IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAMONT WALKER,

Plaintiff,

v.

CHAD KELLER, JANEL NICKELS,
D. MORGAN, SARAH MASON,
TIMOTHY HAINES, BRIAN KOOL,
CHRISTINE BROADBENT,
CHRISTINE BEERKIRCHER and
MELONEE HARPER,

Defendants.

OPINION and ORDER

13-cv-342-bbc

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Plaintiff Lamont Walker, a prisoner at the Wisconsin Secure Program Facility, filed this lawsuit raising claims against prison officials at both the Wisconsin Secure Program Facility and the Columbia Correctional Institution. On July 31, 2013, I issued an order explaining that plaintiff's complaint violated Fed. R. Civ. P. 20 by asserting unrelated claims against different defendants in the same lawsuit. I told plaintiff that his allegations related to events that should be contained in two separate lawsuits:

> Lawsuit #1: Plaintiff was issued a false conduct report while at the Columbia Correctional Institution and then given a hearing that was held without proper due process.
>
> Lawsuit #2: After being transferred to the Wisconsin Secure Program Facility, officials fabricated information about plaintiff, leading to his being classified as "gang affiliated." Plaintiff has not been moved through the correct

> programming levels even though he has completed the programming necessary to do so.

I gave plaintiff a chance to choose which of the two lawsuits he wished to pursue under this case number and whether he would like to pursue the other case under a separate case number with another filing fee. (The court inadvertently issued this order twice, once on July 31 and once on August 13, which understandably seems to have led to some confusion on the part of plaintiff.) In any case, plaintiff has now responded, stating that he would like to pursue Lawsuit #1 under this case number, and that he would like to withdraw the second set of allegations, knowing that he could bring it at a later date if he chooses. This means that the above-captioned defendants who are not implicated in Lawsuit #1—defendants Mason, Haines, Kool, Broadbent, Beerkircher and Harper—will be dismissed from the case.

The next step is to screen plaintiff's complaint concerning the allegations in Lawsuit #1 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. §§ 1915 & 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).

Having reviewed the complaint, I conclude that plaintiff may proceed on retaliation claims against defendant Chad Keller for giving plaintiff a false conduct report and providing false testimony against him. Also, I will allow him to proceed on due process claims against Keller for providing false testimony against him and against defendant D. Morgan for allowing Keller to "deliberate" with the disciplinary committee after the hearing. I will deny

plaintiff leave to proceed on his retaliation and due process claims against Nickels for denying plaintiff witnesses at his hearing and his due process claim against Morgan for allowing Keller to testify.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Lamont Walker is incarcerated at the Wisconsin Secure Program Facility. The events at issue in this case concern events that occurred while plaintiff was incarcerated at the Columbia Correctional Institution.

On October 8, 2010, plaintiff was removed from his segregation cell for an evaluation for possible transfer to the Wisconsin Secure Program Facility. Plaintiff was interviewed by psychologist Jamie Voss. When the interview was over, plaintiff saw defendant Captain Chad Keller approach Voss and have a conversation with her. Plaintiff believes that they were having a conversation about him because they both looked over at him while they were talking. Keller then entered the interview room and told plaintiff that he was conducting an investigation about an explicit letter that plaintiff had allegedly written to the security director, defendant Janel Nickels. Plaintiff asked Keller whether plaintiff's name was on the letter. Keller refused to answer. As Keller was leaving, plaintiff told him that he and Nickels "are defendants on my lawsuit"—the "lawsuit" being a 2010 lawsuit he filed in which Keller and Nickels are defendants. Keller smirked as he left the room.

On October 12, 2010, plaintiff was given a conduct report charging him with (1) sexual conduct; (2) threats; and (3) disrespect. The conduct report contained allegations

that plaintiff "authorized" a letter to Nickels making sexual demands, threatening to grope and kill her. The letter was addressed to another prisoner, Brandon Wingo, who lived across the hall from plaintiff. Wingo's name was misspelled in the letter. Plaintiff does not know Wingo.

Plaintiff's allegations on this point are somewhat difficult to understand, but I understand him to be alleging that defendant Keller stated in the conduct report that he surmised the letter was written by plaintiff because the handwriting matches plaintiff's. However, plaintiff states that the handwriting does not match his.

A week before plaintiff's due process hearing on the conduct report, plaintiff submitted a witness form asking for defendant Nickels and Officer Pitzon (who plaintiff states wrote the conduct report) to appear at the hearing, along with questions for them. They were not approved to appear at the hearing, although they did "partially" answer the questions plaintiff had sent. I understand plaintiff to be alleging that defendant Nickels denied the witness requests.

Plaintiff had his due process hearing on November 1, 2010. Mary Leiser accompanied plaintiff as an advocate. While defendant Captain D. Morgan was holding the hearing, defendant Keller walked into the room. Plaintiff asked why Keller was there, and Morgan answered, "To give his testimony." Plaintiff told Morgan that Keller was not requested or approved to be a witness, so he should be escorted out of the room. Morgan did not have Keller removed.

Keller presented the following testimony: "Yes we did the handwriting analysis. Items were taken for comparison. I believe Lamont Walker wrote the letter due to similarity of the

letters and due to the training I have received in handwriting analysis certain characters were distinctive on both samples." However, Keller is not a certified handwriting analyst with credentials to support his testimony.

Plaintiff testified, stating that he did not write the threatening letter but admitted to writing the various samples that were taken out of his cell that were used to compare his handwriting. After plaintiff testified, he was escorted to a holding cell, where he could see the hearing committee deliberate. Defendant Keller was still present in the room and "deliberated" with the committee.

Plaintiff was found guilty of the charges. He was sentenced to 180 days of disciplinary segregation and "disposal" of contraband." The only "contraband" that was disposed of was exculpatory evidence.

OPINION

A. Retaliation

Plaintiff alleges (1) that defendant Keller gave him a false conduct report and provided false testimony against him in retaliation for his 2010 lawsuit against him (I note that it is unclear from plaintiff's allegations whether Keller actually physically "filed" the conduct report or was merely instrumental in investigating it and providing false conclusions about that investigation. For purposes of this screening order the distinction is irrelevant.); and (2) that defendant Nickels retaliated against him by denying him witnesses at the disciplinary hearing.

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 the 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 has constitutional rights under the First Amendment to free speech and to petition the government for redress of grievances that include the right to file lawsuits about misconduct by prison officials. Powers v. Snyder, 484 F.3d 929, 932 (7th Cir. 2007); Pearson, 471 F.3d at 740-41. Further, the Court of Appeals for the Seventh Circuit has stated that allegations of false disciplinary charges are sufficient to show at the screening stage that the defendants' actions would deter a person of ordinary firmness from exercising his constitutional rights. Bridges, 557 F.3d at 552. It is likely that denying plaintiff witnesses to present evidence at that hearing would also deter him from filing a lawsuit in the future.

Plaintiff's allegations that Keller smirked when informed about the previous lawsuit against him, that the handwriting samples did not match and that plaintiff did not even know the inmate whose name was on the letter seem to indicate that Keller knew that plaintiff did not write the letter but pursued the conduct report anyway, perhaps for the purpose of retaliating against him for plaintiff's previous lawsuit against him. Therefore I will allow plaintiff to proceed on a retaliation claim against Keller.

As opposed to his allegations regarding defendant Keller, plaintiff has not alleged any facts indicating that Nickels meant to retaliate against him other than the implication that she may have been aware of the 2010 lawsuit. He has shown no reason to believe that

Nickels knew that plaintiff was innocent of the disciplinary charges and there is no non-speculative connection between the previous lawsuit and the defendant's alleged retaliatory actions. In fact, it actually seems more likely that a person in Nickels's position would have had motivation to retaliate against plaintiff if he actually *had* written the offensive letter. Because plaintiff's claim against Nickels relies almost exclusively on speculation about her motivation for denying him an opportunity to call witnesses, I find that he has not stated a retaliation claim against her. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Atkins v. City of Chicago, 631 F.3d 823, 830-32 (7th Cir. 2011) (to avoid dismissal, a plaintiff "must plead some facts that suggest a right to relief that is beyond the speculative level") (internal quotations omitted).

As plaintiff moves forward on his retaliation claims against defendant Keller, he should know that he will not be able to stand on his allegations at later stages in the case, but will have to come forward with specific facts showing that a reasonable jury could find in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56. A claim for retaliation presents a classic example of a claim that is easy to allege but hard to prove. Many plaintiffs make the mistake of believing that they have nothing left to do after filing the complaint, but that is far from accurate. A plaintiff may not prove his claim with the allegations in his complaint, Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001), or his personal beliefs, Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007). Plaintiff will have to submit evidence either at summary judgment or at trial that he was disciplined because he had exercised his constitutional rights and not for some legitimate reason. This means that he will have to prove that he was subjected to

adverse treatment because of his previous lawsuit, not because prison staff believed that he violated prison rules.

B. Due Process

I understand plaintiff to be alleging that the discipline he received violated the due process clause for the following reasons: (1) defendant Keller fabricated testimony implicating plaintiff as person who wrote the threatening letter to defendant Nickels; (2) Nickels would not allow plaintiff's proposed witnesses to testify at his hearing; (3) Morgan allowed Keller to testify at the hearing; and (4) Morgan allowed Keller to "deliberate" with the disciplinary committee after the hearing.

The first question is whether plaintiff was deprived of his liberty within the meaning of the due process clause. In the prison context, a prisoner is not entitled to process under the Constitution unless he is subjected to an "atypical and significant hardship." Sandin v. Conner, 515 U.S. 472, 484 (1995). I will assume for the purpose of this screening order that a sentence of 180 days in disciplinary segregation is sufficient to meet that standard. E.g., Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (six months in segregation may be long enough); Truckey v. Nickel, case no. 10-cv-414-bbc (W.D. Wis. Aug. 13, 2010) (allowing due process claim to go forward where prisoner was given 180 days of segregation). At summary judgment or trial, plaintiff will have to show that his conditions in segregation are "harsher than the conditions found in the most restrictive prison in Wisconsin." Marion v. Columbia Correctional Institution, 559 F.3d 693, 698 (7th Cir. 2009).

The next question is whether plaintiff received the process he was due. In Wilkinson

v. Austin, 545 U.S. 209, 226 (2005), the Supreme Court concluded that a prisoner being transferred to a "supermax" prison received sufficient due process if the prisoner received notice of the reasons for the transfer and an opportunity to rebut those reasons. Because one of the conditions of the facility at issue in Wilkinson was placement in segregation and plaintiff's punishment in this case was placement in segregation, there is no reason to believe that plaintiff would be entitled to more process than was provided in that case. Because Wilkinson makes it clear that plaintiff did not have a right to call witnesses, he cannot proceed the due process claim against Nickels for denying his witnesses. Id. at 228. ("Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated.").

Insofar as plaintiff seems to be saying that his due process rights were violated by there mere fact that Keller was allowed to testify, neither Wilkinson nor any other authority I can locate indicates that a prisoner has a due process right to avoid adverse witnesses from presenting evidence, so I will deny him leave to proceed on this claim.

Plaintiff raises another due process claim regarding the substance of Keller's testimony; he states that Keller provided false testimony at the hearing. Usually, so long as an inmate's disciplinary hearing itself provides procedural due process, an allegation that a prison guard offered false evidence or false reports in order to implicate an 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). However, because I conclude below that plaintiff has stated a claim against defendant Morgan for "deliberating" with Keller following

the hearing, I will also allow him to proceed on a due process claim against Keller for providing false testimony.

Turning to plaintiff's claim that Morgan violated his due process rights by conferring with defendant Keller after the hearing, it is difficult to definitively characterize the nature of the due process right harmed by this action without more information detailing precisely what occurred after the hearing. However, it seems likely that either plaintiff's right to rebut the reasons for his punishment or his right to an unbiased decision maker was violated by allowing an adverse witness to privately "deliberate" with the disciplinary committee after the hearing. E.g., id. at 266 ("fair opportunity for rebuttal" is "among the most important procedural mechanism[]"); Piggie v. Cotton, 342 F.3d 660, 666 (7th Cir. 2003) (officials who are "directly or substantially involved in the factual events underlying the disciplinary charges, or the investigation thereof," may not preside over a prison disciplinary hearing). Accordingly, I will allow plaintiff to proceed on a due process claim against Morgan for "deliberating" with Keller.

ORDER

1. Plaintiff Lamont Walker is GRANTED leave to proceed on the following claims:

    a. Defendant Keller gave him a false conduct report and provided false testimony against him in retaliation for his 2010 lawsuit against him.

    b. Plaintiff's due process rights were violated by Keller fabricating testimony at the disciplinary hearing and by defendant D. Morgan by allowing Keller to "deliberate" with the disciplinary committee after the hearing.

2. Plaintiff is DENIED leave to proceed on his retaliation and due process claims against defendant Janel Nickels for denying plaintiff witnesses at his hearing and his due process claim against Morgan for allowing Keller to testify.

3. Defendants Nickels, Sarah Mason, Timothy Haines, Brian Kool, Christine Broadbent, Christine Beerkircher and Melonee Harper are DISMISSED from this case.

4. 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.

5. 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 their 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.

6. 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.

7. 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 warden of plaintiff's institution informing the warden 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 9th day of October, 2013.

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