IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DERRICK HOWARD,

Plaintiff,

v.

LT. D. BERKEBILL, CAPT. D. MORGAN,
MS. J. MINK, SGT. TESKA,
OFFICER JOHNSON and
DEPUTY WARDEN TIM DOUMA,

Defendants.

ORDER

11-cv-561-slc[1]

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In this proposed civil action for monetary and injunctive relief under 42 U.S.C. § 1983, plaintiff Derrick Howard, a prisoner at the Columbia Correctional Institution, contends that several defendants employed at the institution violated his rights under the Eighth and Fourteenth Amendment by sending him to disciplinary segregation after he asked to be placed on observation status. Plaintiff has paid the $350 filing fee.

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 complaint, I conclude that plaintiff has failed to state a claim against any defendant for violation of his constitutional rights. Therefore, I will dismiss his complaint. Additionally, I will deny plaintiff's motion for appointment of counsel as moot.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

On April 29, 2011, defendant Officer Johnson told plaintiff he needed to move from one cell to another. Plaintiff did not refuse to move, but told defendant Sgt. Teska and other officers that he felt like he was going to hurt himself or someone else and needed to be placed on observation. Defendant Lt. D. Berkebill escorted plaintiff to DS-1 segregation, notified a doctor and then placed him on observation status.

After the incident, defendant Johnson issued a conduct report against plaintiff in which he stated that plaintiff had refused to move from cell to another. A hearing was held on the incident report on May 16, 2011. At the hearing, defendants Capt. D. Morgan and Ms. J. Mink concluded that defendant Johnson's account of the event was credible and that plaintiff had disobeyed orders, although Mink and Morgan noted that all witnesses testified that plaintiff did ask to go to observation. Plaintiff was sentenced to 120 days' disciplinary

segregation. He appealed the decision to defendant Deputy Warden Tim Douma. Douma affirmed the decision, finding that "evidence supports a finding [that the] inmate refused to move to another cell."

DISCUSSION

Plaintiff contends that defendants violated 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 giving him time in segregation as punishment for merely requesting to be placed on observation status. However, the allegations in plaintiff's complaint would not allow a factfinder to infer 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) 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). The only allegations in plaintiff's complaint that could be construed as describing a "substantial risk of serious harm" is plaintiff's allegation that he told officers he was feeling as if he might harm himself. Even if I assume that plaintiff was facing a substantial risk of serious harm, there are no allegations that any defendant ignored that risk. Upon hearing plaintiff's concerns, defendant Berkebill notified a doctor and placed plaintiff on observation status. Thus, there are no facts in plaintiff's complaint that would support a finding that plaintiff's rights under the Eighth Amendment were violated.

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. In addressing what satisfies the "atypical and significant" hardship standard, the Court of Appeals for the Seventh Circuit recently explained that "a liberty interest *may* arise 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) (emphasis in original) (holding that prisoner's confinement in segregation for 240 days may implicate liberty interest).

Plaintiff's sentence to disciplinary segregation for 120 days falls in between those that the court of appeals has allowed to proceed and those it has rejected. Compare Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (six months in segregation could be long enough if conditions were sufficiently severe), with Townsend v. Fuchs, 522 F.3d 765, 767 (7th Cir. 2008) (59 days in segregation not long enough to trigger due process clause), and Lekas v. Briley, 405 F.3d 602, 612 (7th Cir. 2005) (90 days in segregation not long enough to trigger due process clause).

However, in Fortney v. Hoffman, 09-cv-192-slc , slip op. at 6 (W.D. Wis. Apr. 24,

2009), I concluded that, under Marion, 120 days in disciplinary segregation does not give rise to a claim under the due process clause. I relied on the court of appeals' observation that "periods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions." Marion, 559 F.3d at 699. In addition, I noted that the plaintiff had not included any allegations in his complaint from which it could be inferred that the conditions of confinement he endured in segregation were "unusually harsh." Similarly, in Spencer v. Sommers, 10-cv-288-bbc, slip. op. at 22-23 (W.D. Wis. Apr. 12, 2011), I concluded that 135 days in disciplinary segregation did not give rise to a liberty interest, particularly in light of the fact that the plaintiff had not suggested the conditions in segregation were unusually harsh.

As in Fortney and Spencer, plaintiff's 120 days in disciplinary segregation do not raise due process concerns, because he has not alleged that the conditions of his confinement were unusually harsh. Moreover, even if plaintiff's sentence could implicate his right to procedural due process, his allegations do not imply that he was denied procedural due process.

Due process requires that a prisoner receive (1) advance written notice of the charges against him; (2) a hearing before an impartial decisionmaker at which the prisoner can present testimony and evidence; and, (3) for any disciplinary action taken, a written explanation, supported by at least "some evidence" in the record. Wolff v. McDonnell, 418 U.S. 539, 563-71 (1974); Lagerstrom v. Kingston, 463 F.3d 621, 624 (7th Cir. 2006).

Plaintiff contends that his hearing deprived him of due process because the decision-makers, defendants Morgan and Mink, were not impartial and because the evidence showed that he did not violate any prison rules. However, plaintiff has alleged no facts suggesting that Morgan and Mink were not impartial. Also, plaintiff's allegations show that there was at least "some evidence" in the record to support the decision, namely, the testimony of defendant Johnson. The fact that Morgan and Mink believed Johnson's testimony over plaintiff's does not mean that they denied plaintiff due process.

Additionally, plaintiff cannot state a due process claim against defendants Berkebill, Teska or Johnson for their allegedly false statements that supported the conduct report and disciplinary decision. So long as a prisoner's disciplinary hearing itself provided procedural due process, an allegation that a prison officer offered false evidence or false reports in order to implicate the inmate in a disciplinary infraction does not state a claim for which relief can be granted. Hanrahan v. Lane, 747 F.2d 1137, 1141 (7th Cir. 1984).

Finally, plaintiff has not stated a claim against defendant Deputy Warden Douma for violation of his right to due process. Plaintiff's allegations against defendant Douma relate only to Douma's rejection of plaintiff's appeals regarding defendants Morgan and Mink's decision penalizing plaintiff with disciplinary segregation. Because Morgan and Mink's actions were not constitutional violations, Douma's failure to reverse their decision was not a constitutional violation.

ORDER

IT IS ORDERED that

1. Plaintiff Derrick Howard is DENIED leave to proceed on his claims that defendants Lt. D. Berkebill, Capt. D. Morgan, Ms. J. Mink, Sgt. Teska, Officer Johnson and Deputy Warden Tim Douma violated his rights under the Eighth and Fourteenth Amendments by disciplining him for asking to be placed on observation status.

2. Plaintiff's motion for appointment of counsel, dkt. #4, is DENIED.

3. 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.

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

Entered this 7th day of September, 2011.

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