

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHAWN McGARVEY,

Plaintiff,

v.

THOMAS BORGAN,
ANDREW BATH and
LT. DOMMISSE,

Defendants.

ORDER

04-C-269-C

This is a civil action for monetary relief, brought under 42 U.S.C. § 1983. Plaintiff is an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. In an order dated June 24, 2004, I granted plaintiff leave to proceed in forma pauperis on his claim that defendant Dommisette retaliated against him for refusing to waive certain work restrictions by issuing a conduct report against him in violation of his rights under the First Amendment. In addition, I allowed him to proceed on his claim that defendants Borgan, Bath and Dommisette retaliated against him for sending a letter to congressman Paul Ryan and on his claim that these defendants violated his rights under the Eighth Amendment by discontinuing prescribed treatment for his broken thumb. I denied plaintiff leave to proceed

on his claim that defendants violated state law by holding him in temporary lock-up beyond the statutory limit, because the claim involved facts not implicated in his federal claims and thus was not a claim over which this court had jurisdiction. Now plaintiff has filed a motion to amend his complaint to add a claim that he was denied due process and equal protection by his placement in temporary lockup and in connection with a disciplinary hearing held on conduct report #1479002. In addition, plaintiff has filed a “motion for temporary restraining order and injunction,” in which he asserts that he is scheduled to be transferred to a minimum security facility and that this will interfere with his ability to prosecute this action. Both of plaintiff’s motions will be denied.

Plaintiff’s motion to amend his complaint will be denied because the claims he wishes to add to his lawsuit are legally frivolous. A Wisconsin prisoner has no liberty interest in remaining free from temporary lockup. Russ v. Young, 895 F.2d 1149, 1154 (7th Cir.1989), holds that being placed in temporary lock up does not implicate a liberty interest. Therefore, plaintiff has no federally enforceable right to process before being held in such detention.

Plaintiff alleges no facts to explain his contention that he was deprived of due process in connection with his disciplinary hearing. A procedural due process claim against government officials requires proof of inadequate procedures and interference with a liberty or property interest. See Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-84 (1995), the Supreme Court held that

liberty interests “will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate’s sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997). Plaintiff alleges in his original complaint that after he was found guilty of charges in conduct report no. 1479002 on September 3, 2003, he lost good time credits as part of his punishment. Under Sandin, he would be entitled to due process protections in connection with the disciplinary hearing. However, plaintiff does not allege any facts to suggest that his disciplinary hearing was procedurally deficient. He does not allege that defendants failed to give him notice of the charges against him, or deprived him of an opportunity to be heard or to present witnesses, and he does not allege that he was not provided a statement of the reasons for the finding of guilt or the sentence imposed. Because plaintiff has alleged no facts from which an inference may be drawn that defendants violated his constitutional right to due process in connection with his disciplinary hearing on conduct report no. 1479002, he cannot amend his complaint to allege such a claim.

In support of the equal protection claim plaintiff wants to add to his complaint, plaintiff alleges that defendants failed to abide by their own regulations and that “every other inmate held in [temporary lockup] received a hearing within the time frame allotted

pursuant to DOC policy and procedure.” In his original complaint, plaintiff alleged that defendants violated state law when they held him in temporary lockup beyond the time allowed in Wis. Admin. Code § DOC 303.11(3) (“The institution shall not allow any inmate to remain in TLU more than 21 days, except that the warden may extend this period for up to 21 additional days.”). I denied plaintiff leave to proceed on this claim on the ground a claim that defendants violated state law should be raised in state court. I told plaintiff that although federal courts may exercise supplemental jurisdiction over some state law claims, they ordinarily do so only when those claims “are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). Perhaps in a maneuver to sidestep this obstacle, plaintiff now makes the fantastical assertion that he is the only inmate ever to be held in temporary lockup beyond the time limits set out in the administrative code.

In his original complaint, plaintiff alleged that he was placed in temporary lockup on September 3, 2003 and that on September 26, 2003, defendant Borgan signed an extension permitting him to be held in that status an additional ten days. Nevertheless, plaintiff was not removed from temporary lockup until October 10, 2003, when he received a disciplinary hearing on conduct report no. 1479002. These allegations do not support a claim that plaintiff was held beyond the time limits set out in the administrative code, or that he is the

only inmate ever to have been so held. As noted above, Wis. Admin. Code § DOC 303.11(3) provides that an inmate may be retained in TLU for no more than 21 days, “except that the warden may extend this period for up to 21 additional days.” Although defendant Borge formally extended the time by an additional ten days on September 26, 2003, he retained full authority under state law to hold plaintiff in temporary lockup for a full 42 days. Plaintiff was removed from temporary lockup on October 10, thirty-seven days after he was placed in that status, and five days earlier than defendant Borge could lawfully have held him. Plaintiff’s unsupported allegation that no other similarly situated inmate has ever been held in temporary lockup for longer than the initial 21-day period and less than the extended 21-day period allowed under Wis. Admin. Code § DOC 303.11(3) defies credulity. Accordingly, plaintiff will not be allowed to amend his complaint to add this claim.

With respect to plaintiff’s motion for an order enjoining defendants from transferring him to a minimum security institution, I note that plaintiff does not advise the court that he has served the motion on the defendants or the defendants’ lawyer, assistant Attorney General Ma Manee Moua. Therefore, I have disregarded this submission. Plaintiff is reminded that in the court’s order of June 24, 2004, he was directed to send the defendants a copy of every paper or document he filed with the court until he learned the name of the lawyer who would be representing the defendants, at which time he was to serve the lawyer

directly rather than the defendants. In addition, he was cautioned to show clearly on the court's copy that he had sent a copy to the defendants or the defendants' lawyer, or his submissions would be disregarded. As soon as plaintiff advises the court that he has served Ms. Moua with his motion, I will consider it.

ORDER

IT IS ORDERED that plaintiff's motion to amend his complaint is DENIED.

Further, plaintiff's motion for temporary restraining order and injunction is DENIED without prejudice to his renewing the motion and notifying the court that he has served a copy of the motion on defendants' lawyer.

Entered this 13th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge