IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN KUSLITS,

OPINION and ORDER

Plaintiff,

15-cv-413-bbc

v.

SGT. KLOTH, UNIT MANAGER STOUDT
and WARDEN REED RICHARDSON,

Defendants.

- -

Pro se prisoner John Kuslits has filed a complaint under 42 U.S.C. § 1983, in which he alleges that defendants Sgt. Kloth, Unit Manager Stoudt and Warden Reed Richardson violated his federal and state constitutional rights to free speech and due process while acting in their individual and official capacities. Plaintiff has paid his filing fee in full. 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. 1915(e)(2)(B). 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 his First Amendment claims against defendants Kloth, Stoudt and Richardson. The remainder of his federal claims and all of his state constitutional claims will be dismissed.

The following facts are drawn from the allegations in plaintiff's complaint and the documents he attached to it.

ALLEGATIONS OF FACT

Plaintiff John Kuslits is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin. He works as a dining aid on unit 1A. At all times relevant to the complaint, defendant Sgt. Kloth was a correctional officer at the institution, defendant Stoudt was the unit 1 housing manager and defendant Reed Richardson was the warden.

On December 3, 2014, plaintiff was taking a dinner break from work with five to seven other inmate workers in the unit dining room when defendant Kloth entered and started yelling at an inmate about using the microwave to heat up his dinner tray. Plaintiff stated that "[W]e are allowed to use the microwaves. We are entitled to hot food, and no one has a problem with it but you." Dkt. #1 at 3. One of the other inmates then stated "[Y]ou need to go. You don't belong here anyways." Id. Defendant Kloth issued plaintiff a conduct report for "inadequate work or study performance" and disruptive conduct on the ground that he "loudly/sarcastically" told her that microwaves were open to workers and "[Y]ou don't belong here, you need to go!" Dkt. #1, exh. #2.

On December 8, 2014, plaintiff appeared at a disciplinary hearing before defendant Stoudt, who found him guilty of both offenses and issued him a reprimand. Defendant Stoudt refused to contact any of plaintiff's witnesses and did not allow him to call witnesses or present their affidavits at the hearing. Plaintiff appealed defendant Stoudt's decision, which defendant Richardson affirmed as well-reasoned with no procedural errors.

OPINION

Plaintiff alleges that defendants Kloth, Stoudt and Richardson violated his right to free speech under the First Amendment; defendants Stoudt and Richardson violated his right to a fair and impartial disciplinary hearing under the due process clause; and all three defendants have a policy of retaliating against inmates for speaking freely. Plaintiff states that he is raising similar free speech and due process claims under article I, sections 1 and 3 of the Wisconsin Constitution. I will address each of these claims separately.

In the conclusion section of his complaint, plaintiff states that "Kloth harasses me when ever [sic] she is on the unit. That Stoudt and Richardson both know that Kloth is a security risk to inmates and staff." It is unclear whether plaintiff made these allegations in support of his free speech or due process claims or whether he intended to raise a separate claim. However, because plaintiff has not explained how Kloth harassed him or why he believes Kloth poses a risk to prisoners, he has failed to state a separate claim upon which relief may be granted.

A. State Constitutional Claims

Plaintiff states that he is raising claims related to freedom of speech and due process under article I, sections 1 and 3 of the Wisconsin Constitution. However, these claims must be dismissed because I cannot grant the relief that plaintiff seeks. The state constitution does not authorize suits for money damages except in the context of a takings claim. W.H. Pugh Coal Co. v. State, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787, 792-93 (1990) (holding that plaintiff could sue state for money damages arising from unconstitutional taking of property because article I, section 13 of the Wisconsin Constitution requires that state provide "just compensation" when property is taken); Jackson v. Gerl, 2008 WL 753919, *6 (W.D. Wis. 2008) ("Other than one very limited exception inapplicable to this case, I am not aware of any state law provision that allows an individual to sue state officials for money damages arising from a violation of the Wisconsin Constitution."). Plaintiff also cannot obtain injunctive relief under the state constitution because sovereign immunity principles prohibit federal courts from enjoining state officials under state law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). This limitation applies to declaratory relief as well. Benning v. Board of Regents of Regency Universities, 928 F.2d 775, 778 (7th Cir. 1991). Accordingly, plaintiff cannot obtain a remedy in this court under the Wisconsin Constitution.

B. First Amendment

Plaintiff alleges that defendants disciplined him because he told defendant Kloth that inmate workers were allowed to use the microwave to warm up their dinner trays and that

she did not belong in the dining room and needed to leave. Specifically, plaintiff contends that (1) Kloth issued a conduct report against him for making statements to her in a loud and sarcastic manner; (2) Stoudt found him guilty and reprimanded him; and (3) Richardson affirmed Stoudt's decision and found it well-reasoned.

After Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009), a prisoner no longer has to show that his speech is a matter of public concern in order to be protected by the First Amendment. Id. ("[W]e conclude that a prisoner's speech can be protected even when it does not involve a matter of public concern."). Speech is protected if it survives the test set forth in Turner v. Safley, 482 U.S. 78 (1987), which is whether the restriction on the speech is reasonably related to a legitimate penological interest. In determining whether a reasonable relationship exists, the United States Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89. See also Watkins v. Kasper, 599 F.3d 791, 797 (7th Cir. 2010) (although prisoner has general First Amendment right to criticize prison policies, he must do so in "manner consistent with his status as a prisoner"). Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship

between a restriction and a legitimate penological interest, e.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004), unless it is clear from the complaint and any attachments that the restriction is justified. E.g., Munson v. Gaetz, 673 F.3d 630, 635 (7th Cir. 2012) (attachments to complaint provided prison's penological interest).

1. Defendant Kloth

In this case, defendant Kloth issued plaintiff a conduct report for loudly and sarcastically telling her that inmate workers have the right to use the microwave and that she should leave the dining room. Dkt. #1, exh. #2. Although plaintiff admits stating that "[W]e are allowed to use the microwaves" and "[N]o one has a problem with it but you," he denies talking loudly or sarcastically or telling her to leave. He also suggests that defendant Kloth lied about his statements and demeanor. In light of the disputed facts, I cannot resolve at this early stage whether any aspect of plaintiff's speech was inconsistent with Kloth's interest in discipline and ensuring that the inmates were completing their assigned work in an efficient manner. Therefore, plaintiff may proceed on his First Amendment retaliation claim against defendant Kloth. However, I give plaintiff a few words of caution.

Plaintiff should be aware that courts "must accord substantial deference to the professional judgment of prison administrators," Overton v. Bazzetta, 539 U.S. 126, 132 (2003), particularly on matters of security. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding regulation that prohibited prisoners from receiving publications

"detrimental to the security, good order, or discipline of the institution"); Singer v. Raemisch, 593 F.3d 529 (7th Cir. 2010) (deferring to prison staff's assessment that role playing games were detrimental to security); Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). Thus, if defendants Kloth and Stoudt come forward with "a plausible explanation" for their actions, Singer, 593 F.3d at 536, plaintiff may be required to come forward with evidence showing that it would be unreasonable to believe that the speech poses a threat to security or other legitimate penological interest. Beard v. Banks, 548 U.S. 521 (2006) (concluding that prisoner failed to meet burden on summary judgment, because he failed to "offer any fact-based or expert-based refutation" of defendants' opinion).

On the other hand, defendants should be aware that deference does not imply abdication. Miller El v. Cockrell, 537 U.S. 322, 340 (2003). Even under the deferential Turner standard, courts have a duty to insure that a restriction on the constitutional rights of prisoners is not an exaggerated response to legitimate concerns. As the Supreme Court held recently in Beard, 548 U.S. at 535, "Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."

2. Defendants Stoudt and Richardson

Plaintiff's claims against defendants Stoudt and Richardson are even less clear. As discussed, plaintiff's allegations suggest that defendant Kloth may have lied on her conduct report about the egregiousness of plaintiff's statements and demeanor. If defendants Stoudt

and Richardson approved the conduct report simply because they believed Kloth's version of the events over plaintiff's version, they could not be held liable under § 1983. Plaintiff must show that each defendant acted with an unconstitutional motive. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009); Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007). Similarly, Richardson could not be held liable if he failed to intervene because he had delegated the decision to other staff members (such as Stoudt) and declined to conduct his own investigation. Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Public officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job."). However, liberally construing plaintiff's allegations in his favor, I may infer at this preliminary stage that both defendants were aware of plaintiff's actual speech and that they refused to overturn the conduct report in order to suppress that speech. Accordingly, I will allow plaintiff to proceed against defendants Stoudt and Richardson on this claim.

C. Due Process

Plaintiff alleges that he was deprived of due process at his disciplinary hearing because defendant Stoudt was not impartial and refused to obtain statements from witnesses to the incident. To state a 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. Because a reprimand is not an atypical and significant hardship, plaintiff cannot state a due process claim against any of the defendants.

ORDER

IT IS ORDERED that

1. Plaintiff John Kuslits is GRANTED leave to proceed with respect to his claims that defendants Sgt. Kloth, Unit Manager Stoudt and Warden Reed Richardson violated his rights under the First Amendment by disciplining him for speaking up about the right of inmate workers to use of the microwave during their dinner break.

2. Plaintiff is DENIED leave to proceed on all other claims for his failure to state a claim upon which relief may be granted.

3. Pursuant to 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 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 for the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing

the defendants, he should serve the lawyer directly rather than the 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 the defendants or to defendants' attorney.

5. 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.

6. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered this 20th day of August, 2015.

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