IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LUIS VASQUEZ,

OPINION AND ORDER

Plaintiff,

11-cv-474-bbc

v.

SGT. TROCHINSKI,

Defendant.

- -

In this prisoner civil rights suit, plaintiff Luis Vasquez, a former inmate of the Waupun Correctional Institution, is proceeding on a claim that defendant Jonas Trochinski violated plaintiff's First Amendment rights when he filed a false conduct report against plaintiff in retaliation for plaintiff's threat to file a grievance and lawsuit against defendant. The case is before the court on defendant's motion for summary judgment. Dkt. #13.

Defendant's motion for summary judgment will be granted. The undisputed facts show that plaintiff would have been disciplined even if he had never made his threat to sue defendant. Plaintiff engaged in disruptive behavior and he refused a direct order from defendant.

From the proposed findings of fact submitted by both sides, I find that the following facts are relevant and undisputed. (Plaintiff has not submitted a response brief or a response to defendant's proposed findings of fact, but he has submitted his own proposed findings of

fact.)

UNDISPUTED FACTS

A. Parties

Plaintiff Luis Vasquez is in state custody at the Wisconsin Resource Center. From April 4, 2006 to April 3, 2012, he was an inmate at the Waupun Correctional Institution. Defendant Jonas Trochinski was a correctional sergeant at the institution from March 1, 2009 through October 7, 2011.

B. Disturbance

On July 8, 2009, defendant was working in the health and segregation complex at Waupun, where plaintiff was participating in a psychotherapy group. At approximately 2:05 p.m., defendant responded to a request for assistance related to a disturbance between inmates. As he approached the room where the disturbance was taking place, defendant heard loud noises and profanity coming from the room and recognized plaintiff's voice. Once inside the room, defendant heard plaintiff make loud and disruptive comments during a verbal argument with another inmate, including saying, "Fuck you, shut the fuck up bitch" to the other inmate. Defendant ordered plaintiff to stop. Plaintiff threatened to sue defendant. Defendant left the room to give plaintiff time to calm down, and returned with Correctional Officer Jesse Jones. Defendant then ordered plaintiff to put his hands out of the trap so that defendant could place restraints on plaintiff. (Neither party explains the

arrangements in the room in which the psychotherapy group was meeting. It appears that the individual prisoners were in cells or cages within the room, which would explain why defendant's response upon returning to the room would have been to ask plaintiff to put his hands through a trap in the door.) Plaintiff refused defendant's order and threatened again to file a lawsuit.

After at least one additional request from defendant, plaintiff placed his hands outside the trap door so that defendant could place him in restraints. With the help of Officer Jones, defendant escorted plaintiff back to his cell (presumably the cell in which he was housed). (The parties dispute whether defendant squeezed and twisted plaintiff's bicep on the way to the cell and threatened to take plaintiff down to the floor forcibly, face first, if he ever again threatened to sue him.)

C. Discipline

The same day (July 8, 2009), defendant wrote Conduct Report No. 201946, in which he alleged that plaintiff violated rules 303.16 [Threats], 303.24 [Disobeying orders], 303.25 [Disrespect] and 303.28 [Disruptive conduct]. On July 9, 2009, plaintiff received notice of this report and waived his right to a formal due process major disciplinary hearing. At a July 17, 2009 disciplinary hearing, plaintiff was found not guilty of making threats and guilty of disobeying orders, being disrespectful and engaging in disruptive conduct. He received punishment in the form of eight days' adjustment segregation and 30 days' loss of recreation. Plaintiff appealed the findings of guilt; on October 27, 2009, the warden affirmed the

decision and the penalty.

OPINION

It is established law that "[a]n act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000). To determine whether any particular act was taken in response to the plaintiff's exercise of a constitutional right and thereby states a claim for retaliation under the First Amendment, a plaintiff must (1) identify a constitutionally protected activity in which he was engaged; (2) identify one or more retaliatory actions taken by defendant that would likely deter a person from engaging in the protected activity in the future; and (3) allege sufficient facts from which the factfinder could 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, 546 (7th Cir. 2009) (citing Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2008)).

A. Protected Activity

In the context of a retaliation claim, a prisoner's right to file a grievance or lawsuit has been recognized as a constitutionally protected activity. Hopkins v. Linear, 395 F.3d 372, 375 (7th Cir. 2005); Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). It is unconstitutional for prison officials to respond to threats to file a grievance or lawsuit with acts of retaliation. I explained the reasoning for this conclusion in Lindell v. O'Donnell, 05-

C-04-C, 2005 WL 2740999, at *30 (W.D. Wis. Oct. 21, 2005):

> Retaliation is constitutionally impermissible because it inhibits individuals from exercising their constitutional rights. Crawford-El v. Bretton, 523 U.S. 574, 589 n.10 (1998); see also Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Illinois, 391 U.S. 563, 574 (1968). It stands to reason that an inmate is more likely to be dissuaded from filing an inmate complaint or lawsuit when his verbalized intention to do so is met with retaliation than when an act of retaliation follows the filing of the grievance or lawsuit. If inhibition is the evil the law seeks to avoid, there is no reason to find anticipatory retaliation more permissible than reactive retaliation. If anything, retaliatory actions taken in advance of the exercise of constitutionally protected rights are more likely to inhibit the exercise of those rights than are subsequent acts of retaliation.

Although a prisoner has "'a general First Amendment right to criticize [prison] policies," he must do so "in a manner consistent with his status as a prisoner'" and with "the legitimate penological objectives of the corrections system." Watkins v. Kasper, 599 F.3d 791, 797 (7th Cir. 2010) (quoting Freeman v. Texas Dept. of Criminal Justice, 369 F.3d 854, 864 (5th Cir. 2004); Smith v. Mosley, 532 F.3d 1270, 1277 (11th Cir. 2008)). In other words, a prisoner's "disruptive" and "insubordinate" oral complaints to a prison official in front of other prisoners are less likely to receive First Amendment protection because they can "impede[] [the official's] authority and . . . ability to implement [prison] policy." Id.

The parties dispute whether plaintiff acted in a manner consistent with his status as a prisoner. For the sole purpose of deciding this motion, I will assume that plaintiff informed defendant respectfully that he intended to file a grievance and lawsuit, so that his speech falls into the protected category. Even so, his claim fails because he did not suffer adverse consequences for exercising his rights under the First Amendment.

B. Adverse Consequences and Retaliatory Motive

In order to prevail on a retaliation claim, a plaintiff must show that because he exercised his constitutional rights, he suffered some adverse consequence that would likely deter his First Amendment activity in the future. Bridges, 557 F.3d at 546. At summary judgment, he must prove that his First Amendment conduct was "'at least a motivating factor'"' in the prison official's decision to take the retaliatory action. Id. at 552 (quoting Woodruff v. Mason, 542 F.3d 545, 551 (7th Cir. 2002).

One way a plaintiff can show retaliatory motive is suspicious timing, that is, showing that an adverse action followed on the heels of protected conduct. However, "suspicious timing will rarely be sufficient in and of itself to create a triable issue." Kidwell v. Eisenhauer, 679 F.3d 957, 966 (7th Cir. 2012) (internal quotation omitted) (discussing suspicious timing in case challenging alleged retaliation in employment). This is especially true when a plaintiff engaged in wrongful conduct that would have led independently to the adverse consequence. "[When a plaintiff's] own aberrant actions or other intervening circumstances led to the negative responses," a suspicious timing argument will not prevail. Id. at 967.

Plaintiff does not deny that he engaged in conduct that violated prison rules. He does not dispute defendant's proposed findings of fact that he disobeyed defendant's order to place his hands out of the trap door and that during an argument with another inmate, he made loud, profane and disruptive remarks, including "Fuck you, shut the fuck up bitch." Because plaintiff admits that he engaged in the conduct that served as the basis for his

discipline, it would be difficult for him to show that his protected conduct was a motivating factor in defendant's decision to issue him a conduct report.

Plaintiff offers two explanations for his behavior, but neither shows that defendant acted with retaliatory motive. With respect to defendant's order to place his hands outside the trap door, plaintiff alleges that he asked that another officer, instead of defendant, handcuff him because plaintiff was "taking precautions" after seeing defendant "display[] an expression of an intent to inflict bodily harm." Next, plaintiff asserts that his disrespectful and disruptive behavior toward another inmate "was motivated by [his] psychological disorder." Neither plaintiff's perception of defendant's expression nor his mental condition is relevant to his claim. The two explanations show no more than plaintiff's reasons for acting the way he did, whereas it is defendant's motivations that are at issue.

Plaintiff's evidence of retaliatory motive consists of the following: (1) protected conduct followed by a conduct report; and (2) an allegation that defendant squeezed his bicep and threatened him with physical violence if he ever again threatened to sue. Defendant had valid reasons for issuing plaintiff a conduct report because plaintiff was disobeying orders and being disrespectful and disruptive. Thus, plaintiff is left with the violation of rule 303.16 [Threats] to show a retaliatory motive. This does not help him because the hearing officer dismissed the charge. Even if plaintiff could show that defendant meant to retaliate against him, "[a] single retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action." Bridges, 557 F.3d at 555. A dismissed disciplinary charge is not going to deter a prisoner from exercising his

constitutional rights in the future.

In sum, a reasonable jury could not find that defendant retaliated against plaintiff for engaging in protected conduct. Even if the evidence allowed a finding that defendant's actions were based on anything other than plaintiff's failure to follow the rules, any claim plaintiff may have had with respect to a conduct report based on threats to file a grievance or lawsuit disappeared when the hearing officer dismissed that charge.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendant Jonas Trochinski, dkt. #13, is GRANTED.

2. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 26th day of September, 2012.

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