IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD J. REYNA, SR.,

Plaintiff,

v.

ORDER

10-cv-611-slc[1]

RICHARD RAEMISCH, JEFFREY PUGH,
CAPTAIN BUESGEN and Officer NICOLE VARLEY,

Defendants.

- -

In this proposed civil action for monetary and injunctive relief, plaintiff Richard Reyna contends that defendants Richard Raemisch, Jeffrey Pugh, Captain Buesgen and Officer Nicole Varley violated his rights under the First, Eighth and Fourteenth Amendments by disciplining him for language he used in a letter to his son. He is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a

[1] For the purpose of issuing this order, I am assuming jurisdiction over this case.

defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the proposed complaint, I conclude that plaintiff has failed to state a claim for violation of his constitutional rights. Therefore, I will dismiss plaintiff's complaint.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At times relevant to his complaint, plaintiff Richard Reyna, Sr. was incarcerated at the Stanley Correctional Institution in Stanley, Wisconsin. Defendant Rick Raemisch is the head of the Wisconsin Department of Corrections. Defendant Captain Buesgen is the officer in charge of the segregation unit at the Stanley Correctional Institution. Defendant Jeffrey Pugh is the warden of the prison and defendant Varley is a correctional officer.

On June 5, 2010, plaintiff was in the day room playing cards with another inmate and writing a letter to his son, who was incarcerated at a county jail. He stated aloud to the other inmate that the correctional officer would read the mail from "front to back." At the end of the letter to his son he wrote, "P.S. they read my mail. Perhaps someday I will be able to stab one of the fucks in the eye!"

On June 6, 2010, plaintiff was taken to the segregation unit and placed on temporary

lockup status pending investigation for violating DOC § 303.16, "threats." Plaintiff signed a notice regarding the investigation, stating that he did not threaten anyone.

On Monday June 7, 2010, plaintiff was given a copy of adult conduct report #1787144, charging him with violation of DOC § 303.16. Defendant Varley and security director Richardson signed the report.

On June 15, 2010, plaintiff received a hearing regarding the charge. Before the hearing, he had requested that he be allowed to present witnesses in his defense. However, at the hearing defendant Buesgen told plaintiff that he could not present witnesses because he never requested any. Plaintiff was disciplined with 62 days in segregation and one month in "transition."

DISCUSSION

Plaintiff contends that defendants violated his right to free speech under the First Amendment, his right to be free from cruel and unusual punishment under the Eighth Amendment and his right to due process under the Fourteenth Amendment by disciplining him with time in segregation and transition for the language he used in the letter to his son. However, the allegations in plaintiff's complaint do not support an inference that defendants violated any of his constitutional rights.

To state an Eighth Amendment claim, a prisoner must allege that (1) he faced a

"substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). Plaintiff does not allege that he faced any risk of harm.

To state a procedural due process claim, a prisoner must allege facts suggesting that he was deprived of a "liberty interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. Sandin v. Conner, 515 U.S. 472, 483-84 (1995). The Supreme Court has explained 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." Id. A period of segregated confinement may be "atypical and significant" "if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." Marion v. Columbia Correction Institution, 559 F.3d 693, 697-98 (7th Cir. 2009) (holding that a prisoner's confinement in segregation for 240 days may implicate a liberty interest).

Plaintiff was in segregation for only 62 days and has alleged no facts to suggest that the conditions of his confinement in segregation were unusually harsh. Thus, plaintiff's allegations do not permit an inference that any liberty interest was implicated by his time in segregation.

Finally, to state a claim for First Amendment retaliation, plaintiff must: (1) allege that he engaged in an activity protected by the First Amendment; (2) identify one or more

retaliatory actions taken by defendants that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts that would make it plausible to infer that plaintiff's protected activity was a motivating factor in defendant's decision to take retaliatory action. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008).

Prisoners have protected First Amendment interests in both sending and receiving mail, Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999), and restrictions on an inmate's First Amendment rights are valid only if reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987); Lindell v. Frank, 377 F.3d 655, 657 (7th Cir. 2004). Legitimate penological objectives include deterrence of crime, rehabilitation and preservation of internal security. Pell v. Procunier, 417 U.S. 817, 822-23 (1974). In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right." Turner, 482 U.S. at 89. Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that in most cases, district courts should

wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009); Lindell v. Frank, 377 F.3d at 658.

However, not every form of speech or conduct is protected by the First Amendment right of free speech. Virginia v. Black, 538 U.S. 343, 358-59 (2003); United States v. O'Brien, 391 U.S. 367, 376 (1968); United States v. Wilson, 154 F.3d 658, 662 (7th Cir. 1998) ("[S]ome forms of expression are harmful and damaging to others and, as such, do not enjoy the protecting cover of speech in the constitutional sense") (internal citation and quotations omitted). In particular, "[s]peech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside" the protection of the First Amendment. United States v. White, 610 F.3d 956, 960 (7th Cir. 2010); Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("physical assault is not . . . expressive conduct protected by the First Amendment"); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 773 (1994) (threats are proscribable under the First Amendment); see also Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) ("[A]n expression of an intention to inflict evil, injury, or damage on another" is a "true threat" that receives no First Amendment protection).

Plaintiff contends that his speech is protected by the First Amendment because he was writing to his son and not to prison staff directly, and he had no plan to harm anyone or

destroy any property. Even if plaintiff's speech was directed toward another prisoner, it contained a thinly veiled threat against prison staff and suggested that plaintiff would attack a guard violently at some point in the future. Also, plaintiff alleges that he knew that the prison staff would screen his letter and thus, he knew that the letter would be read by the staff he was threatening. Threats that communicate an "intent to commit an act of unlawful violence to a particular individual or group of individuals" for the purpose of intimidation are not generally entitled to First Amendment protection, even if the speaker does "not actually intend to carry out the threat." Virginia, 538 U.S. at 360. Because the language at the end of plaintiff's letter was a threat of physical violence directed at least in part toward prison staff, it is not protected speech under the First Amendment. Therefore, the prison did not violate plaintiff's free speech rights by punishing him for the speech.

ORDER

IT IS ORDERED that

1. Plaintiff Richard Reyna is DENIED leave to proceed on his claims that defendants Richard Raemisch, Jeffrey Pugh, Captain Buesgen and Officer Nicole Varley violated his rights under the First, Eighth and Fourteenth Amendments by disciplining him for language he used in a letter to his son.

2. A strike will be recorded against plaintiff pursuant to § 1915(g) because this case

has been dismissed for failure to state a claim upon which relief may be granted.

3. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Wisconsin Resource Center of that institution's obligation to deduct payments until the filing fee has been paid in full.

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 31st day of January, 2011.

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