IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

v.

JANEL NICKEL, TIMOTHY DOUMA, PHILIP KINGSTON, WILLIAM NOLAND, MATTHEW J. FRANK,

Defendants.

OPINION AND ORDER

05-C-232-C

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This is a civil action for declaratory and monetary relief brought pursuant to 42 U.S.C. § 1983. In his complaint, plaintiff Willie Simpson, a prisoner at the Columbia Correctional Institution in Portage, Wisconsin, contends that defendants retaliated against him for exercising his First Amendment rights by issuing him a conduct report for lying after he initiated a lawsuit and wrote a letter relating to alleged abuse by prison staff.

On October 31, 2005, I issued an order sua sponte, noting that "to state a claim for retaliation, a plaintiff must plead three elements: he must specify a retaliatory action; name the appropriate defendants; and assert a constitutionally protected activity, the exercise of which caused the retaliation. Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005)."

Order, dkt. #48, at 2. Although I found that plaintiff had specified a retaliatory action and named appropriate defendants, he did not assert a constitutionally protected activity, because he did not demonstrate that the speech in which he had engaged was truthful. Instead, he admitted that the speech that was the subject of his retaliation claim was found to be a lie by the prison disciplinary committee. Because falsehoods do not constitute protected speech and factually baseless court actions and inmate complaints are not immunized by the First Amendment right to petition, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); McDonald v. Smith, 472 U.S. 479, 484 (1985), I concluded that before plaintiff could state a retaliation claim, he needed to make a threshold showing that the disciplinary finding was erroneous. Therefore, I directed him to file, no later than November 11, 2005, evidence that conduct report #148547 had been overturned or vacated.

Now plaintiff has moved for reconsideration of the October 31 order. He argues that the holding in DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), runs counter to the ruling of this court.

In DeWalt, the Court of Appeals for the Seventh Circuit addressed the question whether the "favorable-termination" requirement set forth in Heck v. Humphrey, 512 U.S. 477 (1994), should apply to an inmate's constitutional challenges to disciplinary sanctions imposed where the sanctions had no effect on the length or duration of the inmate's confinement, that is, the sanctions did not involve the loss of good time credits. In that case,

DeWalt had alleged that he had been subjected to a "wave of retaliation" following his filing of a grievance against a prison official and on account of his race. Among the acts alleged to have been retaliatory or discriminatory or both were the removal of DeWalt from his job in the prison school, a scheme to induce him to disobey an order so that he could be found guilty of a disciplinary violation and a plot to enlist other prison officials to issue conduct reports against DeWalt "whenever possible." The district court dismissed DeWalt's retaliation and discrimination claims at the screening stage, reasoning that Edwards v. Balisok, 520 U.S. 641 (1997), a case extending Heck to disciplinary proceedings involving the loss of good time credits, precluded his challenge to disciplinary sanctions because he had not shown that the sanctions had been overturned. The court of appeals disagreed. In particular, the court of appeals held that inmate DeWalt could raise under 42 U.S.C. § 1983 a claim in federal court that his loss of a prison job was the result of racial discrimination and retaliation for the exercise of his First Amendment right to file a grievance, without first showing that his disciplinary sanctions had been invalidated. In reaching this conclusion, the court observed that unlike the circumstances in Heck and Edwards, habeas corpus is not an available remedy for prisoners alleging constitutional violations that have no bearing on the length or duration of their confinement. Because application of Heck and Edwards to such situations would foreclose any avenue of relief for prisoners challenging the constitutionality of disciplinary proceedings or the conditions of confinement imposed as

a result of those proceedings, the court of appeals held that such an extension of Heck was improper.

Plaintiff Simpson's case is distinguishable from the DeWalt case. DeWalt's complaint alleged the facts necessary to make out a claim under the First and Fourteenth Amendments. He alleged he was black, that he had filed a grievance against an officer, and that for both of those reasons he had suffered unfavorable treatment, including the issuance of a conduct report for rule violation he had been induced to commit. No de novo review of the disciplinary hearing was necessary in order to decide whether plaintiff had stated a claim of a constitutional violation. In this case, however, I cannot find that plaintiff has stated a claim of a violation of his constitutional rights unless I determine first whether his speech was protected. From the face of the complaint, it appears that it was not protected. The speech has been found to be a lie. The only way I can find that the speech was protected is to conduct a de novo review of the disciplinary committee's finding that plaintiff lied. Such intercession into prison disciplinary matters flies in the face of the extensive body of case law that counsels federal courts against second-guessing the decisions of prison authorities. See, e.g., Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (court must accord substantial deference to professional judgment of prison administrators); Lewis v. Casey, 518 U.S. 343, 387 n.8 (1996) ("The judiciary is ill equipped to deal with the difficult and delicate problems of prison management and . . . prison administrators are entitled to

considerable deference."); Turner v. Safley, 482 U.S. 78, 84-85 (1987) ("Courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." (citation omitted)).

Plaintiff's reading of DeWalt is problematic in another way, too. Permitting a federal court to disturb the factual finding of prison officials would create an unusual anomoly in which federal courts would be permitted to re-examine findings of guilt without deference to state officials in the context of § 1983 claims involving prison disciplinary hearings, while requiring courts to defer to the states when reviewing findings of guilt on habeas review under 28 U.S.C. § 2254. It would seem incongruous to permit federal courts to review civil constitutional claims de novo, while limiting review of criminal confinement in alleged violation of the constitution to a highly deferential standard. Such a result cannot be what the DeWalt court intended.

If plaintiff had no other mechanism for obtaining relief from the allegedly unconstitutional actions of defendants, DeWalt might counsel in favor of review, as inevitably intrusive as review would be upon the decisions of state authorities. In support of its conclusion that prisoners could bring a § 1983 claim challenging consequences of disciplinary sanctions, the DeWalt court cited Sylvester v. Hanks, 140 F.3d 713, 714 (7th Cir. 1998), which questioned whether § 1983 actions should be available to prisoners in

such situations, given "the fact that few states afford collateral review of prison disciplinary decisions." DeWalt, 224 F.3d 607, 617-18. However, Wisconsin provides a writ of certiorari that is the well-established mode of judicial review for inmates who seek to challenge prison disciplinary decisions. State ex rel. Curtis v. Litscher, 2002 WI App 172, ¶ 12, 256 Wis. 2d 787, 650 N.W.2d 43; State ex rel. L'Minggio v. Gamble, 2003 WI 82, ¶ 21, 263 Wis. 2d 55, 667 N.W.2d 1. As the court detailed in the October 31 order, if plaintiff had sought review of his disciplinary action and the state court had found that plaintiff did not lie when he initiated a lawsuit and wrote a letter relating to alleged abuse by prison staff, this court could address his retaliation claim without re-trying his disciplinary action. However, without a threshold showing that plaintiff's grievances were not lies (as the prison disciplinary committee found them to be), plaintiff has not stated a cause of action and his case must be dismissed.

ORDER

IT IS ORDERED that

(1) Plaintiff's motion to reconsider is DENIED;

(2) This case is dismissed for failure to state a claim upon which relief may be granted.

Entered this 23rd day of November, 2005.

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