

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

SABIR WILCHER,

Plaintiff,

v.

RICK RAEMISCH, WILLIAM POLLARD,
TYLER ROMENESKO,
WILLIAM SWIEKATOWSKI
ROBIN LINDMEIER,
CHRISTOPHER STEVENS and
PETER ERICKSEN,

Defendants.

OPINION and ORDER

12-cv-803-BBC

In this civil action for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983, plaintiff Sabir Wilcher is proceeding on his claims that defendants Rick Raemisch, William Pollard, Tyler Romenesko, William Swiekatowski, Robin Lindmeier, Christopher Stevens and Peter Ericksen convicted him on a false conduct report and transferred him to the Wisconsin Secure Program Facility because he refused to provide false information about the alleged illegal activities of another prisoner. In a screening order entered on December 26, 2012, I allowed plaintiff to proceed on claims that defendants' retaliation violated his right not to speak under the First Amendment, Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-97 (1988), and that defendants Raemisch, Pollard and Stevens violated plaintiff's Fourteenth Amendment right to due process by intentionally

depriving him of a meaningful opportunity to challenge his disciplinary conviction and transfer. Wilkinson v. Austin, 545 U.S. 209, 223 (2005).

Defendants have filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), dkt. #14, which is ready for decision. Defendants argue that they are entitled to qualified immunity on plaintiff's First Amendment claim and that plaintiff's due process claim should be dismissed for failure to state a claim. I will deny defendants' motion to dismiss plaintiff's retaliation claim because any reasonable correctional officer would know that it violates a prisoner's First Amendment rights to retaliate against him for refusing to provide false testimony. However, I will dismiss plaintiff's due process claim because Wisconsin provides adequate post deprivation remedies for the kind of intentional conduct alleged by plaintiff.

In his proposed amended complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff was a prisoner incarcerated at the Green Bay Correctional Institution. At all relevant times, defendant Rick Raemisch was the secretary of the Wisconsin Department of Corrections. Defendant William Pollard was the warden of the Green Bay Correctional Institution, where defendant Peter Ericksen was employed as the security director and defendants William Swiekatowski, Robin Lindmeier and Christopher Stevens were lieutenants and defendant Romenesko was a correctional officer.

Plaintiff was approved to be transferred to medium security custody at the Stanley Correctional Institution on March 16, 2010. The evening before his scheduled transfer,

plaintiff was placed on temporary lockup pending an investigation into the introduction of contraband into the prison. Defendant Lindmeier interviewed plaintiff. He wanted plaintiff to provide information about his fellow inmate Derek Williams, who had filed a lawsuit against defendants. Lindmeier asked plaintiff whether Williams had ever mentioned the lawsuit to plaintiff. Plaintiff had no information to provide about Williams and refused to provide false information. Plaintiff also did not want to receive the label of “snitch,” which would increase the danger to him throughout his life sentence. After plaintiff said that he knew nothing about the lawsuit, Lindmeier stated, “Since you don’t have any information you wish to share you can forget about your camp and think about it for awhile.”

Three days later, Romenesko issued a false conduct report to plaintiff for misuse of prescription medication, theft, possession of contraband and damage or alteration of property. Plaintiff alleges that the conduct report was issued in retaliation for his refusal to provide information about Williams. After a “full due process hearing” on April 17, 2010, plaintiff was found guilty and given 90 days of disciplinary segregation. Plaintiff appealed the hearing officer’s decision, but it was upheld by defendant Pollard on April 23, 2010.

On May 21, 2010, defendant Swiekatowski issued another false conduct report to plaintiff for possession of intoxicants. The report relied on statements by two confidential informants. (Plaintiff speculates that the statements and informants never existed.) Defendant Lindmeier also signed the report as the “reporting staff member,” although she conducted no investigation.

After a full due process hearing on June 8, 2010, defendant Stevens found plaintiff

guilty on the second conduct report and sentenced him to 360 days of disciplinary segregation. Stevens knew about the facts underlying the conduct report because he had conducted an interview with Derek Williams previously. At the hearing, plaintiff was not allowed to listen to the recordings of phone conversations mentioned in the report or view the statements by the two confidential informants. Plaintiff appealed Stevens's findings and on June 16, 2010, defendant Pollard affirmed the finding and sentence. Plaintiff appealed both conduct reports to defendant Raemisch, who denied his appeals.

From March 2010 until August 2010, plaintiff remained in segregation, where he was subject to "extreme isolation, sensory deprivation, 24 hour constant illumination, fluctuating temperatures of extreme hot and cold, excessive non-stop loud noise caused by inmates, no use of the telephone and limited to no recreation." In August 2010, plaintiff was transferred to administrative segregation in the Wisconsin Secure Program Facility, based on the false allegations that plaintiff obtained and sold illegal drugs with Williams.

OPINION

A. Qualified Immunity and First Amendment Retaliation

Defendants argue that plaintiff's retaliation claim should be dismissed pursuant to Fed. R. Civ. P 12(b)(6) because they are entitled to qualified immunity. They argue that it was not clearly established that it would violate a prisoner's rights under the First Amendment to retaliate against him for refusing to cooperate with an internal prison investigation.

Courts should be hesitant to resolve qualified immunity questions in a motion to dismiss under Rule 12(b)(6) because qualified immunity is an affirmative defense and often involves disputed factual issues. Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001). Nevertheless, it may be appropriate to resolve this issue on a motion to dismiss when, accepting all of the plaintiff's allegations as true, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McMath v. City of Gary, Indiana, 976 F.2d 1026, 1031 (7th Cir. 1992) (quotation omitted). E.g. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (reversing denial of motion to dismiss under Rule 12(b)(6) for qualified immunity). Moreover, the court is obligated by the Prisoner Litigation Reform Act to dismiss "as soon as practicable" any portion of a prisoner complaint that "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A.

Qualified immunity shields public officials from suit for money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right and (2) that the right was "clearly established" at the time of the challenged conduct. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" al-Kidd, 131 S.Ct. at 2083 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). A right is clearly established if there is controlling precedent from the Supreme Court or the Seventh Circuit Court of Appeals or if "there was such a

clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.” Estate of Escobedo v. Bender, 600 F.3d 770, 781 (7th Cir. 2010) (quoting Jacobs v. City of Chicago, 215 F.3d 758, 766 (7th Cir. 2000)).

It is well established that prisoners retain their rights under the First Amendment and that prison officials violate prisoners’ First Amendment rights if they retaliate against them for engaging in protected activities. Pearson v. Welborn, 471 F.3d 732, 741 (7th Cir. 2006). On numerous occasions, the Supreme Court has explained that the First Amendment protects citizens from being compelled to speak. E.g. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (state could not compel plaintiff to display its slogan on his license plate); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (state could not compel parade organization to include groups with which it disagreed); United States v. United Foods, Inc., 533 U.S. 405, 411 (2001) (federal government could not compel mushroom producers to fund generic advertising). Together these principles are sufficient to conclude that plaintiff has stated a claim for retaliation.

However, as I noted in the screening order, neither the Supreme Court nor any circuit court of appeals has held that a prison official violated a prisoner’s First Amendment rights by retaliating against the prisoner for refusing to provide false testimony in an internal prison investigation. But see Cornell v. Woods, 69 F.3d 1383, 1386 (8th Cir. 1995) (holding prisoner stated claim under First Amendment by alleging defendants retaliated against him for cooperating in internal investigation against correctional officers). Several

district courts have held that prisoners do not have a right to refuse to participate in internal prison investigations. Clardy v. Mullens, No. 12-cv-11153, 2012 WL 5188012, at *7-8 (E.D. Mich. Aug. 29, 2012) (collecting cases), rep. and rec. aff'd 2012 WL 5187852. Defendants argue that in light of this case law, it was not clearly established that plaintiff had a right to refuse to participate in their internal investigation.

This characterization of plaintiff's asserted right conflates the two stages of the First Amendment analysis. Prisoners retain their rights under the First Amendment. Turner v. Safley, 482 U.S. 78, 89 (1987). Like other persons, prisoners have a right not to be compelled to speak. Newman v. Beard, 617 F.3d 775, 780-81 (3d Cir. 2010) (holding prisoners had a right not to speak but parole board had legitimate penological interest in requiring prisoners to admit guilt as condition of parole) cert. denied, 131 S. Ct. 2126 (2011). Although several district courts have said that prisoners have no right to refuse to speak, those cases are contrary to controlling Supreme Court precedent. In the prison context, what changes is not a prisoner's rights but the standard of review for evaluating restrictions on those rights. Turner, 482 U.S. at 89. Restrictions on prisoners' protected speech are upheld if they are "reasonably related to legitimate penological interests." Id. Although prison officials may have legitimate penological reasons for compelling prisoners to speak in some circumstances, that does not mean it is unclear whether prisoners have a right not to speak generally.

For similar reasons, the question whether plaintiff had a right not to speak must not be confused with the question whether a reasonable correctional officer in defendants'

position would understand that retaliating against him violated that right. The answer to the latter question depends on whether defendants had a legitimate penological reason for compelling plaintiff to speak. Defendants conflated these two questions by characterizing plaintiff's asserted right as "a right to refuse to participate in an internal investigation." This conflation is particularly inappropriate in this case because plaintiff has alleged not only that he refused to participate in the investigation but that he had no information and refused to fabricate testimony. At the motion to dismiss stage, I must treat these allegations as true. Even if it is unclear whether prison officials have legitimate penological reasons for compelling prisoners to participate in prison investigations, defendants cannot contend in good faith that they had legitimate reasons to compel false testimony. Any reasonable correctional officer would know that it violates a prisoner's constitutional rights to retaliate against him for refusing to provide false testimony. Therefore, I will deny defendant's motion to dismiss plaintiff's retaliation claim on the basis of qualified immunity.

B. Due Process

Plaintiff is also proceeding on a claim that defendants Raemisch, Pollard and Stevens intentionally deprived plaintiff of his right to due process by relying on fabricated evidence because plaintiff had refused to participate in the sham investigation against Williams. Wilkinson v. Austin, 545 U.S. 209, 223 (2005). Defendants argue that this claim should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) because plaintiff has alleged that defendants intentionally deprived him of due process and Wisconsin provides

adequate postdeprivation remedies for such “random and unauthorized” conduct.

Ordinarily, due process requires the state to provide a person with notice and an opportunity to be heard before depriving them of liberty or property. However, if the state establishes predeprivation procedures and state employees negligently or intentionally violate those procedures, the only way a state could provide protections from such “random and unauthorized” conduct is through post deprivation remedies. Parratt v. Taylor, 451 U.S. 527, 541-4 (1981); Hudson v. Palmer, 468 U.S. 517, 533 (1984). Therefore, if a plaintiff alleges that he was deprived of liberty by an official’s negligent or intentional violation of state procedures, he can state a due process claim only if the state also fails to provide an adequate post deprivation remedy. Id. In Wisconsin, prisoners may challenge disciplinary or transfer decisions through a writ of certiorari and the state court may review, among other things, whether the decision was reasonable, whether the decision maker followed departmental regulations and whether the procedure complied with constitutional due process. State ex rel. Meeks v. Gagnon, 95 Wis. 2d 115, 119-20, 289 N.W.2d 357 (Ct. App. 1980) (holding prisoner could challenge disciplinary decision by writ of certiorari); State ex rel. Lomax v. Leik, 154 Wis. 2d 735, 739-41, 454 N.W.2d 18 (Ct. App. 1990) (holding prisoner could challenge transfer decision by writ of certiorari and vacating committee’s transfer decision for not following administrative procedures); State ex rel. Curtis v. Litscher, 2002 WI App 172, ¶ 20, 256 Wis. 2d 787, 650 N.W.2d 43 (holding disciplinary hearing violated due process because hearing examiner was a witness to alleged rule violation).

In Hamlin v. Vaudenberg, 95 F.3d 580 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that Wisconsin's state law remedies provided adequate post deprivation process for "random and unauthorized" conduct in a prison disciplinary proceeding. The plaintiff, an inmate at the Green Bay Correctional Institution, alleged that the prison adjustment committee relied on false information from confidential witnesses, without finding that confidentiality was necessary to protect the witnesses as required by the Wisconsin Administrative Code. Id. at 580. The court of appeals held that the committee's alleged conduct was random and unauthorized because it violated the administrative procedures and that Wisconsin provided adequate remedies to challenge such defective procedures through the inmate complaint system and a writ of certiorari. Id. at 585. As the court explained:

[Wisconsin's] inmate complaint review system and certiorari review allow consideration of alleged due process violations. Both offer relief from liberty deprivations by reinstating prisoner status in the general population (even assuming that disciplinary segregation implicates due process) and expunging the prisoner's disciplinary record. Neither can offer money damages, which would be available in a state law tort action against the prison officials, but these proceedings are neither meaningless nor nonexistent, so they provide all the process that is constitutionally required. We agree with the district court that Wisconsin post-deprivation proceedings are adequate.

Id. at 585.

Although plaintiff has alleged that defendants intentionally violated state law by relying on false and fabricated witness testimony, he argues that their intentional conduct was predictable because the administrative code gives the Department of Corrections wide discretion regarding how to initiate, implement, adjudicate and oversee disciplinary

decisions. A state official's conduct is not "random and unauthorized" if his discretionary authority is so "uncircumscribed" by state law that an abuse of that discretion is predictable and preventable with better predeprivation procedures. Easter House v. Felder, 910 F.2d 1387, 1400 (7th Cir. 1990). However, the court of appeals has analyzed Wisconsin's administrative procedures for disciplinary convictions and found that prison disciplinary committees "must follow the applicable procedures and lack[] discretion in determining how to carry out those proceedings." Hamlin, 95 F.3d at 548. Moreover, as the court of appeals observed, no amount of procedural safeguards will prevent prison officials from engaging in a conspiracy to intentionally convict a prisoner. Id. Because plaintiff has alleged that prison officials intentionally deprived him of due process but has not alleged that a writ of certiorari under Wisconsin law would have been inadequate to remedy this violation, his allegations fail to state a claim for violation of due process and must be dismissed.

ORDER

IT IS ORDERED that the motion to dismiss, dkt. #14, filed by defendants Rick Raemisch, William Pollard, Tyler Romenesko, William Swiekatowski, Robin Lindmeier, Christopher Stevens and Peter Ericksen is GRANTED IN PART and DENIED IN PART. Plaintiff Sabir Wilcher's claim that defendants Raemisch, Pollard and Stevens violated his procedural due process rights under the Fourteenth Amendment is DISMISSED for failure

to state a claim under Fed. R. Civ. P. 12(b)(6). The motion is DENIED in all other respects.

Entered this 28th day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge