

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

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THOMAS DANIEL STANTON,

Plaintiff,

v.

MEMORANDUM AND ORDER  
05-C-53-S

PHIL PAUSMA, HARLAN BUWALDA,  
JOHN RICHARDS, TODD JOHNSON,  
ANTHONY ASHWORTH, JEFF KARNS  
and LYNN NICOLAI,

Defendants.

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Plaintiff Thomas Daniel Stanton was allowed to proceed on his First Amendment claim against defendants Phil Pausma, Harlan Buwalda, John Richards, Todd Johnson, Anthony Ashworth, Jeff Karns and Lynn Nicolai. In his complaint plaintiff alleges that defendants retaliated against him for reporting that defendant Pausma assaulted another inmate.

On April 25, 2005 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. Plaintiff responded to the motion on May 18, 2005. No further briefing is required.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

#### FACTS

For purposes of deciding the defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Thomas Daniel Stanton is currently an inmate at the Flambeau Correctional Center, Hawkins, Wisconsin. He has been previously incarcerated at the Oregon Correctional Center, Oregon, Wisconsin (OCC), the Oakhill Correctional Institution (OCI), the

Stanley Correctional Institution (SCI) and the New Lisbon Correctional Institution (NLCI).

Defendant Phil Pausma was a correctional officer at the Oregon State Prison Farm (OSF). Defendant Harlan Buwalda is a Supervising Officer 2 at OSF. Defendant Jeff Karns is a Correctional Sergeant at OCC. Defendant Todd Johnson was a correctional captain at OCC.

Defendant John Richards is a Supervising Officer 2 at the Thompson Correctional Center. Defendant Anthony Ashworth was a Supervising Officer 2 at the Columbia Correctional Institution. Defendant Lynn Nicolai is an Offender Classification Specialist at the Stanley Correctional Institution, Stanley, Wisconsin.

On December 30, 2002 at approximately 4:00 p.m. defendant Pausma discovered inmate Brian Burkheimer in the milking barn. Pausma questioned Burkheimer's presence in the barn. It is disputed whether Pausma verbally and physically abused Burkheimer. On December 31, 2002 plaintiff reported that defendant Pausma had shouted at Burkheimer, grabbed his sweatshirt and shook him. Plaintiff also sent a signed statement to Superintendent Franson at the OCC.

Plaintiff and Burkheimer were placed in Temporary Lockup in the Oakhill Correctional Institution segregation unit. Defendant Buwalda investigated the incident and did not find any evidence to support plaintiff's allegations that defendant Pausma had verbally or physically abused Burkheimer.

On January 17, 2003 defendant Buwalda issued plaintiff conduct report number 1381507 for lying about staff. Defendant Karns was the staff advocate appointed to assist plaintiff at his disciplinary hearing. On January 22, 2002 plaintiff submitted his request for attendance of witnesses at his disciplinary hearing. He requested Pausma, and inmates Burkheimer, Bootz, Bentle, Norton, Zinger, Chapel, Wolter and "other two milkers who were in the barn that evening." Pursuant to the Wisconsin Administrative Code § DOC 303.81(1) an inmate cannot call more than two witnesses without good cause. Defendant Johnson reviewed plaintiff's request and allowed his first two choices, Burkheimer and Bootz as witnesses.

On January 28, 2003 a disciplinary hearing was held on plaintiff's conduct report. Because Bootz was housed at another institution his written statement was presented at the hearing. Plaintiff and Pausma testified at the hearing. Burkheimer's written statement was presented. The statements of two confidential witnesses were also submitted into evidence. Defendant Richards was the hearing officer and found plaintiff guilty of lying about staff.

On April 13, 2002 Secretary Cindy O'Donnell found that an approved witness Burkheimer was not present at plaintiff's disciplinary hearing and remanded the matter to the OCC for a new hearing. Defendant Ashworth was asked to be the disciplinary hearing officer for the hearing which was held on June 10, 2003.

Burkheimer had been released and was not able to appear at the hearing. He supplied a detailed question and answer format statement. Defendant Ashworth found plaintiff guilty of lying about staff. On June 25, 2003 the Warden affirmed the finding of guilt but reduced the sentence. On November 21, 2003 Secretary Cindy O'Donnell ordered that the conduct report be expunged because of the failure to correct the error on remand.

On December 11, 2003 the program review committee recommended plaintiff's transfer to the McNaughton Correctional Center. This transfer was approved. On January 22, 2004 plaintiff was bused to a temporary holding site, the Stanley Correctional Center.

During this time, defendant Nicolai was given the responsibility of sending fifty(50) inmates in minimum or minimum community status from the Stanley Correctional Institution to a new institution, the New Lisbon Correctional Institution (NLCI). Plaintiff was chosen to go to NLCI because he had no special placement needs nor an upcoming release date.

On March 23, 2004 Nicolai held a program review hearing for an early recall on plaintiff to re-evaluate custody, placement and program issues to determine whether Stanton met the criteria for placement at NLCI. Plaintiff requested a transfer to McNaughton. Nicolai thought that plaintiff had six more minor conduct reports since his last review. She recommenced his transfer to NLCI.

Plaintiff was transferred to NLCI on April 5, 2004. Plaintiff appealed the decision and received an early recall to the Program Review Committee because of incorrect information considered at his March review. On April 28, 2004 he was approved for a transfer to McNaughton. McNaughton would not accept plaintiff and he was transferred to Flambeau Correctional Center on July 7, 2004.

#### MEMORANDUM

Plaintiff claims that the defendants violated his First Amendment rights by retaliating against him from reporting defendant Pausma's abuse of another inmate. Defendants moved for summary judgment on this claim.

To prevail on his First Amendment claim plaintiff must show that his speech was constitutionally protected and that it was a motivating factor in the defendants' challenged actions. Abrams v. Walker, 307 F.3d 650, 657 (7<sup>th</sup> Cir. 2002). He must also show that the alleged conduct would not have occurred absent a retaliatory motive. Mt. Health City Sch. Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274, 286 (1977).

Plaintiff claims that the defendants retaliated against him for reporting defendant Pausma's misconduct to Superintendent Franson. He claims that this is protected speech and that it was the motive for the defendant's challenged actions. This conclusion is merely speculative.

The defendants have submitted affidavits stating that they did not retaliate against plaintiff. Plaintiff has submitted no evidence from which a jury could infer that their motives were retaliatory. In addition, defendant Nicolai had no knowledge of plaintiff's statements made to Lieutenant Franson. Plaintiff has not shown that the defendants' challenged actions were retaliatory.

Further, absent any retaliatory motive the defendants would have taken the same actions. Although plaintiff continues to assert that he was not lying, he was given a conduct report for lying about staff. During the disciplinary proceedings defendants took the actions they did in furtherance of determining plaintiff's guilt or innocence. They would have taken these actions regardless of the content of plaintiff's speech.

As a matter of law defendants did not retaliate against plaintiff for protected speech. Accordingly, their motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that the defendants' motion for summary judgment is GRANTED.

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IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all federal law claims contained therein with prejudice and state law claims without prejudice.

Entered this 20<sup>th</sup> day of May, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge