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

DANIEL RYAN CURRY,

Plaintiff,

v.

SGT. REED TREFZ and
CAPTAIN DAVID GARDNER,

Defendants.

OPINION AND ORDER

11-cv-223-slc

In this civil action brought pursuant to 42 U.S.C. § 1983, this court granted plaintiff Daniel Curry leave to proceed on his Eighth Amendment claim that defendant Reed Trefz conducted an unconstitutional pat search when he allegedly slapped Curry's buttocks and on Curry's First Amendment claim that defendant David Gardner retaliated against him by placing Curry in segregation after he filed a complaint about Trefz. Before the court is defendants' motion for summary judgment, dkt. 49, and Curry's renewed request for appointment of counsel, dkt. 60, which he filed after responding to the summary judgment motion.

I find that even under Curry's version of the facts, a reasonable jury could not conclude that defendant Trefz violated Curry's Eighth Amendment rights during the pat search, or that defendant Gardner retaliated against Curry in violation of the First Amendment for accusing Trefz of sexual assault.[1] Because I am granting defendants' motion for summary judgment, Curry's renewed request for appointment of counsel is moot.

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[1] In his brief in response to defendants' motion, Curry asserts that Gardner violated his access to the courts because placing him in lockup prevented him from obtaining sworn witness testimony in support of his claim. See dkt. 55 at 3-4. However, because Curry failed to raise such a claim in his complaint, it is beyond the scope of this lawsuit and will not be considered.

For the purpose of deciding defendants' motion for summary judgment, I find from the parties' submissions that the facts set out below are material and undisputed:[2]

FACTS

I. The Parties

Plaintiff Daniel Curry is an inmate at Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin and has been incarcerated there at all times relevant to this matter.

Defendant Reed Trefz has been employed by the Wisconsin Department of Corrections (DOC) at WSPF since August 30, 1999. Trefz has been a correctional sergeant since April 18, 2004. Under the general supervision of the supervising officer 1 or 2, Trefz is responsible for the security, custody, control and treatment of inmates; supervising inmates in a particular area or an assigned shift; and performing other related work as required.

Defendant David Gardner has been employed as an administrative captain at WSPF at all times relevant to this matter. His duties include, but are not limited to, managing staff, making sure policies and procedures are being followed, investigating grievances and serving as the acting security director when the security director is away from WSPF.

II. The Alleged Assault

On September 23, 2010, Curry was released from his cell at 12:29 p.m. on Charlie Unit to start his work in the kitchen. Prior to being released to go to work, it is standard practice for

[2] I note that defendants failed (perhaps intentionally) to submit a response to Curry's proposed findings of fact. Pursuant to this court's summary judgment procedures, I have accepted Curry's proposed facts as true to the extent that they are supported by admissible evidence and do not merely state a legal conclusion.

WSPF staff to pat down inmates before they are allowed to go to the kitchen. Trefz was conducting these pat downs on September 23, 2010 and there were a total of five inmates who needed to be so searched before proceeding to the kitchen. At the conclusion of each pat search, Trefz's practice was to tap the inmate on his hip to signal that Trefz was done with the search. Curry was the last inmate in line for the pat search. When Trefz tapped Curry on the hip to let him know the search was complete, the heel of the palm of his open right hand came into contact with portion of Curry's right buttock, high and to the outside. (The parties dispute whether Trefz also struck a portion of Curry's hip.) The contact of Trefz's hand with Curry's body can be seen on a CD copy of a video taken in the hallway outside of Charlie Unit (dkt. 54).[3]

The video shows that Curry looked back at Trefz after Trefz touched him. Trefz believes that it is clear from the video that he did not tap Curry directly on his buttocks and that the force with which he tapped Curry was not great enough to cause him physical pain or leave a red mark. In fact, during an interview with Grant County Sheriff's Detective Rick Place, Curry stated that he felt no pain from the contact. According to Trefz, he did not intend to tap Curry on that area of his body and the accidental tapping of a portion of Curry's right buttock caught him by surprise. (Curry attempts to dispute this by pointing out that Trefz made no attempt to apologize or acknowledge that his striking of Curry's buttocks was accidental. He also submits an affidavit from Michael Moffett, a fellow inmate who avers that he also was subject

[3] There is no substitute for watching the video recording of Trefz patting down Curry. The software associated with dkt. 54 allows the viewer to watch it at half-speed and pause the image. This allows the viewer to see the actual location of Trefz's right hand on Curry's body. Real-time playback allows the viewer to see the manner in which the pat took place and how long it lasted.

to the same pat down search and that Trefz struck his buttocks and was laughing. More on this below.)

Curry avers that he found Trefz's conduct offensive, sexually humiliating and degrading. Curry's psychological pain was more severe because he had been sexually assaulted as a juvenile inmate at the Ethan Allen School for Boys.

III. Curry's Complaints and Placement in Segregation

Curry reported the alleged assault to both WSPF and the Grant County Sheriff's Department. The Department of Adult Institutions (DAI) handled the investigation for WSPF and defendant Gardner was one of the investigators. On September 24, 2010, Security Director Schwandt told Gardner to inform Curry not to talk to other inmates about the incident until it was investigated further.

(The parties dispute what happened next. Gardner avers that he informed Curry of Schwandt's directive and that over the next few days, inmates were reporting that Curry was talking about the incident on his unit. Curry denies this and alleges that Gardner placed him in segregation because he complained about Trefz's conduct. He also avers that Gardner and Bob Hable, the unit manager, threatened him with more segregation if he talked about the incident to anyone.)

On September 28, 2010, Gardner and Hable interviewed four inmates, including Moffett. They learned that Curry had spoken with Moffett. (The parties dispute specifically what Curry told Moffett. Moffett and Curry aver that Curry did not discuss the incident but merely asked Moffett to sign an affidavit about what he witnessed during the pat down search

on September 23, 2010. Gardner's interview notes indicate that Moffett told him that Curry had been talking about what happened with the pat search. Those notes also show that Sergeant Furrer did not overhear anything about Curry talking about the alleged assault to other inmates.)

After Gardner informed Schwandt about the results of the inmate interviews, Schwandt instructed Gardner to place Curry in temporary lock up (TLU) status. On September 28, 2010, Curry was placed in TLU pursuant to Wisconsin Administrative Code DOC 303.11(4)(a), which states "The institution may place an inmate in TLU and keep the inmate there if the decision-maker believes that one or more of the following is present: If the inmate remains in the general population, the inmate may impede a pending investigation or disciplinary action." In a written response on a form titled "Notice of Offender Placed in Temporary Lockup" and dated September 28, Curry wrote:

> I didn't disobey orders by talking about this situation. . . . After he told me not talk [*sic*] about it I specifically asked him if it was an order or a request. I know for a fact that because it was a sexual assault I am encouraged to talk about what happened to me. . . . I didn't speak about the situation after I agreed not to talk about [it] . . .
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> Dkt. 58, Exh. 8.

Curry was released from TLU on October 4, 2010.

DAI ultimately determined that no sexual assault occurred, but Trefz was instructed not to pat inmates on the hip at the conclusion of his searches. Similarly, Detective Place, who investigated the incident for the sheriff's department, determined that the contact with Curry's buttock did not "meet the elements of a crime of a sexual assault in a criminal matter."

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Assault

The circumstances under which a search conducted in the prison setting violates the Constitution are very limited. The Court of Appeals for the Seventh Circuit has held that these cases are governed by the Eighth Amendment rather than the Fourth Amendment and has applied a standard similar to the one used in excessive force cases. The Eighth Amendment

generally prohibits "unnecessary and wanton infliction of pain" that is "grossly disproportionate to the severity of the crime for which an inmate was imprisoned, or [is] totally without penological justification." *Whitman v. Nesic*, 368 F.3d 931, 934 (7th Cir. 2004) (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 415 (7th Cir. 1987)). Factors relevant to this determination include the need for an application of force, the relationship between the need and the force applied, the threat reasonably perceived by the responsible officers, the efforts made to temper the severity of the force employed and the extent of the injuries to the prisoner. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312 (1986)); *DeWalt v. Carter*, 224 F.3d 607, 619-20 (7th Cir. 1999).

In *Hudson*, 503 U.S. at 9-10, the Court explained that although the absence of a significant injury does not bar a claim for excessive force, "the Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Following this reasoning, many courts in this circuit have applied the *de minimis* doctrine in cases involving strip or pat searches. *See, e.g.*, *Fillmore v. Page*, 358 F.3d 496, 505 (7th Cir. 2004) (district court did not err in concluding that search involved *de minimis* application of force where officer asked inmate during strip search to spread buttocks five times in quick succession, search took place out of view of other inmates, prisoner given ample time to undress and dress, total examination lasted only few seconds and prisoner not physically injured); *Rivera v. Drake*, 2012 WL 589272, *2 (E.D. Wis. Feb. 22, 2012) (officer's touching of plaintiff's buttocks and insertion of thumb between buttocks resulted in only *de minimis* injury); *Blanchard v. Andrews*, 2011 WL 3205315, *3 (N.D. Ill. Jul 26, 2011) (officer's conduct *de minimis* where

he allegedly forced plaintiff and other inmates to stand nude for four seconds and told them that they could thank plaintiff for it because plaintiff initially refused to remove clothing for strip search).

However, in *Washington v. Hively*, __ F.3d __, 2012 WL 3553419, *2 (7th Cir. Aug. 20, 2012) an opinion issued about three weeks ago, the court of appeals for the Seventh Circuit deemed the excessive ↔ *de minimis* spectrum of characterizing a prison's use of force irrelevant to sexual touching by prison staff:

> [a]n unwanted touching of a person's private parts, intended to humiliate the victim or gratify the assailant's sexual desires, can violate a prisoner's constitutional rights whether or not the force exerted by the assailant is significant. Indeed, sexual offenses need not involve *any* touching . . ..
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> *Id.* at *2 (citations omitted).

The court of appeals rejected the district court's characterization of pat down and strip search as *de minimis* where officer allegedly fondled inmate's testicles and penis through his clothing for five to seven seconds, then fondled plaintiff's nude testicles for two or three seconds. The court announced that "it is therefore time that the formula 'de minimis uses of physical force' was retired" and for courts instead to approach these matters as the Supreme Court directed in *Hudson*. *Id.* *See also Guitron v. Paul*, 675 F.3d 1044, 1046 (7th Cir. 2012)("A court should not recreate the disapproved 'significant injury' requirement by classifying all consequences it deems 'insignificant' as *de minimis* harms.")

In other words, courts should not focus on the amount of force used or the degree of physical injury sustained but instead should focus on whether prison staff used force maliciously and sadistically for the very purpose of causing harm. *See Hudson*, 503 U.S. at 6. With respect

to searches in particular, only those that are "maliciously motivated, unrelated to institutional security, and hence totally without penological justification are considered unconstitutional." *Whitman*, 368 F.3d at 934. Prison officials are permitted to touch, pat down and search a prisoner in order to determine whether the prisoner is hiding anything dangerous on his person. *Id.* Even routine strip searches are considered appropriate. *Peckham v. Wisconsin Dept. of Corrections*, 141 F.3d 694, 695 (7th Cir. 1998). However, a search of a prisoner may violate the Eighth Amendment if it is "conducted in a harassing manner intended to humiliate and inflict psychological pain." *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003); *see also Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (quoting same in strip search case); *Hively,* 2012 WL 3553419 at *2 (sexual offenses tend to cause significant distress and often lasting psychological harm).

Here, the parties agree that during a pat down search of Curry and other kitchen workers on September 23, 2010, Trefz's open hand struck a portion of Curry's clothed right buttock. Curry alleges that Trefz also hit his hip and that he found Trefz's conduct offensive, sexually humiliating and degrading. Trefz denies any malicious or sadistic intent, claiming the incident was an accident. Curry argues that the parties' disagreement over Trefz's intent requires that this case go to trial. In many cases, that would be true. *See Hively*, 2012 WL 3553419, *2 (parties' disagreement about officer's intent created issue of fact because "subjective intent, unless admitted, has to be inferred rather than observed; judges and jurors are not mind readers"). However, as explained below, Curry has no evidence to support his characterization of the incident.

To survive summary judgment, Curry must do more than merely say that he felt humiliated and violated. For example, in *Hively*, the plaintiff alleged that he complained

vociferously to the guard when the guard spent five to seven seconds gratuitously fondling plaintiff's testicles and penis during a pat down search and then fondled his nude testicles for two or three seconds during a strip search in direct contravention of a jail policy that forbade touching an inmate during a strip search. Here, Curry admits—and the video recording confirms—that Trefz briefly touched the upper portion of Curry's buttock/hip area for a second as Trefz tapped Curry to signal that the search was over.[4] Unlike in *Hively*, Trefz did not touch Curry's genitals or fondle him in any way.

In an attempt to show that Trefz's contact was deliberately calculated to cause humiliation, Curry avers that the video does not show that Trefz looked surprised or apologetic. The lack of sound on the video and camera's placement make it difficult to discern whether Trefz had *any* reaction after he made contact with any of the inmates he was searching. (The second inmate Trefz searched turns back while walking away and appears to be joking with Trefz, but Trefz's response cannot be discerned). However, even accepting that Trefz showed no visible surprise or remorse, it is not reasonable to infer from this lack of reaction that Trefz intended to touch Curry in a sexual manner.

Curry has submitted an affidavit from a fellow prisoner, Moffett, who was one of the other four inmates subject to a pat down search from Trefz that day. Moffett alleges that Trefz struck his buttocks and was laughing. However, Moffett's statement is discredited by the video of the incident, which clearly shows that Trefz did not slap any of the inmate's buttocks. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) ("Respondent's version of events is so utterly

[4] Although Curry alleged in his complaint that Trefz slapped him so hard as to leave a red mark, he does not pursue that claim on summary judgment and does not make any averment or propose any fact to this effect. The video also shows that Trefz did not "slap" Curry or use any force in conducting the pat down.

discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."). In the video, Trefz's hands are always visible, and he never touches any inmate's buttocks. Although the quality of the video makes it is impossible to tell whether Trefz ever laughed, there is no visible indication that he did or that he was behaving in an otherwise harassing manner toward any of the five inmates.

Nonetheless, let's accept as true Moffett's allegation that Trefz laughed when he conducted an otherwise appropriate pat search of Moffett. Keep in mind that Curry does not allege that Trefz laughed when he patted Curry down. No reasonable jury could infer from Trefz's laughter while patting down *Moffett,* Trefz intended to sexually assault or humiliate *Curry*. The connection between this laughter and the later touching of Curry is simply too attenuated to permit such an inference; indeed, it is doubtful that Moffett's testimony on this point even would be admissible at trial. Fed. R. Evid. 404(b) allows admission of evidence of another act to prove motive, intent or lack of accident or mistake, but not to prove person's character to show person acted in accordance with character on a particular occasion. The evidence (1) must be directed to establish a matter in issue other than defendant's propensity to commit the act alleged, (2) must be similar enough and close in time to be relevant to the issue, (3) must suffice to support a jury finding that defendant committed the similar act and (4) its probative value must not be substantially outweighed by the danger of unfair prejudice. *United States v. Vargas*, ___ F.3d ___, 2012 WL 3240678 (7th Cir. Aug. 10, 2012). It is a non sequitur to posit that because Trefz laughed while conducting a by-the-book pat down of

Moffett, he must have intended to humiliate Curry or to sexually gratify himself when he patted Curry once on his clothed buttock without laughing.

Even viewing the evidence in the light most favorable to Curry, it would be a distortion to characterize Trefz's conduct in this case as sexual assault. *See Berryhill v. Schriro*, 137 F.3d 1073, (8th Cir. 1998) (finding same where prison maintenance employee's brief touch to inmate's buttocks lasted mere seconds and was not accompanied by sexual comments or banter). Curry points to no evidence other than the facts that he was briefly touched in an objectively non-sexual manner and that Trefz laughed while patting a different inmate down to support his claim that Trefz sexually assaulted him. Although not dispositive, cases involving significantly more serious allegations than Curry's have failed to withstand summary judgment. *See, e.g., Boddie v. Schneider*, 105 F.3d 857 (2nd Cir. 1997) (allegation that corrections officer touched inmate's penis and pressed up against him in sexual manner was "isolated episode[] of harassment and touching" not involving "harm of federal constitutional proportions"); *Vanden Heuvel v. Zwicky*, 2011 WL 833254, *6 (E.D. Wis. Mar. 4, 2011) (incident in which guard allegedly put hands down front of plaintiff's pants during routine pat down search not objectively or sufficiently serious). Considering all of the evidence of record, resolving all doubts in Curry's favor and recognizing that intent must be inferred rather than observed, a reasonable jury could not conclude that Trefz touched Curry's buttock with intent to humiliate Curry or to derive sexual pleasure. Therefore, there is no basis to take this claim to trial. *See Washington v. Hively*, 2012 WL 3553419 at *2.

III. Retaliation

To prevail on his First Amendment retaliation claim against defendant Gardner, Curry must present a prima facie case that:

> (1) He engaged in activity protected by the First Amendment;
>
> (2) He suffered a deprivation that would likely deter First Amendment activity in the future; and
>
> (3) The First Amendment activity was a "motivating factor" in Gardner's decision to retaliate.

Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009) (citations omitted); *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005). *See also Kidwell v. Eisenhauer*, 679 F.3d 957, 964-65 (7th Cir. 2012) (clarifying law related to prima facie case and but for causation and reconciling apparent conflict in court's previous rulings); *Greene v. Doruff*, 660 F .3d 975, 977-79 (7th Cir. 2011) (same, and explaining that "motivating factor" is a "sufficient condition" for an adverse action).

Curry alleges that Gardner had him placed in segregation for seven days in retaliation for filing a complaint against Trefz. Although a prisoner's right to use available grievance procedures has been recognized as a constitutionally protected activity, *Hoskins*, 395 F.3d at 375, and being locked up for seven days may likely deter Curry from filing future complaints, Curry has not shown that his complaint was a motivating factor in the decision to place him in TLU.

First, as defendants point out, Gardner did not make the final decision to place Curry in TLU. He merely reported Curry's behavior to Schwandt, who ordered Gardner to place Curry in TLU. A defendant can only be liable under § 1983 for those constitutional deprivations in which he was personally involved. *Alejo v. Heller*, 328 F.3d 930, 936 (7th Cir. 2011); *see also Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) (public employees responsible only for their

own misdeeds, not those of others). There is no evidence that Gardner was anything but a messenger for Schwandt, who was the decision maker. *See Bell v. Osafo*, 2010 WL 3283025, *9 (C.D. Ill. Aug. 18, 2010) (finding same with respect to defendant who informed inmate plaintiff that he had been denied a bakery job).

Second, even if one assumes that Gardner reported false findings to Schwandt in order to punish Curry for a filing complaint about Trefz, the only evidence of a retaliatory motive is the timing of Curry's complaint in relation to his placement in TLU. The Seventh Circuit repeatedly has held that suspicious timing rarely will suffice to show that a complaint caused the adverse action against the plaintiff. *Kidwell*, 679 F.3d at 966; *Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012); *Williams v. Snyder*, 367 Fed. Appx. 679, 682 (7th Cir. 2010) (unpublished) (suspicious timing insufficient to overcome uncontradicted evidence of other, non-retaliatory motives); *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913,918 (7th Cir. 2000) ("[S]peculation based on suspicious timing alone . . . does not support a reasonable inference of retaliation . . .. Rather, other circumstances must also be present which reasonably suggest that the two events are somehow related to one another"). For an inference of causation to be drawn solely on the basis of suspicious timing, the court of appeals typically allows no more than a few days to elapse between the protected activity and the adverse action. *Kidwell*, 679 F.3d at 966. This case is a close call because Curry was locked up only four days after filing a complaint. However, where a "'significant intervening event separat[es]'" the protected activity from the adverse action, "a suspicious-timing argument will not prevail." *Id.* at 967 (quoting *Davis v. Time Warner Cable of Se. Wis., L.P.*, 651 F.3d 664, 675 (7th Cir. 2011)).

Here, it is undisputed that Curry's own subsequent actions led to his transfer to TLU. Garner and Schwandt both aver that Curry was instructed not to discuss the alleged assault while it was being investigated, but he did so anyway. The result was that Curry was placed in TLU to prevent him from continuing to discuss the incident with others while the investigation continued. Such a placement was authorized (although not mandated) by Wisconsin Administrative Code DOC 303.11(4)(a). Curry attempts to refute this evidence by averring that Gardner did not give him a "directive" to remain silent. However, in his written statement in the TLU notice, Curry admitted that he was told not to talk about the assault, even though he tried to characterize the directive as a request and not an order. Therefore, even if Gardner only "requested" that Curry not discuss the incident, it is clear that Curry was made aware that the institution did not want him talking about it during the investigation. Whether or not Curry knew that he could be punished for talking about it is irrelevant.

In addition, although Curry avers that he did not discuss the incident, he and Moffett both admit that they had a conversation about Moffett completing an affidavit. Assuming that Curry only asked Moffett to prepare an affidavit detailing what he experienced during the pat down, they still "discussed" the incident, even if only tangentially. This conduct constitutes a sufficient and legitimate basis for placing Curry in TLU. *See Russell v. Richards*, 384 F.3d 444, 448 (7th Cir. 2004) (fit between prison's actions and objectives in implementing policy "need not be perfect," just rational). Because Curry has not adduced any evidence of ill motive and Gardner's explanation for the lockup is not beyond reasonable dispute, Gardner is entitled to summary judgment on Curry's retaliation claim.

ORDER

IT IS ORDERED that

(1) The motion for summary judgment filed by defendants Sgt. Reed Trefz and Captain David Gardner (dkt. 49) is GRANTED;

(2) Plaintiff Daniel Curry's renewed request for appointment of counsel (dkt. 60) is DENIED as moot; and

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

Entered this 11th day of September, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge