IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SABIR WILCHER,

OPINION and ORDER

Plaintiff,

12-cv-803-bbc

v.

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

Defendants.

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In this proposed civil action for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983, plaintiff Sabir Wilcher alleges that defendants retaliated against him for refusing to provide information about another prisoner who was allegedly bringing contraband into the prison by convicting him of false conduct reports and transferring him to the Wisconsin Secure Program Facility. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by 28 U.S.C. § 1915(b)(1).

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 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).

As an initial matter, plaintiff has filed a proposed amended complaint, dkt. #8, which includes additional factual allegations and legal theories but not a request for relief. Instead, plaintiff incorporates his request for relief from the first complaint. Dkt. #11. As a general rule, this court does not permit parties to amend their pleadings piecemeal, but instead requires a party to file a completely new document that replaces the original pleading. It is usually too difficult and confusing for the parties and the court to look at multiple documents to find out what claims a party is asserting. Nevertheless, to avoid unnecessary delay in this case, I will treat plaintiff's amended complaint as superseding his original complaint and incorporating the request for relief from his original complaint. In the future, if plaintiff chooses to file a second amended complaint, he must file a self-contained document that includes all of the material on which he intends to rely.

Having reviewed the amended complaint, I conclude that plaintiff may proceed on his claims that all of the defendants retaliated against him in violation of his right to free speech under the First Amendment and that defendants Christopher Stevens, William Pollard and Rick Raemisch violated his right to procedural due process under the Fourteenth Amendment. However, plaintiff's procedural due process claims against the remaining defendants will be dismissed, along with his claim that all of the defendants violated his rights under the Eighth Amendment.

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

ALLEGATIONS OF FACT

Plaintiff is an inmate in the Wisconsin Department of Corrections. Plaintiff was incarcerated at the Green Bay Correctional Institution until he was transferred to the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin, in August of 2010.

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

Plaintiff was approved for transfer to medium security custody at the Stanley Correctional Institution on March 16, 2010. The afternoon before his scheduled transfer, plaintiff packed his personal property with the assistance of defendant Romenesko.

That evening, plaintiff was placed on temporary lock-up pending an investigation into the introduction of contraband into the prison. Defendant Lindmeier interviewed plaintiff about the introduction and sale of illegal drugs. Lindmeier wanted plaintiff to provide information about his fellow inmate, Derek Williams. Williams has filed a lawsuit in this court 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. He 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 contends that Romenesko's conduct report was retaliation for plaintiff's refusal to provide information about Williams. Plaintiff was found guilty after a "full due process hearing" on April 17, 2010, and given 90 days of disciplinary segregation. Plaintiff appealed the hearing officer's decision, but the decision 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. At the hearing, plaintiff was not allowed to listen to the phone recordings of conversations mentioned in the conduct report or view the statements by the two alleged confidential informants. Stevens had existing knowledge of the conduct report from an interview that he had conducted with Derek Williams. Plaintiff appealed Stevens's findings, and on June 16, 2010, defendant Pollard affirmed Stevens's 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 the Wisconsin Secure Program Facility on the grounds that he had obtained and sold illegal drugs with Williams. After his transfer, plaintiff was placed in administrative segregation.

OPINION

Plaintiff contends that defendants retaliated against him for refusing to provide information about the alleged criminal activities by Derek Williams, who had filed a lawsuit against defendants. In addition, he contends that defendants violated his right to due process by placing him in segregation and transferring him on the basis of false conduct reports, inadequate hearings and inadequate reviews on appeal.

A. Retaliation

To state a claim for retaliation, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that plaintiff's protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert,

557 F.3d 541, 556 (7th Cir. 2009).

Plaintiff's allegations are sufficient to meet the second and third prong. He alleges that defendants retaliated against him when (1) Ericksen, Swiekatowski, Lindmeier and Romenesko filed false conduct reports; (2) Stevens found him guilty on the second false conduct report without giving him an opportunity to see the evidence; (3) Pollard and Raemisch affirmed the convictions despite the procedural flaws; and (4) used these convictions to support his transfer to a higher security prison. At this early stage of the litigation, plaintiff has also alleged enough facts to imply that retaliation was one reason for defendants' actions. Lindmeier stated that plaintiff would not be denied his transfer to a lower security prison because he would not provide information on Williams. Then, within in a short period of time, plaintiff received two false conduct reports and was transferred to a more secure facility.

The first prong, however, is more complicated. My research did not uncover any case decided by the Supreme Court or the Court of Appeals for the Seventh Circuit holding that an inmate has a constitutional right to refuse to respond to a correctional officer's questions about misconduct by other inmates. Plaintiff argues that this right is a logical extension of the failure to protect case law under the Eighth Amendment. Prison officials have a duty to "protect prisoners from violence at the hand of other prisoners," which they violate if they exhibit deliberate indifference to a substantial risk of harm. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citations and quotations omitted). Because being labeled a snitch increases a prisoner's risk of harm, prison officials may be held liable if they know an inmate

has been labeled a snitch and fail to take adequate precautions. Grieveson v. Anderson, 538 F.3d 763, 776 (7th Cir. 2008). Plaintiff argues that if prison officials have a duty to protect him after he is labeled a snitch, he has a right not to provide information and avoid that additional risk in the first place. One district court has endorsed this line of reasoning, Cooper v. Beard, No. CIV.A. 06-0171, 2006 WL 3208783 at *11-12 (E.D. Pa. Nov. 2, 2006), and several others have adopted this reasoning for screening purposes. David v. Hill, 401 F. Supp. 2d 749, 756-57 (S.D. Tex. 2005) (right not to be prison informant "is a logical extension of failure to protect case law; that he not be forced to participate in activities that place his life in danger"); Walzier v. McMullen, No. CIV.A. H-06-2361, 2008 WL 701371 (S.D. Tex. Mar. 13, 2008) (same).

This extension of the failure to protect case law is a stretch, at best. Prison officials are liable for failure to protect only if the prisoner "experienced, or was exposed to a serious harm" and officials knew about the risk of harm but failed to take reasonable precautions. Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005). If prison officials had required plaintiff to become an informant and then failed to take reasonable measures to protect him, perhaps plaintiff would have an Eighth Amendment claim. As it stands, plaintiff's argument assumes that prisoners have an Eighth Amendment right to refuse to do things that would increase their risk of harm, even if they are never exposed to the harm. This argument is not supported by existing case law. Therefore, I will dismiss plaintiff's claim that defendants violated his rights under the Eighth Amendment.

Nevertheless, this conclusion is not fatal to plaintiff's claim because his allegations

fit into the category of "compelled speech" under the First Amendment. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). As the Supreme Court has reiterated,

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-97 (1988) (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)). Prisoners retain their First Amendment rights, including the right not to speak. However, the prison may restrict those rights and compel speech if its actions are "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987); Newman v. Beard, 617 F.3d 775, 780-81 (3d Cir. 2010) (recognizing prisoners' First Amendment right not to speak, but holding that parole board had legitimate interest in requiring prisoners to admit guilt as condition of parole).

Although I have found no circuit court opinions addressing the question whether prisoners may refuse to provide information for internal prison investigations, several district courts have done so. Clardy v. Mullens, No. 12-cv-11153, 2012 WL 5188012 at *3-8 (E.D. Mich. Aug. 29, 2012) (collecting opinions), rep. and rec. aff'd 2012 WL 5187852. The majority of these courts have found that prisoners have no such right, but none of them address the allegations as a claim of compelled speech or discuss Turner. Some of these

courts held at screening that the plaintiff had not engaged in any protected activity because he merely choose not to speak, e.g. Salazar v. Sullivan, No. 1:09-CV-2264-MJS PC, 2011 WL 4623418 at *6 (E.D. Cal. Oct. 4, 2011), but this argument is inconsistent with the Supreme Court precedent on compelled speech. Others courts have held that prisoners cannot bring a retaliation claim for a transfer or withdrawal of prison privileges because prisoners have no "protected liberty interests" in avoiding these actions. E.g. Bradley v. Rupert, Civ. A. 5:05CV74, 2007 WL 2815733 at *6-7 (E.D. Tex. Sept. 25, 2007); Canosa v. Hawaii, Civ. 05-00791 HG-LEK, 2007 WL 128849 at *6-7 (D. Haw. Jan. 11, 2007) rep. and rec. adopted 2007 WL 473679 (D. Haw. Feb. 8, 2007). By drawing on the "liberty interest" language of procedural due process analysis, this argument obscures the fact that the retaliation impinges on the prisoner's First Amendment right not to speak, so plaintiff need not need allege any *other* protected interest. Watson v. Norris, 2:07-CV-102SWWHDY, 2007 WL 4287840 (E.D. Ark. Dec. 5, 2007) (summary judgment inappropriate on prisoner's claim he was transferred to "less desirable" housing in retaliation for refusal to be informant, because "act taken in retaliation for the exercise of a constitutionally-protected right under § 1983 is actionable even if the act, when taken for a different reason, would not have been actionable."). This analysis also conflates two distinct questions: whether a prisoner has a First Amendment right not to speak and whether compelling speech on a particular occasion was related reasonably to legitimate penological interests.

I conclude that prisoners retain a First Amendment right to refuse to speak with

prison officials but that prison officials may restrict that right and compel a prisoner to speak if doing so is "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. Under Turner, four factors are relevant to that determination: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the impact that accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Turner, 482 U.S. at 89. It is not clear that all of these factors apply to plaintiff's situation, especially the second factor. Nevertheless, in this screening order, it is unnecessary to sort out the precise factors to consider. The court of appeals has stated that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest, because an assessment under Turner requires a district court to evaluate the prison officials' particular reasons for the restriction. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding district court erred by concluding without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same). Therefore, plaintiff will be allowed to proceed on his First Amendment retaliation claim.

B. Due Process

Plaintiff contends also that defendants violated his due process rights by punishing him with disciplinary segregation and a transfer to the Wisconsin Secure Program Facility

in reliance on false conduct reports, a flawed disciplinary hearing and inadequate appellate review. According to plaintiff, defendants Ericksen, Swiekatowski, Lindmeier and Romenesko filed the allegedly false reports; defendant Stevens convicted plaintiff without allowing him to hear the recordings or see the informants' statements; and defendants Pollard and Raemisch affirmed the convictions.

The Fourteenth Amendment prohibits states from depriving "any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV. To state a claim for procedural due process, plaintiff must allege inadequate procedures and an interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In the absence of a protected liberty or property interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001).

Accordingly, the first question in any due process analysis is whether a protected liberty or property interest has been infringed. In the prison context, liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 483-84 (1995). In Wilkinson v. Austin, 545 U.S. 209, 223 (2005), the Supreme Court held that the conditions in an Ohio supermaximum facility were sufficiently "atypical and significant" to rise to the level of deprivation of liberty under Sandin. Similarly, the Court of Appeals for the Seventh

Circuit has held that transfers from a general population facility to the Wisconsin Secure Program Facility, particularly for an indefinite period, might meet the Sandin standard. Lagerstrom v. Kingston, 463 F.3d 621, 623 (7th Cir. 2006) (describing conditions at Wisconsin Secure Program Facility as "draconian"). Additionally, the court of appeals has emphasized that the courts must take into consideration *all* of the circumstances of a prisoner's segregation, including its duration and the actual conditions the prisoner experienced. Marion v. Columbia Correction Institution, 559 F.3d 693, 698-99 (7th Cir. 2009).

Plaintiff was sentenced to 360 days in disciplinary segregation, and the sentence was affirmed on appeal. In March, plaintiff was transferred from the general population to disciplinary segregation at the Green Bay Correctional Institution. His segregation status involved isolation, 24-hour constant illumination and limited recreation, if any. In general, a prisoner does not have a protected liberty interest in a transfer from the general population to disciplinary segregation, placement in disciplinary segregation for a significant period of time might implicate a liberty interest. Marion, 559 F.3d 693 (disciplinary segregation term longer than 240 days requires inquiry into conditions and should not be dismissed at pleading stage).

As a result of the charges against him, defendant was transferred to the Wisconsin Secure Program Facility in August. Plaintiff alleges few details about his conditions at the Wisconsin Secure Program Facility, but it is reasonable to infer that this "drastic change in conditions of confinement" from the general population to this facility represents an

"atypical and significant" hardship. Lagerstrom, 463 F.3d at 624-25. At this early stage of the litigation, I will assume that plaintiff's allegations are sufficient to state a protected liberty interest in a sentence to a year of disciplinary segregation in the Green Bay Correctional Institution and in the decision to transfer him to Wisconsin Secure Program Facility.

The next question is whether plaintiff received adequate process. No bright line test exists for determining what constitutes adequate process in the context of a transfer to a secure facility such as the one at Boscobel. Ghashiyah v. Frank, 2007 WL 5497186, *1 (W.D. Wis. Aug. 14, 2007). The Supreme Court has held that at a minimum, prisoners "must receive notice of the factual basis leading to consideration for . . . placement [in the supermaximum facility] and a fair opportunity for rebuttal." Wilkinson, 545 U.S. at 225-26. The Court stated that those two requirements "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations . . . requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason." The Court of Appeals for the Seventh Circuit has stated that "due process requires the plaintiff receive advance written notice of the charges, the chance to present testimony and documentary evidence to an impartial decisionmaker, and a written explanation, supported by at least 'some evidence' in the record, for any disciplinary action taken." Lagerstrom, 463 F.3d at 624-25. See also Westefer v. Snyder, 422 F.3d 570, 588 (7th Cir. 2005) (for transfer to supermax, due

process satisfied by "sufficient notice of the reasons for [prisoner's] transfer to afford meaningful opportunity to challenge his placement").

Plaintiff admits that he received notice and a chance to be heard, but argues that the charges were fabricated, he was not given a chance to see the evidence against him and the hearing officer and appellate decision makers were not impartial. In Lagerstrom, 463 F. 3d at 622-23, the court of appeals upheld the dismissal of a prisoner's due process claim at screening, although he alleged that the reporting officer had falsified the conduct report and the hearing officer had not allowed him to review statements from anonymous informants. The court found that the false charges and fabricated evidence did not undermine the *quality of the procedures* offered. Id. at 627-25 (citing McPherson v. McBride, 188 F.3d 784, 787 (7th Cir. 1999) ("[W]e have long held that as long as procedural protections are constitutionally adequate, we will not overturn a disciplinary decision solely because evidence indicates the claim was fraudulent."). Because the false charges are the only basis for plaintiff's due process claim against by Ericksen, Swiekatowski, Lindmeier and Romenesko, this claim will be dismissed as to those defendants.

Plaintiff also alleges that Stevens did not permit him to review the alleged telephone recordings or the statements of the alleged informants and Stevens, Pollard and Raemisch were not impartial decision makers. In Lagerstrom, the prisoner raised similar allegations that he was not permitted to review statements by an anonymous informant, but this limitation was held not to violate his due process rights because disciplinary hearings may be non-adversarial, which means prisoners do not have a right to challenge the evidence

presented at the hearing. See also Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003). However, plaintiff's claim is not only that he was not permitted to see the evidence. Plaintiff alleges that Stevens, Pollard and Raemisch were biased against him because he refused to provide information about Williams and that this led to Stevens's convicting him on the basis of non-existent evidence and to Pollard's and Raemisch's turning a blind eye to the non-existent evidence and the procedural defects in the hearing. Taking into account the alleged retaliatory motive, the fabrication of evidence and the refusal to permit plaintiff to see the evidence, I conclude that plaintiff has alleged enough to imply that the decision makers were not impartial and that they deprived him of a meaningful opportunity to challenge his punishment and transfer.

ORDER

IT IS ORDERED that

1. Plaintiff Sabir Wilcher's motion to amend his complaint, dkt. #5, is GRANTED;

2. Plaintiff's motion for leave to proceed in forma pauperis is GRANTED on his claims that

a. defendants Rick Raemisch, William Pollard, Peter Ericksen, William Swiekatowski, Robin Lindmeier, Christopher Stevens and C.O. Romenesko violated plaintiff's right to freedom of speech under the First Amendment by retaliating against him for refusing to provide information about allegedly illegal activities of Derek Williams; and

b. defendants Raemisch, Pollard and Stevens violated plaintiff's procedural

due process rights under the Fourteenth Amendment.

3. Plaintiff's claim that defendants Raemisch, Pollard, Ericksen, Swiekatowski, Lindmeier, Stevens and Romenesko violated plaintiff's rights under the Eighth Amendment is DISMISSED for failure to state a claim upon which relief may be granted.

4. Plaintiff's claim that defendants Ericksen, Swiekatowski, Lindmeier and Romenesko violated his procedural due process rights under the Fourteenth Amendment is DISMISSED for failure to state a claim upon which relief may be granted.

5. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

6. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the director of plaintiff's institution informing the director of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 26th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge