IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEE KNOWLIN,

Plaintiff, OPINION and ORDER

v. 10-cv-829-bbc

CHRISTA MORRISON,
KIMBERLY MARKS, LARRY STICH
and RON BREWER,

Defendants.

- -

Pro se plaintiff Lee Knowlin is proceeding on a claim that defendants Christa Morrison, Kimberly Marks, Larry Stich and Ron Brewer refused to transfer him to community custody because he exercised his constitutional right to file an administrative appeal of a previous decision by Morrison. Two motions are before the court: (1) defendants' motion for summary judgment; and (2) defendants' motion for leave to file an affidavit with their reply brief. Because plaintiff has failed to show that a reasonable jury could find that any of the defendants took an adverse action against him because of his appeal, I am granting defendants' motion for summary judgment. It was unnecessary to consider the affidavit defendants filed with their reply brief, so I am denying the second

motion as moot.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

During the time relevant to this case, plaintiff Lee Knowlin was a prisoner at the Prairie du Chien Correctional Center. On January 13, 2010, plaintiff participated in a meeting with the Earned Release Review Commission, which is responsible for reviewing prisoners' classifications and requests for parole or release to extended supervision. The commission recommended plaintiff for work release. The same day, plaintiff submitted an "Early PRC Hearing Request" to his social worker, who forwarded the request to defendant Christa Morrison, the chairperson for the Program Review Committee.

After Morrison reviewed the recommendation of the Earned Release Review Commission, she contacted one of the commissioners to express her concern that plaintiff had been incarcerated at Prairie du Chien for only two months, which she did not believe was sufficient time for the Program Review Committee to learn about potential problems with his behavior. On January 27, 2010, Morrison denied plaintiff's request for an early hearing. However, she placed plaintiff on the schedule for a hearing before the Program Review Committee in May 2010.

On March 3, 2010, plaintiff filed an appeal of Morrison's decision. On March 31, 2010, he filed a second appeal form in which he asked the Bureau of Offender Classification and Movement to expedite a transfer. On April 6, 2010, the section chief rejected the March 3 appeal on the ground that the denial of a request for a classification review is not subject to appeal. On June 10, 2010, the second appeal was denied as untimely.

On April 2, 2010, plaintiff met with his social worker to prepare for the May hearing. He asked to be transferred to Kenosha Correctional Center, Sturtevant Transition Facility or Sanger B. Powers Correctional Center and be placed in minimum custody with work release privileges. The social worker filed a report in which she recommended that plaintiff's request be granted.

On May 26, 2010, plaintiff received a hearing before the program review committee. The committee included defendant Morrison and defendants Larry Stich and Ron Brewer. The committee reviewed at least one of plaintiff's March 2010 appeal forms during the hearing. (The parties dispute whether Morrison stated during the hearing that she considered his appeal to be intimidating behavior.) Each committee member recommended that plaintiff be approved for minimum custody and transfer to a facility where he could participate in work release. Morrison prepared a report, which included the following comments:

> This inmate is 46 years old. He is currently minimum custody and has served

> 10 years, 1 month of his sentence. He has 3 years, 3 months remaining to serve. This is his 3rd incarceration. The inmate was reviewed by the ERRC. He was endorsed for transition to work release to prepare for release. He is a PMR inmate. He has a total of 10 minors, 6 major conduct reports. The inmate has been incarcerated over 10 years and each year his conduct has improved. His last major conduct report was in 10/2008. His conduct is currently considered appropriate. Inmate Knowlin does have an AODA need. His AODA was terminated no-fault 10/2009. He has completed CGIP; and completed a custodial vocation program at a previous institution. He has not participated with pre-release modules. The inmate risk rating is low in all areas. The comments in the SWs section of this summary are noted and have been reviewed by the Committee. Inmate Knowlin has participated with programs appropriately and his conduct has been appropriate over the past two years. When talking with him regarding the endorsement to work release by the ERRC; he asked why he wasn't reviewed by Classification sooner. It was explained that review for work release at his regular recall was discussed with D. LaCost; she did not see a problem with it this [sic] based on his release date. The inmate then stated he would contact Mr. Mark Heise about this. The perception of the Committee was that he was trying to intimidate myself, OCS Morrison.
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> The Committee has taken the inmate's comments and requests into consideration. The inmate is being recommended for minimum-community custody and transfer to KCC/STF/SPCC. Recall is set for 05/11. Recall and recommendation are based on review and endorsement by ERRC; appropriate conduct; low risk rating and completion of primary programs. Classifications [sic] expectations for the inmate are to continue to maintain positive institution adjustment and while still at PDCI he is encouraged to participate in pre-release modules. This will aid him once he releases and the hope is he will not re-offend and return to prison for a fourth incarceration. If the inmate receives any crs [presumably this refers to conduct reports] prior to transfer, it could jeopardize his transfer opportunities.

On July 29, 2010, defendant Kimberly Marks, an offender classification specialist, reviewed the report. She recommended that plaintiff remain at Prairie du Chien in

minimum custody "with a six month recall to review his behavior." She relied in part on Morrison's statement in the report that plaintiff was trying to intimidate her at the hearing.

On August 10, 2010, plaintiff appealed the decision. On October 15, 2010, Marks's decision was reversed by the class manager for the Bureau of Classification and Movement. He wrote: "Upon review of this case, the original committee decision for Min community custody is found to be appropriate. Reasons cited are ERRC endorsement, recent conduct history, program completions and time left to serve. Decision altered to reflect this decision."

On October 22, 2010, plaintiff was transferred to the Sanger B. Powers Correctional Center on minimum custody and with work release privileges.

OPINION

To prevail on his retaliation claim, plaintiff must show that he engaged in conduct protected by the Constitution and that defendants took an adverse action against him because of that conduct. Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005); Babcock v. White, 102 F.3d 267, 274-75 (7th Cir. 1996). Defendants' actions must be sufficiently adverse to deter a person of ordinary firmness from exercising his constitutional rights. Bridges v. Gilbert, 557 F.3d 541, 552 (7th Cir. 2009); Pieczynski v. Duffy, 875 F.2d 1331, 1333 (7th Cir. 1989).

The parties agree that plaintiff's administrative appeals were constitutionally protected. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson v. Welborn, 471 F.3d 732, 738 (7th Cir. 2006). In his summary judgment materials, plaintiff says that defendants retaliated against him for filing an appeal *and* for statements he made at the hearing. However, plaintiff did not raise a claim in his complaint about statements at the hearing, so that issue is beyond the scope of this case and it is too late for plaintiff to amend his complaint to include it. Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002) (plaintiff "may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment"). Accordingly, I am limiting consideration of plaintiff's claims to his administrative appeals.

Defendants identify two grounds for granting their motion for summary judgment: (1) their actions were not sufficiently adverse to support a retaliation claim; and (2) plaintiff has not adduced sufficient evidence to show that his administrative appeals motivated their decisions. With respect to the first ground, defendants say that plaintiff did not suffer any harm because Marks's decision to delay his transfer was reversed. Cf. Bridges, 557 F.3d at 555 ("A single retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action."). However, plaintiff argues in his brief that he likely would have been transferred much sooner if Marks initially had approved it. Because plaintiff was transferred a week after Marks's decision was reversed, I cannot say that plaintiff is drawing

an unreasonable inference. In any event, defendants do not respond to this argument in their reply brief, so I decline to resolve their motion on this ground.

I agree with defendants that plaintiff has failed to adduce sufficient evidence to show that any of the defendants was motivated by his administrative appeals. With respect to defendants Morrison, Stich and Brewer, it is undisputed that they were unanimous in recommending that plaintiff be transferred. If any of these defendants were angry with plaintiff for filing an appeal and wanted to retaliate against him, why would they vote to give plaintiff exactly he wanted? Plaintiff has no answer for that question. Apparently, he believes that they included the statement in their report about his trying to intimidate Morrison with the intent to influence Marks's decision, but that makes no sense. That statement was one line in a report that was otherwise uniformly positive. He identifies no reason that Morrison, Stich and Brewer would have believed that Marks would disregard their recommendation and focus on an isolated comment instead.

Plaintiff cites Conner v. Reinhard, 847 F.2d 384, 397 (7th Cir. 1988), in which the court stated that the "requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights." It is not clear whether that standard is still the law. In Staub v. Proctor Hospital, 131 S. Ct. 1186, 1191 (2011), the Court considered a similar standard in a discrimination case and rejected it:

> [The plaintiff] contends that the fact that an unfavorable entry on the plaintiff's personnel record was caused to be put there, with discriminatory animus, by [two nondecision makers], suffices to establish the tort, even if [the nondecision makers] did not intend to cause his dismissal. But discrimination was no part of [the decision maker's] reason for the dismissal; and while [the nondecision makers] acted with discriminatory animus, the act they committed—the mere making of the reports—was not a denial of "initial employment, reemployment, retention in employment, promotion, or any benefit of employment," as liability under USERRA requires. If dismissal was not the object of [the nondecision makers'] reports, it may have been their result, or even their foreseeable consequence, but that is not enough to render [the nondecision makers] responsible.

Under Staub, it is not enough to show that an adverse consequence is "reasonably foreseeable." Rather, the plaintiff must also show that the nondecision makers *intended* that consequence. Although the Court was not applying § 1983 in Staub, the Court stated that it was applying "general tort law," which is often used to interpret § 1983 as well. E.g., Heck v. Humphrey, 512 U.S. 477, 486 (1994)("§ 1983 . . . borrowed general tort principles").

In any event, even if Conner still provides the relevant standard, plaintiff cannot prevail. Without additional evidence, no reasonable jury could find that defendants Morrison, Stich or Brewer should have known that Marks would disregard their recommendation.

Alternatively, plaintiff argues that the statement in the report was an adverse act in itself that independently harmed him. However, this is simply a repackaging of the same argument I have rejected. The statement in the report would not deter a person of ordinary

firmness unless a tangible consequence followed from the statement. Lloyd v. Swifty Transp., Inc., 552 F.3d 594, 602 (7th Cir. 2009) ("[W]ritten reprimands without any changes in the terms or conditions of . . . employment are not adverse employment actions."); Smart v. Ball State University, 89 F.3d 437, 442 (7th Cir. 1996) (concluding that negative employer evaluations, even if undeserved, were not alone sufficient to show adverse action). I have concluded that defendants Morrison, Stich and Brewer could not have reasonably foreseen that Marks would deny plaintiff's request for a transfer because of the statement and plaintiff identifies no other potential harm that would have been more obvious to defendants.

Plaintiff cites Yoggerst v. Stewart, 623 F.2d 35, 39 (7th Cir. 1980), in which the court stated that "a verbal reprimand followed by [a] written memorandum placed in [the plaintiff's] personnel file" was sufficiently adverse to support a claim for retaliation under the First Amendment. The court of appeals has not cited Yoggerst since 1993 and it is arguably inconsistent with later cases in which the court has stated that reprimands generally are not sufficiently adverse to provide the basis for a claim. In any event, Yoggerst is readily distinguishable because Morrison's statement was *not* a reprimand or even directed at him. It was simply Morrison's opinion regarding statements plaintiff had made. Again, because it was included in a report in which the committee recommended plaintiff for a transfer and there is no indication in the report that the committee was trying to persuade Marks to deny

plaintiff a transfer, I cannot conclude that "[t]he purpose of [Morrison's statement] was to discipline [plaintiff] for [his] behavior." Id. at 39.

This leaves plaintiff's claim against Marks, which requires little discussion. Even if Morrison were trying to retaliate against plaintiff for filing an administrative appeal, that would not be enough to prevail on a claim against Marks, even though Marks relied on Morrison's report when she denied plaintiff's request for a transfer. Rather, plaintiff must show that Marks also had a retaliatory motive. Ashcroft v. Iqbal, 556 U.S. 662 (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."). See also 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).

In this case, Marks denies that she was even aware of plaintiff's administrative appeal. Although plaintiff says that Morrison discussed his appeal in her report to Marks, that simply is not true. Morrison said in her report that Marks was trying to intimidate her at the hearing, but she did not say anything about his appeal. Obviously, Marks could not retaliate against plaintiff for engaging in conduct she did not know about. Brown v. County of Cook, 661 F.3d 333, 336 (7th Cir. 2011); Everett v. Cook County, 655 F.3d 723, 728-29

(7th Cir. 2011). Even if I assume that Marks did know about the appeal, plaintiff has adduced no evidence that the appeal motivated Marks's decision. Although plaintiff denies that he engaged in intimidating behavior, Marks was entitled to rely on Morrison's report. Plaintiff identifies no reason that Marks would have doubted Morrison's account, much less believed that it was a pretext for retaliating against plaintiff for challenging a decision.

Plaintiff criticizes Morrison for failing to conduct her own investigation, but he is not proceeding on a claim for negligence. Rather, he was required to show that Marks *intentionally* denied his transfer because he filed an appeal. Thus, it is irrelevant whether Marks could have discovered that Morrison's statement was untrue.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Christa Morrison, Kimberly Marks, Larry Stich and Ron Brewer, dkt. #21, is GRANTED.

2. Defendants' motion for leave to file an affidavit with their reply brief, dkt. #38, is DENIED as moot.

3. The clerk of court is directed to enter judgment in favor of defendants and close

this case.

Entered this 22d day of February, 2012.

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