Id. at 538. The Court cited effective management of a detention facility and maintenance of security and order as legitimate interests that could justify conditions and restrictions beyond those necessary to assure a detainee's presence at trial. Id. at 540.

Bell's reasoning applies with equal force in the context of a treatment facility like the Wisconsin Resource Center. Although involuntarily committed individuals may not be subjected to punitive conditions of confinement, the state's interests in order, security, and effective management apply just as strongly in the civil institution setting. "In operating an institution . . . there are occasions in which it is necessary for the State to restrain the movement of residents – for example, to protect them as well as others from violence." Youngberg, 457 U.S. at 320; see also Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) (ch. 980 patients "may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others."). Thus, the due process clause does not prevent officials at civil institutions like the Wisconsin Resource Center from imposing rules to maintain security and order and from imposing minor sanctions for violations of those rules. Bell, 441 U.S. at 537 ("This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."); Allison, 332 F.3d at 1079. Indeed, it is difficult to imagine how an institution such as the one to which plaintiff is confined could function without a

system of sanctions for rules violations. With this in mind, I will analyze plaintiff's temporary reassignment and placement in high management status.

1. 72-hour reassignment

Plaintiff was placed in 72-hour temporary reassignment on December 5, 2003 but was not released until December 10, 2003, more than 72 hours later. Policies in effect at the Wisconsin Resource Center at the time entitled patients in temporary reassignment to a review of their status within 72 hours, excluding weekends and holidays. In plaintiff's case, it appears that his treatment team did not review his status until December 10 because December 6-7, 2003 was a weekend. Despite the plain language of the handbook policy that excludes weekends from the 72-hour calculation, plaintiff argues that defendant violated his due process rights by keeping him in reassignment for more than 72 hours. In his view, the treatment team should have reviewed his status on the Monday immediately following the weekend. The fact that Gable did not review his status until December 10 indicates to plaintiff that the purpose of the reassignment was punitive.

Plaintiff seems to believe that he had a constitutional right to a review of his status 72 hours after he was placed in reassignment. He does not. Although plaintiff contends that punitive intent underlies the exclusion of weekends and holidays, he has produced no evidence to support this contention. The undisputed facts show that the policy promotes

effective management of the facility. Temporary reassignment is not grounded in punitive intent; it is merely a part of the process by which officials at the facility investigate alleged misconduct and determine what steps need to be taken in response. Weekends and holidays are excluded from the 72-hour calculation because most of the members of a patient's treatment team are not present on those days and cannot determine what happens to a patient after his temporary reassignment ends. Moreover, patients placed on temporary reassignment have limited access to the courtyard and their property. Restrictions that are imposed in reassignment allow staff to maintain a safe and secure environment while the patient's alleged misconduct is investigated. In this case, plaintiff does not dispute that he was caught trying to smuggle a videotape into his room on a Friday. The fact that a patient placed in reassignment on a Monday might spend fewer hours in that status than a patient placed in reassignment on a Friday does not mean that the latter patient is being unconstitutionally punished.

2. High management status

Plaintiff contends that defendant's decision to place him in high management status after his release from temporary assignment violated his substantive due process rights because high management status constitutes punishment. He cites Kansas v. Hendricks, 521 U.S. 346 (1997), for the proposition that mentally ill patients are unlikely to be deterred by

the threat of confinement and argues that the state may not impose consequences for misbehavior under the guise of "treatment" because ch.980 patients cannot be deterred by the threat of punishment. Any consequences imposed do not further the state's interests in treatment or deterrence; therefore, he argues, they must be considered punishment.

Plaintiff's arguments fail for two reasons. First, even if I accepted plaintiff's contention that his placement in high management status had nothing to do with treatment, it would still not be unconstitutional. As noted earlier, not all restraints or restrictions imposed by officials at civil institutions automatically constitute "punishment" in the constitutional sense. Bell holds that there is a distinction between *unconstitutional* conditions of confinement that "punish" individuals like plaintiff for their sex crimes or status as sex offenders and *constitutionally permissible* measures designed to preserve safety, maintain order or discipline civilly committed persons who violate institutional rules or policies. A restraint on liberty that is imposed because of security concerns can be constitutionally valid regardless of its value as a treatment tool. West v. Schwebke, 333 F.3d 745, 748 (7th Cir. 2003). The undisputed facts in this case show that defendant assigned plaintiff to high management status because he attempted to steal a videotape; the sanction was temporary, lasting only forty-five days; and it was imposed to maintain security and allow officials to investigate possible avenues of treatment that could deter further acts of misconduct. On these facts, defendant's decision was not unconstitutionally punitive.

Second, plaintiff has failed to overcome the presumption of validity accorded to defendant's decision. Officials who monitor involuntarily committed individuals in facilities like the Wisconsin Resource Center work in "volatile environments whose day-to-day operations cannot be managed from on high." Thielman v. Leean, 282 F.3d 478, 483 (7th Cir. 2002) (internal citation and quotations omitted). Because of this, Youngberg requires courts to consider the decisions of such officials presumptively valid limit their inquiries to whether defendants exercised their professional judgment. (Defendant's experience as a unit manager since 2001 qualifies her as a "professional" under Youngberg. Her job duties as a unit manager include daily management and responsibility for security, supervision of psychiatric care supervisors and unit psychologists and development of treatment programs for sexually violent persons. Youngberg, 457 U.S. at 323 n.30 ("By 'professional' decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue.")) Therefore, to survive summary judgment, plaintiff must present facts tending to show that defendant did not exercise her professional judgment when she placed him in high management status. The undisputed facts show that defendant exercised her professional judgment on this occasion: she placed plaintiff on high management status to deter his misconduct and prevent further behavioral problems. West v. Macht, 2000 WI App 134 ¶ 23, 237 Wis. 2d 235, 614 N.W.2d 34 (discussing therapeutic goals of reassignment to high management). She believed that he needed treatment to assist

him in controlling his behavior in a more restrictive environment. Plaintiff has produced no evidence other than his own unsupported speculation to contradict defendant's assertion that she exercised professional judgment when she decided to place him in high management status. Therefore, his substantive due process claim cannot survive summary judgment.

B. Equal Protection

Plaintiff's equal protection argument is difficult to pinpoint, but easy to resolve. He contends that the state of Wisconsin treats ch. 980 patients differently from all other civilly committed individuals, apparently because non-ch. 980 patients receive treatment for their misbehavior but ch. 980 patients are "punished" for their misconduct. Initially, I note that the Court of Appeals for the Seventh Circuit has recognized that a rational basis exists for treating ch. 980 patients differently from other civilly committed persons. Thielman, 282 F.3d at 485 ("it is not unreasonable for the State to believe that a person with a mental disorder of a sexual nature is qualitatively more dangerous than another mental patient who nonetheless threatens danger to himself or others").

Beyond that, the equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To make out an equal protection claim, plaintiff must identify similarly situated individuals. Although the question whether individuals are

similarly situated is usually one for the jury, a court may grant summary judgment "where it is clear that no reasonable jury could find that the similarly situated requirement has been met." McDonald v. Village of Winnetka, 371 F.3d 992, 1002 (7th Cir. 2004). That is the case here. Plaintiff's murky assertion of disparate treatment cannot survive summary judgment because his identification of "misbehavior" as the factor that similarly situates ch. 980 patients and all other committed individuals is much too generic for comparison. Plaintiff has presented no evidence that any other involuntarily committed patient at the Wisconsin Resource Center was caught trying to steal institution property and not given temporary reassignment or placed in high management status. Thus, his equal protection claim fails to get off the ground, much less survive summary judgment.

ORDER

IT IS ORDERED that defendant Diane Fergot's motion for summary judgment, dkt. #15, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 2nd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge