IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAURICE D. RODGERS,

Plaintiff,

v.

PATRICIA GARRO,

Defendant.

OPINION AND ORDER

04-C-0798-C

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In this civil action brought under 42 U.S.C. § 1983, plaintiff Maurice D. Rogers seeks injunctive and monetary relief for an alleged violation of his rights under the First Amendment. Specifically, plaintiff alleges that defendant Patricia Garro retaliated against him for filing an inmate complaint on or around July 12, 2004, by placing him in temporary lockup and later issuing him a conduct report. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is defendant's motion for summary judgment. Because plaintiff has not submitted evidence from which a reasonable trier of fact could find in his favor on his claim, I will grant defendant's motion.

Before turning to the merits of the motion, however, a few words are necessary about plaintiff's response to defendants' proposed findings of fact. Plaintiff was sent a copy of this

court's Procedure to be Followed on Motions for Summary Judgment as part of the pretrial conference order issued on February 3, 2005, PTC Order, dkt. #9, and was advised to read the procedures and follow them carefully. Despite this advice, plaintiff failed to comply with the instructions in responding to defendant's proposed findings of fact. Several times, plaintiff attempted to dispute defendant's proposed facts. In some instances, he pointed to evidence in the record to support his version of the facts, but the evidence would corroborate only one of the several factual statements he made. For example, defendant proposed as fact that,

> 6. Pursuant to DOC § 309.04(4)(b), correctional staff may read mail that is not clearly identified as being addressed to parties described in DOC 309.04(3) to ensure the safety of the institution. Rodgers' letter to another inmate did not fall within one of those exceptions and was read by Sergeant Shrader on or about July 22, 2004. Sgt. Shrader determined that Rodgers' letter posed a threat to the security, orderly operation, discipline or safety of the institution, and it was not delivered pursuant to DOC 303.09(4)(c)(8)(b). Rodgers was notified of the non-delivery of his letter. The letter was referred to FLCI Warden Thomas Borgen for his review. (Affidavit of Garro, ¶ 5).

Plaintiff responded,

> 6. Dispute. Pursuant to DOC § 309.04(4)(b), correctional staff may read mail that is not clearly identified as being addressed to parties described in DOC 309.04(3) to insure the safety of the institution. Plaintiff's letter to another inmate did not fall within one of those exceptions and was read by Sergeant Shrader on July 12, 2004. Sgt. Shrader did not approve of the letter, so under Captain Dommisse's direction he sent the letter back to plaintiff with a post-it note attached to it stating letter must be cleaned up before it will be sent out. There was no compulsory notification that stated the non-delivery of this letter. The letter was not referred to Warden Thomas Borgen for his

> review, it could not have been when it was given back to the plaintiff with directions to clean up the language, if plaintiff wanted the letter delivered. The letter was turned over to Captain Garro for her investigation. (See Affidavit of Plaintiff, ¶ 12, Exh. A.)

Plaintiff's affidavit at paragraph 12 states, "The letter was turned over to Captain Garro for her investigation, after and only after plaintiff filed an ICE." The first part of this averment was enough to support the last sentence of plaintiff's response in ¶ 6. It did not support any of the other factual statements. Exhibit A is an unauthenticated copy of an "Interview/Information Request" form. Unauthenticated copies of documents are not admissible as evidence. Procedure C.1.f. Even if plaintiff's exhibit was admissible, it, too, simply verified that plaintiff's letter was turned over to Captain Garro for her investigation. It would not have supported any of the remaining statements. Therefore, none of the remaining statements could be considered with the exception of the first sentence, which was identical to the first sentence in defendant's proposed fact ¶ 6.

In other instances, plaintiff attempted to dispute defendant's proposed fact, but the evidence he cited in the record did not support his version of the fact. Plt.'s Resp. to Dft.'s PFOF, Dkt. #25, ¶¶ 8, 9, and 11. At other times, plaintiff failed to cite to any evidence at all to support his version of the facts. Id. at ¶ ¶ 15, 16, 20, 21. In the face of these shortcomings the court has had to disregard many of plaintiff's proposed facts. To fill the void in the factual detail, I have pulled some factual information about plaintiff's filing of

an inmate complaint from the documentation of his exhaustion efforts attached to his complaint.

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

UNDISPUTED FACTS

At all relevant times, plaintiff Maurice Rodgers was an inmate at the Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Patricia Garro is employed by the Wisconsin Department of Corrections at Fox Lake and has been employed by the State of Wisconsin since October 1973. In her capacity as a captain, Garro has total responsibility on assigned shifts for institution operations and for the security, custody and control of adult male inmates.

On July 12, 2004, plaintiff Rodgers wanted to send a letter to another inmate who was housed at a different institution. With certain exceptions, correctional staff may read mail that is not clearly identified as being addressed to parties described in Wis. Adm. Code § DOC 309.04(3) to insure the safety of the institution. Rodgers' letter to another inmate did not fall within one of those exceptions. That same day, plaintiff filed an inmate complaint stating in part,

On the above date I received my letter back that I had placed in the box to be

> mailed the night before, with a note attached to it stating quote "Letter needs to be cleaned up before it will be sent out per Cpt. Dommisse, signed by Sgt. Shrader. I then had first shift Sgt. read the letter and he came to the conclusion that what needed to be cleaned up was quote "dis to dem honkeys I know dat you readin' dis, but I rebuke you." But I like to point to what the courts have stated in regards to this issue . . . Having established that I would like my mail to be sent out just the way it is.

On July l5, 2004, inmate complaint examiner Tom Gozinski recommended dismissal of plaintiff's complaint. In his report, Gozinski stated,

> The letter in question was being sent to another correctional institution and is subject to inspection by staff at both the sending and receiving institutions. Sergeant Shrader read the outgoing letter and returned it to inmate Rodgers with the instruction to remove offensive language.
>
> In the letter inmate Rodgers states, "This join is f_up and they be on some major oe'cake s_! dis to dem honkeys I know date you readin' dis, but I rebuke you . . . f_wit me and you chose ta die."
>
> That constitutes disrespectful language and Sergeant Shrader correctly told inmate Rodgers to remove that language.

On July 27, 2004, plaintiff appealed the recommended dismissal of his complaint to corrections complaint examiner John Ray. Ray affirmed the dismissal "with modification." In particular, Ray found,

> While I would agree the language used by the complainant in this outgoing letter was inappropriate, I nonetheless find that returning the letter to the inmate with instruction to remove the offensive language was inconsistent with the rule. 309.04(4)(c) states that the institution may not deliver incoming or outing mail if it does any of the following, and then lists 12 specific reasons. It goes on to say at (e) A record of any mail that is not delivered shall be kept by the security director. It shall include the name of

> the sender and intended receiver, the date, and the reason for not delivering it. 2. If the letter is outgoing mail, the department shall provide the sender a notice stating why the letter was not delivered. Correctional staff shall dispose of the letter consistent with s. DOC 303.10. Accordingly, it is recommended this complaint be affirmed on appeal to acknowledge proper procedure was not followed at FLCI in this instance. The noted modification is that staff be advised of the provisions of 309.04 and that they should be followed verbatim in the future. Since the letter would have been disposed of under the above procedure, I fail to see how the complainant was harmed by having it returned instead, and thus find no cause for further ICRS involvement.

On August 3, 2004, Richard Raemisch accepted Ray's recommendation for affirming the dismissal with modification on behalf of the Secretary of the Department of Corrections.

Meanwhile, on or about July 22, 2004, Sergeant Shrader read plaintiff's letter and determined that it posed a threat to the security, orderly operation, discipline or safety of the institution. At some point, the letter was turned over to defendant Garro for her investigation. Also on or about July 22, 2004, Warden Borgen reviewed Rodgers' letter. Both Warden Borgen and Sergeant Shrader found that there were disrespectful comments and threats made towards staff written in the letter. Because of the comments made by Rodgers in the letter, Warden Borgen instructed Garro to place Rogers in temporary lockup status while the incident was being investigated and to prevent further disruption at the Fox Lake institution.

At Fox Lake, it is the standard practice to house inmates in temporary lockup status in the segregation unit. Temporary lockup is considered a non-punitive status. That is,

unlike inmates in segregation for punishment, inmates in temporary lockup continue to receive pay and retain their good time credits. Warden Borgen has complete authority to house inmates wherever he deems appropriate and had authority to instruct defendant Rodgers to place plaintiff there.

In a July 22, 2004 "Notice of Offender Placed in Temporary Lockup," plaintiff was told that the reasons for his confinement in temporary lockup were that "the offender [plaintiff] may impede a pending investigation or disciplinary action" and "may be disruptive to the operation of the institution." In the section of the form titled "Facts upon which decision is based," plaintiff was informed that the situation precipitating his placement in temporary lockup was "Investigation - Alleged threats against the Warden & Fox Lake Staff." Plaintiff was given an opportunity to respond to this notice. On the same day, plaintiff gave a statement denying that he threatened anyone in a letter. Plaintiff thought that the reason for his placement in temporary lockup was a letter that he had written to the warden about a staff member on July 14, 2004.

On July 23, 2004, the Security Director Designee, Lt. Kim Olson, reviewed the decision to place plaintiff in temporary lockup, taking plaintiff's statement into consideration. Olson agreed that temporary lockup placement was appropriate. If the security director or Olson would have determined temporary lockup inappropriate, plaintiff would have been released immediately.

On or about August 2, 2004, Warden Borgen instructed defendant Garro to issue plaintiff adult conduct report #1298937 charging plaintiff with disrespect and threats in violation of §§ DOC 303.25 and 303.16, respectively. Plaintiff remained in temporary lockup until his disciplinary hearing on this conduct report on August 5, 2004. On August 5, 2004, plaintiff attended his disciplinary hearing on conduct report #1298937, which was held by Melvin Pulver, a Captain at the Fox Lake institution. Pulver found plaintiff guilty of disrespect because plaintiff had referred to staff in his letter as "motha fukkkas, honkeys, this joint is fukkked up." Pulver also found plaintiff guilty of threats on the grounds that plaintiff knew staff would read his letter and threatened them by writing: "Fukkk wit me and you chose to die."

OPINION

A state official who takes action against an inmate to retaliate against him for exercising a constitutional right may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conduct was one of the reasons the defendant took adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis.

2003). "Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct." Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

Plaintiff has not come forward with any evidence that would allow a jury to draw an inference that defendant Garro put him in temporary lockup because he filed an inmate complaint on July 12 or 13, 2004. Indeed, nothing in the facts suggests that Garro knew anything at all about plaintiff's inmate complaint. The facts reveal that plaintiff's letter became the object of an investigation sometime around July 22, 2004, after Sgt. Shrader and Warden Borgen reviewed it and decided it contained disrespectful comments and threats towards staff. At that point, Garro was instructed to put Rogers in temporary lockup and she complied with this directive. Later, Garro was instructed to issue plaintiff a conduct report charging him with disrespect and threats. Even if I assume that Sgt. Shrader and Warden Borgen were aware of plaintiff's inmate complaint, it would not be reasonable to assume on the basis of those facts alone that one or both of them told Garro about plaintiff's inmate complaint. Obviously, a person cannot be motivated by conduct of which he is not even aware. Morfin v. City of East Chicago, 349 F.3d 989, 1005 (7th Cir. 2003).

In any event, although filing an inmate grievance is a constitutionally protected activity, the facts reveal that plaintiff was not punished for filing an inmate grievance. He

was placed in temporary lockup and subsequently punished because of the disrespectful and threatening statements in his letter to another inmate in another prison. It is well-settled that prison officials may discipline inmates for insolent and disrespectful behavior, for obvious legitimate penological concerns of security and order. Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986) (few things more inimical to prison discipline than allowing prisoners to abuse guards). A prisoner does not insulate himself from punishment simply by making threatening or abusive remarks in the context of an inmate grievance. Hale v. Scott, 371 F.3d 917 (7th Cir. 2004) (prison grievance containing libelous "rumor" about prison staff not protected speech).

In his brief, plaintiff argues that if he had not attached his letter to his inmate complaint, he would not have been placed in temporary lockup or subsequently disciplined. He then concludes that because he was punished after he turned the letter over to prison officials with his inmate complaint, the punishment that followed must have been taken in retaliation for his having filed the complaint. Plaintiff's logic is flawed.

When a prisoner claims that he has been retaliated against for filing a prison grievance, he must prove that the retaliation was motivated at least in part by a desire to suppress the exercise of a constitutional right. Hasan v. U.S. Dept. of Labor, 400 F.3d 1001 (7th Cir. 2005). A claim of retaliation is not cognizable in federal court if it does not implicate a constitutional right. For example, if a prisoner were to claim that prison officials

"retaliated" against him for violating prison rules by imposing sanctions upon him, his claim would fail at the outset. Violating prison rules is not a constitutionally protected activity. In this case, the constitutional right at issue is plaintiff's right to file an inmate grievance. His job was to prove that when defendant Garro put him in temporary lockup and issued a conduct report against him, she was motivated to take these actions by a desire to punish plaintiff for his having filed the grievance. Id. at 1006. Plaintiff did not do this.

True, plaintiff succeeded in showing that he might have escaped punishment altogether if he had not filed an inmate complaint that afforded prison officials a second opportunity to see his letter. However, this showing falls far short of allowing an inference to be drawn that when he was punished, the punishment was intended to deter him from exercising his right to file inmate complaints. The facts reveal that corrections complaint examiner John Ray made it clear to prison officials in his affirmance of the dismissal of plaintiff's inmate complaint that they had violated prison regulations by failing to confiscate plaintiff's letter and turn it over to security for appropriate action when it was first rejected for mailing. Had proper procedure been followed, it is likely that plaintiff would have been subject to the same consequences he ultimately faced. In sum, I conclude that plaintiff has failed to show that he engaged in activity protected by the United States Constitution that was a substantial or motivating factor in defendant Garro's decision to put plaintiff in temporary lockup or issue him a conduct report. Therefore, defendant's motion for

summary judgment will be granted.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 15th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge