IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WAR N. MARION,

OPINION and ORDER

Plaintiff,

09-cv-723-bbc

v.

JANEL NICKEL, DYLON RADTKE,
CHAD KELLER and BENJAMIN NEUMAIER,[1]

Defendants.

- -

Plaintiff War Marion is suing prison officials Janel Nickel, Dylon Radtke, Chad Keller and Benjmain Neumaier on the following claims:

(1) defendants disciplined plaintiff in retaliation for a federal lawsuit that he filed in 2007, in violation of plaintiff's right to have access to the courts; and

(2) defendant Radtke was biased at plaintiff's disciplinary hearing, refused without a legitimate reason plaintiff's request to call witnesses, refused to allow him to present important evidence that was available and then sentenced plaintiff to 360 days of disciplinary separation, in violation of plaintiff's right to due process.

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[1] Plaintiff identified defendant Benjamin Neumaier as "B. Neumaier" in his complaint. I have amended the caption to reflect Neumaier's full name, as identified in defendants' summary judgment materials.

Defendants' motion for summary judgment is ready for decision. I conclude that plaintiff has raised a genuine issue of material fact on his claim that defendants Keller and Neumaier retaliated against him for exercising his right to have access to the courts. Plaintiff has not presented the most compelling case of retaliation, but he has done enough, to require resolution of this claim by a jury. Plaintiffs' remaining claims are not supported by the evidence and must be dismissed.

The undisputed facts are set forth below. Generally, this court takes its facts from the proposed findings of fact submitted by both sides. In this case, plaintiff submitted an affidavit and responses to defendants' proposed findings of fact, but he did not submit his own proposed findings of fact. In accordance with this court's procedures, I have not considered any evidentiary materials plaintiff submitted unless he cited them in support of a dispute in his responses to defendants' proposed findings of fact. Helpful Tips for Filing a Summary Judgment Motion, attached to Preliminary Pretrial Conference Report, dkt. #22, at Tip #2 ("The court will not search the record for factual evidence. Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion.").

In addition, I have not considered any proposed findings of fact or responses to proposed findings of fact unless they were supported with a citation to admissible evidence

in the record. Procedure to Be Followed on Motions for Summary Judgment, dkt. #22, at II.E.2 ("The court will not consider any factual propositions made in response to the moving party's proposed facts that are not supported properly and sufficiently by admissible evidence."). In many instances plaintiff cites answers to interrogatories and requests for admission as evidence in support of an allegedly disputed fact. However, he did not file those documents with his responses to defendants' proposed findings of fact; instead, he waited until January 18, 2011, two months after his deadline for submitting his summary judgment materials. On the same day, he filed a surreply to defendants' proposed findings of fact, which is not permitted by the court's procedures. I have not considered any of the documents plaintiff filed on January 18.

UNDISPUTED FACTS

Plaintiff War Marion has been incarcerated at the Columbia Correctional Institution in Portage, Wisconsin since March 2006. On May 23, 2009, he was transferred from general population to temporary lockup; on June 5, he was transferred to control segregation; on June 6, he was returned to temporary lockup; on June 12, he was placed in disciplinary separation; on December 10, 2009 he was placed back in general population.

A. Previous Case[2]

In 2007, plaintiff filed Marion v. Columbia Correctional Institution in the Eastern District of Wisconsin. In his complaint, he alleged that defendants Dylon Radtke, Chad Keller, Janel Nickel and other prison officials failed to provide him a fair hearing before he was given 240 days in segregation, in violation of the due process clause. The case was transferred to this court and assigned case no. 07-cv-243-bbc. I screened the complaint in accordance with 28 U.S.C. §§ 1915 and 1915A, concluded that plaintiff failed to state a claim upon which relief may be granted and entered judgment in favor of defendants.

In an opinion dated March 23, 2009, the Court of Appeals for the Seventh Circuit reversed, concluding that 240 days of disciplinary segregation could give rise to a claim under the due process clause. Marion v. Columbia Correction Institution, 559 F.3d 693 (7th Cir. 2009). The court of appeals issued the mandate on April 17, 2009 and I rescreened the complaint on May 1, 2009, allowing plaintiff to proceed on a claim against defendants Radtke, Keller and Nickel. The Wisconsin Department of Justice accepted service on behalf

[2] Neither side submitted proposed findings of fact about plaintiff's previous case, but I may take judicial notice of past court proceedings. Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1172-73 (7th Cir. 2010) ("We can take judicial notice of prior proceedings in a case involving the same litigant.").

of these defendants on May 12, 2009.

In an order dated June 11, 2010, I granted defendants' motion for summary judgment on the ground that plaintiff had failed to show that his discipline was serious enough to trigger the due process clause or that defendants deprived him of any process that he was due. Plaintiff appealed the judgment and the case is pending before the Court of Appeals for the Seventh Circuit.

B. Disciplinary Proceedings

On May 23, 2009, 22 days after I granted plaintiff leave to proceed on his claims against defendants Radtke, Keller and Nickel in case no. 07-cv-243-bbc, plaintiff and another prisoner were fighting on the recreation field. (Plaintiff insists that he was simply defending himself, but that is irrelevant to the claims in this case.) Defendant Benjamin Neumaier and Ray Davenport, both correctional officers, arrived on the scene after the fight began. Davenport ordered the prisoners to "stop fighting and lay on their bellies." (The parties dispute whether Neumaier gave a similar order.) Neumaier heard the other prisoner say, "He won't let go of me"; Neumaier observed that plaintiff "continued to hold [the other prisoner's] legs together with his arms." Davenport put restraints on the other prisoner; Neumaier focused on plaintiff. (The parties dispute whether plaintiff resisted being restrained by "reach[ing] back and grab[bing] the handcuffs with his left hand, not allowing

Officer Neumaier to open the handcuffs"; and whether plaintiff squeezed Neumaier's left index and middle fingers and "twisted [Neumaier's] fingers up toward the left side of the officer's chest away from the restraints.") Neumaier placed both of plaintiff's hands in restraints.

Defendant Chad Keller, a supervising officer, responded to the scene after learning of the fight. When he arrived, plaintiff was in restraints. Plaintiff and the other prisoner were taken to the segregation unit. (The parties dispute whether plaintiff made threats while he was being escorted.) Neumaier did not seek medical attention for his fingers.

Defendant Neumaier wrote an incident report, dated May 23, 2009, in which he stated:

> On the above date and time, I, CO Neumaier was standing outside rec. The bubble received a call . . . notifying rec officers about [plaintiff] and [another prisoner] fighting by the track. I responded to the incident and gave both inmates a direct order to "stop and lay on the ground." [The other prisoner] put his hands out to the side and said, "he won't let go of me." [Plaintiff] did not follow orders, he continued to hold [the other prisoner's] legs together with his arms. CO Davenport arrived and we gained control of the incident. CO Davenport put restraints on [the other prisoner] as I put restraints on [plaintiff]. After having [plaintiff's] right hand restrained, he reached back and grabbed the cuffs with his left hand, not allowing me to open it, and did not follow my order to "stop resisting," I then implemented a trained [illegible]; compression compliance hold. He let the cuff go and grabbed my fingers. I gave another order to "let me go." He did not follow my first order. The team arrived on scene at this time. The team escorted [plaintiff] to HSU then to DS1. [The other prisoner] was also escorted to DS2.
>
> Note: [Plaintiff] was making threats to [the other prisoner], "that's it, you['re]

dead fucker, I got something for you when you get out."

Relying on statements from "the officers involved in the incident on the recreation field," defendant Keller prepared a form called, "Notice of Offender Placed in Temporary Lockup," that is dated May 23, 2009. Keller wrote that plaintiff was "placed in TLU pending conduct report for fighting in the rec field." After speaking with "staff involved in the incident on the recreation field," defendant Keller "advised" Neumaier to write a conduct report for battery, threats and disobeying orders.

On May 29, 2009, defendant Neumaier issued a conduct report to plaintiff for battery, threats and disobeying orders. (Apparently, Neumaier did not charge plaintiff with fighting because of a belief that charges for fighting and battery could not be included in the same conduct report, even if each charge related to a different person. Dfts.' PFOF ¶ 52, dkt. #65.) Neumaier repeated much of the same information from the incident report, but he added that plaintiff "squeezed my pointer finger and middle finger and twisted them away from the restraints."

On the same day, defendant Janel Nickel, the security director, reviewed the conduct report to determine whether it should proceed, be dismissed or "return[ed] for investigation." Nickel allowed the conduct report to proceed as a "major offense." Plaintiff received a copy of the report that evening, around 8:30 p.m. (The parties dispute whether plaintiff received a document informing him of all of his rights related to his disciplinary hearing.)

On May 30, 2009, plaintiff filled out a form called "Offender's Request for Attendance of Witness." Under the heading "name of witness," plaintiff wrote "camera or tape of the incident." Defendant Radtke reviewed that request and wrote, "a video, if available, is approved to be viewed by the hearing committee."

On an "interview/information request" form, plaintiff wrote, "I would like to put C.O. Davenport down on my witness form." In a response dated June 3, 2009, the security office wrote, "Ms. Leiser, advocate, will be coming to see you in the next few days and will be giving you a DOC-73. You need to request witnesses using that form."

In a memorandum dated June 9, 2009, Mary Leiser, plaintiff's staff advocate, wrote:

> I contacted the accused on June 9, 2009. Inmate Marion was offered an "Offender's Request for Attendance of Witness" form and informed of the two-day time limit in which to return the completed witness form to the Security Office, per DOC 303.81.
> Marion was informed of the "tentative date" of his hearing.

"Mary Leiser 6-12-09" is handwritten on the bottom of the memorandum. (Plaintiff denies that Leiser gave him the form or met with him before his hearing.)

Plaintiff received a hearing on June 12, 2009, before defendant Dylon Radtke and James Spangberg. They recorded plaintiff's statement as follows:

> I did have a physical altercation with another inmate; he ran up behind me and hit me in the side of the head. We wrestled on the ground after he hit me. I did not g[r]ab the officer['s] finger. I did comply when he told me to be restrained. I did not let go of the dude's hand. Th[ere] was no tussle after it was over. I asked the Security Director of CO Davenport [sic]. The first page [of the conduct report] is

> true but the second page is a l[i]e. I did not make any threats. I am not guilty. I am guilty of disobeying orders because I did not let go of the arm.

In addition, Radtke and Spangberg viewed the videotape, which plaintiff was not allowed to watch. According to Radtke, the tape "showed a small portion of the outdoor recreation field, with several inmates walking or jogging around the track," but it did not show "a physical altercation between inmates." (After plaintiff filed this case, defendant Nickel viewed the tape as well and came to the same conclusion.)

The committee found plaintiff guilty of all three charges. They reasoned that the "report writer" was "credible due to direct observation of the incident, without reason to fabricate the report and has no stake in the outcome of the hearing" and that plaintiff's statement was "contradictory and not credi[b]le."

Plaintiff received a disposition of 360 days in disciplinary separation (a form of segregation) and 10 days' loss of recreation. The committee listed several reasons for choosing this discipline:

> 1. Inmate['s] overall disciplinary record is poor.
> 2. Inmate has been found guilty of similar offenses recently.
> 3. Serious compromise of institution security.
> 4. Dangerous or disruptive event.
> 5. Inmate accepts no responsibility nor shows any remorse over the incident.
> [6.] Disposition must deter further violation.
> [7.] Disposition must allow the inmate to be kept in a status where his behavior can be more safely managed.

On June 16, 2009, plaintiff appealed the committee's decision to the warden, who

affirmed.

C. Conditions of Confinement in Columbia Correctional Institution

1. General population

Before May 23, 2009 plaintiff was housed in general population. Prisoners assigned to general population status are allowed to have personal and religious property in their cells including electronic equipment, such as televisions, radios, clock radios, personal photographs, typewriters, writing materials and publications as long as the property items conform to prison regulations. Prisoners are also allowed to have recreation time, make telephone calls, send and receive mail, have visitors, have access to personal hygiene items, canteen privileges and leisure time activities.

2. Temporary lockup

On May 23, 2009, plaintiff was placed in temporary lockup pending resolution of his conduct report for battery, disobeying orders and making threats. Prisoners who are assigned to temporary lockup are allowed to possess the following kinds of property:

- toiletries such as chapstick, conditioner, deodorant, shampoo, shaving cream, skin lotion, soap, soap dish, toilet paper, toothbrush, toothbrush holder and toothpaste;

- writing supplies, including an address book, carbon paper, dictionary,

greeting cards, legal envelopes, pen inserts and stationary;

- reading materials, including books, chapel library books, school books, magazines and newspapers;

- one comb, cup, hairbrush, 10 photographs, one hair pick, one deck of playing cards, one pair of shower thongs and one calendar.

Prisoners may use fingernail clippers, toenail clippers and dental floss, but they may not keep these items in their cell.

With respect to privileges, prisoners may place canteen orders, participate in out-of-cell exercise, send and receive mail and make phone calls in accordance with the procedures set in the unit rules.

3. Control segregation

On June 5, 2009, after plaintiff received a conduct report for flooding his cell and covering his window with a towel, he was moved to control segregation for 13 1/2 hours. Plaintiff did not have any clothes when he was first placed in control segregation. He was given "a vest with the arms out" during the last hour that he spent in control status. Plaintiff did not have a bed, but only a rubber mat. The cell was "very cold." He received only one meal, a bologna sandwich and milk. When he needed to use the bathroom, he received one sheet of toilet paper.

4. Disciplinary separation

Prisoners in disciplinary separation are provided a clean mattress, sufficient light to read by at least 12 hours each day, a toilet and sink and "adequate" ventilation and heating. Prisoners are also provided with necessities, which are not necessarily kept in the prisoner's cell and include clothing and bedding, toothbrush, toothpaste, soap, towel, face cloth and comb, writing materials and stamps, holy books and "nutritionally adequate" meals. Prisoners have "access to materials pertaining to legal proceedings" and law books. They are permitted visitation, telephone calls and may receive and send first class mail pursuant to institution rules and procedures. They are allowed to shower at least once every four days and to exercise. They are provided with services such as social services, clinical services and program opportunities on an as-needed basis. Disciplinary separation does not affect the prisoner's release date from prison.

OPINION

A. Retaliation

A prisoner may sue officials under 42 U.S.C. § 1983 if they retaliate against him for exercising a constitutional right and if their actions would deter a person of ordinary firmness from exercising his rights in the future. Watkins v. Kasper, 599 F.3d 791, 794 (7th Cir. 2010); Bridges v. Gilbert, 557 F.3d 541, 552 (7th Cir. 2009); DeWalt v. Carter, 224 F.3d

607, 618 (7th Cir. 2000). Defendants do not dispute for the purpose of summary judgment that plaintiff had a constitutional right to file and litigate case no. 07-cv-243-bbc or that the conduct report he received for battery would deter a person of ordinary firmness from exercising his rights. Rather, the question for summary judgment is whether plaintiff has adduced sufficient evidence to allow a reasonable jury to infer that defendants disciplined him because of that lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). More specifically, the question is whether plaintiff's lawsuit was "a motivating factor" in the decision to discipline plaintiff. Mays v. Springborn, 575 F.3d 643, 650 (7th Cir. 2009). In other words, plaintiff must show that the lawsuit was one of the reasons for his discipline. Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153-54 (W.D. Wis. 2003).

Defendants argue first that they "were not aware of the 2007 lawsuit and/or the status of the lawsuit in the courts." Dfts.' PFOF ¶ 112, dkt. #65. Of course, "[t]he protected conduct cannot be proven to motivate retaliation if there is no evidence that the defendants knew of the protected activity." Morfin v. City of East Chicago, 349 F.3d 989, 1005 (7th Cir. 2003). I cannot grant summary judgment on this ground, however, because a reasonable finder of fact could choose to disbelieve defendants' professed ignorance.

Plaintiff received his conduct report on May 29, 2009, more than two years after he filed the lawsuit against defendants Keller, Radtke and Nickel, two months after the court of appeals revived the case, a few weeks after I allowed plaintiff to proceed against Keller,

Radtke and Nickel and several days after the Department of Justice accepted service of the complaint on behalf of defendants. It may be that defendants remained blissfully ignorant of the case during all of these developments, but it would not be unreasonable to infer that a defendant would be aware of his own lawsuit. Cf. Norman-Nunnery v. Madison Area Technical College, 625 F.3d 422, 430 (7th Cir. 2010) ("A person is unlikely to quickly forget being falsely sued for racial discrimination.").

It is a closer question whether it is reasonable to infer that defendant Neumaier was aware of the lawsuit or had reason to care about it. Neumaier was not a party to the 2007 case and plaintiff does not point to evidence that Neumaier has any relationship to the other defendants other than as a coworker. However, plaintiff's theory is that defendant Keller informed defendant Neumaier about the lawsuit and convinced him to write the conduct report for battery and making threats.

Is there any evidence to support plaintiff's theory? Certainly there is no direct evidence of this. Both Neumaier and Keller, the only two people with personal knowledge of their discussions, deny that they were motivated by anything other than Neumaier's observations of plaintiff's misconduct. On the other hand, for the purpose of defendants' motion for summary judgment, I must accept as true plaintiff's averments that he did not "squeeze" or "twist" Neumaier's fingers or make any threats. Lewis v. Downey, 581 F.3d 467, 472 (7th Cir. 2009). Thus, I must assume at this stage that Neumaier's allegations of

battery and making threats are false. This raises the question of *why* Neumaier would fabricate a conduct report.

At first look, it would seem that there is little reason to believe that Neumaier would be motivated by a lawsuit that did not involve him. However, there are some facts that could be construed reasonably as supporting plaintiff's theory. First, it is undisputed that it was Keller's, not Neumaier's, idea to charge plaintiff with battery. Defendants do not explain why Keller was involved in the charging decision when he was not a witness to the incident. Second, there are significant differences between the incident report (which Neumaier wrote before speaking with Keller) and the conduct report (which Neumaier wrote after their discussion). For example, the conduct report embellishes the allegations that form the basis for the battery charge. The incident report simply says that plaintiff "grabbed" Neumaier's fingers; the conduct report says that plaintiff "squeezed [Neumaier's] pointer finger and middle finger and twisted them away from the restraints." The prison regulations define "battery" as "caus[ing] bodily injury or harm to another," Wis. Admin. Code § DOC 303.12, suggesting that the difference between simple "grabbing" and "squeezing" and "twisting" could make a difference to a finding of guilt.

Another bit of evidence weighing in plaintiff's favor is that defendant Keller has difficulty in his affidavit explaining how he came to the conclusion that plaintiff should be charged with battery. He avers that he first believed plaintiff would receive a conduct report

for "fighting" with another prisoner rather than battery of an officer because of "information that [he] received from the officers involved in the incident on the recreation field." Keller Aff. ¶ 10, dkt. #67. In the very next paragraph, he avers that he later "was advised by the officers involved in the incident that Officer Benjamin Neumaier was battered by Marion during the escort off of the recreation field." Id. at ¶ 11. Keller does not identify which officers gave him this information, explain why they gave him conflicting accounts of the incident or explain what he did to resolve the different accounts. He simply says that he "advised" Neumaier to charge plaintiff with battery.

Neumaier's affidavit raises questions as well. In any instance in which he is describing plaintiff's alleged misconduct, he prefaces it with tentative phrasing such as "it was my perception that . . ." and "it was my belief that . ." rather than simply describing what he observed. Neumaier's Aff. ¶¶ 9-10, 12, 14-15 and 17, dkt. #68. This is unusual in itself, but it seems even more so because Neumaier's averments about plaintiff's disputed misconduct are the only ones in the affidavit that are phrased so cautiously.

This is far from overwhelming evidence. There may well be innocent explanations for the discrepancies in defendants Keller's and Neumaier's testimony and their version of the story may be more compelling than plaintiff's However, "[o]n summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." Payne v. Pauley, 337 F.3d 767, 770 (7th

Cir. 2003). The closeness in time between the revival of plaintiff's lawsuit and the conduct report, the conflicting testimony about what happened on the recreation field and the unanswered questions about the way that Keller and Neumaier reached their decision to charge plaintiff with battery lead to me to conclude that plaintiff has raised a genuine issue of material fact on the questions whether Neumaier and Keller were aware of the 2007 lawsuit and whether the lawsuit was a motivating factor in their decision to issue the conduct report. "However implausible [plaintiff's] account might seem, it is not [the court's] place to decide who is telling the truth." Washington v. Haupert, 481 F.3d 543, 550 (7th Cir. 2007).

If the plaintiff adduces sufficient evidence of a motivating factor, the burden shifts to the defendants to show that they would have made the same decision in the absence of an unconstitutional motive. Hasan v. U.S. Dept. of Labor, 400 F.3d 1001, 1006 (7th Cir. 2005). (Defendants cite Rakovich v. Wade, 850 F.2d 1180, 1189 (7th Cir. 1988), for the proposition that plaintiff must establish "but for" causation, but the court of appeals abrogated that portion of Rakovich several years ago in Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004).) Defendants argue that no "but for" causal link exists as to defendants Keller and Neumaier because they had no involvement in the disciplinary proceedings after issuing the conduct report.

Defendants are conflating issues. A proper argument under the burden shifting

framework would be that the evidence of plaintiff's guilt was so overwhelming that the court could find as a matter of law that defendants Neumaier's and Keller would have issued the same conduct report even if plaintiff had not filed the 2007 lawsuit. This is not what defendants argue and they could not argue that for the purpose of summary judgment in light of the disputed testimony about what happened on the recreation field. Rather, their argument is one of personal involvement, that the relationship between Neumaier's and Keller's actions is too remote from the decision to punish him. In a lawsuit brought under 42 U.S.C. § 1983, a defendant cannot be held liable unless he is personally involved in the constitutional violation, which means the plaintiff must show that each defendant either directly participated in the violation or knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he or she might see. Morfin, 349 F.3d at1001.

I considered and rejected an argument similar to defendants' in Hennings v. Ditter, No. 06-C-353-C, 2007 WL 5445543, *5 (W.D. Wis. 2007):

> [R]egardless whether defendant made the final decision, he brought it about through his accusation. That is enough. A defendant may not escape liability for unconstitutional conduct that he caused by professing that he is only one cog in the machine. Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961); see also Jones v. City of Chicago, 856 F.2d 985, 993-94 (7th Cir. 1988) (police officers who gave knowingly false reports to prosecutor could be held liable for charging decision that relied on those reports). A subordinate who urges a higher ranking official

> to follow a particular course of conduct cannot later protest that he had no involvement in the decision that followed or that he could not have foreseen it. Johnson v. Johnson, 385 F.3d 503, 527 (5th Cir. 2004) (rejecting view that defendants could not be held liable because they only made recommendations to a higher authority).
>
> Also, following defendant's logic would mean that many victims of unconstitutional conduct would have no recourse. . . . Under defendant's view, § 1983 provides no remedy any time a constitutional violation is approved by an innocent party, even if the subordinate's unconstitutional motive is the cause of the violation. Such a result would only encourage public officials to diffuse responsibility to prevent accountability for unlawful conduct. That cannot be and is not the law.

I adhere to the reasoning in Hennings. Although defendants Keller and Neumaier did not participate in the disciplinary hearing, it was reasonably foreseeable that the conduct report would lead to plaintiff's punishment. That is enough to satisfy the personal involvement requirement.

Defendants' only other argument as to Keller and Neumaier is that they are entitled to qualified immunity. Because it is clearly established that prison officials may not retaliate against prisoners for exercising their right to have access to the courts, I must reject that defense for the purpose of summary judgment. Pearson v. Welborn, 471 F.3d 732, 742 (7th Cir. 2006) ("[A] reasonable public official in Welborn's position would understand that retaliating against a prisoner on the basis of his complaints about prison conditions is unlawful."); Babcock v. White, 102 F.3d 267, 276 (7th Cir. 1996) ("[F]ederal courts have long recognized a prisoner's right to seek administrative or judicial remedy of conditions of

confinement.").

Plaintiffs' retaliation claim against defendants Nickel and Radtke must be dismissed for lack of evidence. Nickel's only involvement in the disciplinary proceedings was to review the conduct report and allow it to proceed. Wis. Admin. Code § DOC 303.67(3)) ("The security director shall review conduct reports for the appropriateness of the charge."). Radtke's involvement was in finding plaintiff guilty of the charges. Although it may be reasonable to infer that Nickel and Radtke were aware of plaintiff's 2007 lawsuit, plaintiff has not adduced any evidence that the lawsuit influenced their behavior.

Plaintiff's main complaint about Nickel and Radtke seems to be that they accepted Neumaier's word over his in the absence of any objective evidence requiring that conclusion. Even if I assume that plaintiff's characterization of the evidence is correct, it is not a violation of a prisoner's constitutional rights for a decision maker to believe an officer's statement over that of the prisoner. Rather, the prisoner must show that the decision maker shared any unconstitutional motive held by the officer. Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007) (hearing officer may not be held liable for retaliatory conduct report if plaintiff fails to show that hearing officer shared animus held by officer who wrote report). See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948-49 (2009) ("[P]urpose rather than knowledge is required to impose . . . liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his

or her superintendent responsibilities.").

Plaintiff argues that a retaliatory motive may be inferred with respect to defendant Nickel because she did not act on the conduct report until six days after the incident and she declined to conduct an investigation into the correctness of the charges. The first argument does not make any sense. Even if I assume that a delay in making a decision would be suspicious, Nickel did not delay; she approved the conduct report the same day she received it.

With respect to the second argument, plaintiff adduces no evidence that Nickel was required to conduct an investigation under the regulations or even that her behavior departed from her usual practice. In fact, plaintiff fails to point to a single instance in which Nickel or another security director stayed a conduct report in order to conduct an investigation on it. Without evidence of that kind, it is not reasonable to infer that an official is engaged in a cover up every time she fails to independently investigate a conduct report that involves a dispute between an officer and a prisoner (likely to be a large percentage of the conduct reports), particularly when she knows that the prisoner will have an opportunity to rebut the charges at a hearing. Jackson v. Raemisch, 726 F. Supp. 2d 991, 1009 (W.D. Wis. 2010) (failure to conduct investigation is not evidence of retaliation); Wilson, 571 F. Supp. 2d at 956 (same).

With respect to defendant Radtke, plaintiff has many complaints about his

disciplinary hearing, but none of them support a conclusion that Radtke had a retaliatory motive for finding plaintiff guilty. First, plaintiff argues that he was denied the right to call officer Davenport as a witness. However, even if I assume that Davenport was an appropriate witness, it was not Radtke's fault that Davenport was not present because Radtke did not receive any requests for witnesses from plaintiff before the hearing. Plaintiff says that he could not request a witness because the security office required him to use a particular form and his staff advocate did not give him the form or otherwise help him. This cannot be entirely true because plaintiff *did* have the proper form at one point, but he used it to request the videotape rather than a witness. Plaintiff says in his affidavit that initially he did not request Davenport as a witness because Davenport had not yet agreed to testify for him, Plt.'s Aff. ¶ 44, dkt. #75, but plaintiff does not cite any authority for the proposition that he needed permission from a proposed witness before requesting his presence.

Even if I assume that plaintiff did not have an adequate opportunity to call Davenport, plaintiff does not show that Radtke was responsible for that. Plaintiff says in his brief that "Radtke intentionally made it possible for Davenport not to show on the day of plaintiff's hearing," Plt.'s Br., dkt. #74, at 9, but he does not cite any evidence in the record for this proposition or even explain how he believes Radtke did that. To the extent plaintiff blames Radtke for refusing to continue the hearing so that Davenport could be called, I

cannot conclude that Radtke acted suspiciously by declining to credit plaintiff's excuses and holding him to the time limits in Wis. Admin. Code § DOC 303.81(1) for requesting a witness.

Plaintiff also challenges defendant Radtke's decision to review the videotape in camera and Radtke's conclusion that the tape did not show the incident. Defendants have justified the refusal to show plaintiff the video on security grounds, arguing that "[s]uch tapes demonstrate the institution's abilities and limitations such as resolution, range, scope and area of coverage. The disclosure of such information would allow inmates to circumvent the institution's surveillance system." Radtke Aff. ¶ 31, dkt. #70. Plaintiff has not disputed defendants' position with any admissible evidence. Similarly, his account of what he believes the videotape would show is unsupported; he does not even cite his own affidavit. Plt.'s Resp. to Dfts.' PFOF ¶ 79, dkt. #74. To the extent plaintiff is arguing that the magistrate judge erred by denying his motion to compel defendants to allow him to view the tape, that argument is waived because plaintiff did not appeal the magistrate judge's decision to this court as authorized by 28 U.S.C. § 636.

Although I am dismissing plaintiffs' claim for damages against Nickel and Radtke, I will not dismiss them from the case at this time. If plaintiff prevails on his claim against Neumaier and Keller, Radtke's and Nickel's presence may be necessary for the purpose of injunctive relief.

B. Due Process

The threshold question on plaintiff's due process claim is whether he was deprived of his liberty within the meaning of the Fourteenth Amendment. Courts have framed this question as whether the plaintiff had a "liberty interest" in being free from a particular restriction. Abcarian v. McDonald, 617 F.3d 931, 941 (7th Cir. 2010). Because the liberty of prisoners is already severely restricted, not every additional limitation is enough to give rise to a constitutional claim. Rather, the question is whether the discipline they receive increases their duration of confinement or subjects them to an "atypical and significant" hardship. Sandin v. Connor, 515 U.S. 472, 484 (1995). As plaintiff knows from his previous case, in the context of disciplinary segregation, a court must look at two components in determining whether a prisoner has been subjected to an atypical and significant hardship: the length of time in segregation and the severity of the conditions of confinement. Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009).

With respect to the length of time in segregation, the Court of Appeals for the Seventh Circuit has held that six months or more may be sufficient to trigger the due process clause if the conditions are sufficiently severe. E.g., Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995). Relying on 180 days as a cut-off, defendants argue in their brief that plaintiff does not meet the threshold because he served only 171 days in disciplinary

segregation. Dfts.' Br., dkt. #64, at 10.

Even if I assume that due process does not apply to stays in segregation of shorter than 180 days, defendants' argument has two potential problems. First, plaintiff's sentence was *300* days in segregation; he was returned to general population early for reasons the parties do not explain, but presumably for good behavior. Defendants cite no authority for the proposition that courts should consider the time served rather than the sentence imposed when determining whether the due process clause is implicated. Scott v. Albury, 156 F.3d 283, 287-88 (2d Cir. 1998) ("In conducting the Sandin analysis . . . courts should consider the degree and duration of the sentence actually imposed in the hearing."). If I adopted defendants' position, it would mean that neither the prisoner nor the hearing officer would know whether the prisoner was entitled to due process until after the prisoner was released from segregation, making it impossible for the hearing officer to determine in advance what procedures the hearing should include and making injunctive relief difficult for the prisoner to obtain, if not impossible.

In any event, even if the time plaintiff served in temporary lockup and control status is excluded from the calculation, plaintiff spent *181* days in segregation (from June 12, 2009, to December 10, 2009), not 171, which puts him over the threshold defendants identify. Although defendants included a two-page argument in their brief relying on the fact that 171 is less than 180, Dfts.' Br., dkt. #64, at 10-12, the only place they acknowledge their mistake

is in the last round of their proposed findings of fact and even there they do not acknowledge the implications for this concession on their argument. Dfts.' Reply to Plt.'s Resp. to Dfts' PFOF ¶ 130, dkt. #76. In the future, I anticipate that, if counsel learns that the factual premise of one of their arguments is incorrect, they will withdraw that argument in their reply brief or a letter to the court.

The problem for plaintiff is with the second component for determining an atypical and significant hardship, the severity of the conditions. The court of appeals has held that it is not enough for a prisoner to describe his own conditions. Rather, the plaintiff must compare his conditions with those of "nondisciplinary segregation." Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997) ("[T]he key comparison is between disciplinary segregation and nondisciplinary segregation rather than between disciplinary segregation and the general prison population."). In Marion, 559 F.3d at 698, the court stated that the question is whether plaintiff's conditions were "harsher than the conditions found in the most restrictive prison in Wisconsin."

As with the last case plaintiff filed in this court in which he raised a similar due process claim, neither side adduced evidence about conditions of confinement in other prisons or of conditions in protective custody in the Columbia prison. Rather, defendants simply describe the privileges and property to which prisoners are entitled in the various classifications in which plaintiff was housed. Plaintiff adduces *no* admissible evidence about

conditions in segregation at his prison or any other. He makes the same mistake he did in case no. 07-cv-243-bbc by discussing the conditions in his brief, which is not evidence, Box v. A & P Tea Co., 772 F.2d 1372, 1379 n.5 (7th Cir. 1985), rather than in his affidavit. Even in his brief he does not draw a comparison about the conditions he endured and those in nondisciplinary segregation. Because it is plaintiffs' burden to adduce evidence on every element of his claim, his failure to do so means that the claim must be dismissed. Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (on motion for summary judgment, it is plaintiff's burden to adduce evidence on each element of his claim; it is not defendant's burden to disprove it).

The only conditions discussed in plaintiff's affidavit are the conditions in control status. These allegations cannot help him for two reasons. First, it is undisputed that plaintiff was placed in control status because of another conduct report that is not the subject of this case. Plaintiff does not suggest that any of the defendants were involved in that second conduct report or were otherwise responsible for his conditions in control status. Second, it is also undisputed that plaintiff was in control status for only 13 1/2 hours. I am not aware of any authority suggesting that due process is implicated by such a short amount of time.

Even if I assume that plaintiff was entitled to due process, he has not shown that defendant Radtke may be held liable for failing to provide it. Plaintiff says that Radtke

violated his due process rights in three ways: (1) refusing to allow him to call Davenport as a witness; (2) refusing to allow him to view the videotape himself; (3) being biased against him. (Plaintiff raises other alleged due process violations in his brief, but I did not allow him to proceed on those claims, so I have not considered them in this opinion.) As I discussed in plaintiff's earlier case no, 07-cv-243-bbc, the Supreme Court suggested in Wilkinson v. Austin, 545 U.S. 209, 226 (2005), that, in the context of a transfer to segregation, a prisoner's right to due process is limited to notice of the reasons for the transfer and an opportunity to rebut those reasons. Thus, it is questionable whether plaintiff had a right to call witnesses, present particular pieces of evidence or even have a hearing. Id. at 228. ("Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated.")

Regardless of the extent of the required procedures, plaintiff has not adduced any evidence that Radtke was biased. Although plaintiff's 2007 lawsuit might have given Radtke a possible motive for treating plaintiff less fairly, plaintiff must come forward with something more than just speculation to support his belief that the lawsuit influenced Radtke's decision. Redding v. Fairman, 717 F.2d 1105, 1112 (7th Cir. 1983) (rejecting argument that due process "require[s] disqualification of all Adjustment Committee members who are defendants in unrelated civil suits for damages brought by the inmate appearing before the

Committee").

Further, as I discussed in the context of plaintiff's retaliation claim, plaintiff cannot hold Radtke liable for Davenport's absence from the hearing because plaintiff has not adduced evidence that Radtke had any involvement in keeping plaintiff from making a proper request or even that Radtke was aware of the problem. Perhaps if it could be inferred reasonably that Radtke knew that other officers had conspired to keep plaintiff from calling Davenport, Radtke would have been required to do more. However, according to the documents in front of Radtke at the hearing, it appeared that plaintiff had multiple opportunities to request Davenport's presence, but had declined to do so. Because due process is satisfied so long as there is an adequate *opportunity* to be heard, Green v. Benden, 281 F.3d 661, 666 (7th Cir. 2002), Radtke's refusal to call Davenport at the last minute cannot be described as a denial of due process. If Radtke was wrong in concluding that plaintiff had squandered his opportunity to call Davenport as a witness, this would show nothing more than possible negligence, which is not enough to sustain a claim under the Constitution. United States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010).

With respect to the videotape, even if I assume that plaintiff was entitled to the same procedural protections as prisoners losing good conduct time, this would mean that he would have the right to *present* evidence. Wolff v. McDonnell, 418 U.S. 539 (1974); Scruggs v. Jordan, 485 F.3d 934, 939 (7th Cir. 2007). Plaintiff was not allowed to view the videotape,

but he was allowed to present it for consideration. Plaintiff cites no authority holding that he was entitled to more. The case he cites, Mayers v. Anderson, 93 F. Supp. 2d 962 (N.D. Ind. 2000), is distinguishable because it involved the destruction of a videotape that the disciplinary hearing committee never viewed. Further, a prisoner's right to present evidence may be truncated in situations in which it would be "inconsistent with correctional goals" or institution safety would be compromised. Superintendent, Mass. Correctional Institution v. Hill, 472 U.S. 445, 454 (1985). In this case, Radtke's decision to view the video in camera was justified by concerns that showing plaintiff the video would compromise security because it would "demonstrate the institution's abilities and limitations such as resolution, range, scope and area of coverage." Radtke Aff. ¶ 31, dkt. #70. For all of these reasons, defendants' motion for summary judgment will be granted with respect to plaintiff's due process claim.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Janel Nickel, Dylon Radtke, Chad Keller and Bejamin Neumaier, dkt. #64, is DENIED with respect to plaintiff War Marion's claim that defendants Keller and Neumaier retaliated against plaintiff for exercising his right to have access to the courts. The motion is GRANTED in all other respects. Defendants Nickel and Radtke will remain in the case in

the event that plaintiff prevails on his claim and needs them to obtain injunctive relief.

Entered this 26th day of January, 2011.

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