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

WILLIE DAVIS,

Plaintiff,

v.

SGT. JAKUSZ,
TIM ZIEGLER, and
MICHAEL MEISNER,

Defendants.

OPINION AND ORDER

18-cv-77-wmc

Pro se plaintiff Willie Davis filed this lawsuit under 42 U.S.C. § 1983, claiming that defendants violated his constitutional rights by treating his correction tape as contraband and punishing him for having it in his cell. Because Davis is proceeding *in forma pauperis* and currently incarcerated at New Lisbon Correctional Institution, his complaint must be screened under 28 U.S.C. §§ 1915(e)(2), 1915A. For the following reasons, the court will allow him to proceed, but only on First Amendment retaliation claims against defendants Jakusz and Ziegler.

ALLEGATIONS OF FACT[1]

The events comprising Davis's claims in this lawsuit took place when he was incarcerated at Columbia Correctional Institution ("Columbia"), and he would like to proceed against three of its employees: Sergeant Jakusz, Unit Manager Tim Ziegler, and Warden Michael Meisner.

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court assumes the following facts based on the allegations in plaintiff's complaint, unless otherwise noted.

Since his 2010 arrival at Columbia, Davis alleges that he possessed two correction tapes, which he used for his typewritten legal work. On March 20, 2012, however, Correctional Officer Janda (not a defendant) searched Davis's cell. Later, Davis discovered that one of his correction tapes was missing.

On March 21, Davis asked Officer Janda about the missing tape, and she told Davis that Sergeant Jakusz ordered her to take the tape during the cell search. Davis then asked Jakusz to return the tape because it was a permissible property item, but he refused. However, Jakusz did not issue Davis a conduct report for possessing contraband, nor did he fill out a contraband tag slip. After Jakusz had completed his shift on the 21st, Davis next complained to Unit Manager Ziegler that Jakusz had stolen his correction tape, explaining that (1) he was allowed to possess correction tape while incarcerated at Red Granite Correctional Institution, and (2) correction tape was available for sale from Columbia's canteen. Ziegler directed Davis to fill out an Interview/Request form to remind him to speak to Jakusz about the tape, which Davis did that same day and gave it back to Ziegler, who also assured Davis that he would speak with Jakusz the next day.

Instead of returning the tape, however, Davis alleges that Ziegler retaliated against him, directing Jakusz to issue Davis a conduct report. And indeed, on March 22, Jakusz then issued Conduct Report #1957171 to Davis for violating Wis. Admin. § DOC 303.47, possession of contraband. Moreover, a correctional officer confiscated Davis's one remaining correction tape.

On March 25, Davis then complained to Warden Meisner about the incident, requesting that Ziegler not serve as the hearing officer on the conduct report, since he was

substantially involved in the underlying incident. On March 27, 2012, Meisner responded that Ziegler would not preside over the conduct report hearing if he was substantially involved, copying Ziegler. Nonetheless, and over Davis's objection, Ziegler presided over Davis's hearing for Conduct Report #1951717 on March 29. At the conclusion of the hearing, Ziegler further found Davis guilty and punished him to five days of room/cell confinement, destruction of the subject correction tape, and loss of electronics.

On March 29, Davis appealed Ziegler's decision, alleging that he had substantial involvement in the incident. On May 15, Davis was advised that Ziegler's findings were reversed and a new hearing was ordered with a different hearing officer. Davis sat for a new hearing on October 16, 2012, and was found *not* guilty. However, his correction tape was still not returned to him, nor was he compensated for that loss.

OPINION

The court understands plaintiff to be pursuing First Amendment retaliation and Fourteenth Amendment due process claims. As an initial matter, however, the court will dismiss Meisner as a defendant because plaintiff has not alleged any facts suggesting he had reason to know that: Sergeant Jakusz had ordered Officer Janda's initial confiscation; Unit Manager Ziegler covered for Jakusz; Ziegler actually presided over the initial conduct report hearing; or the other aspects of the conduct report proceedings, except perhaps possibly the reversal of the initial ruling against plaintiff. Since "individual liability under § 1983 requires personal involvement in the alleged constitutional violation," *Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010), Meisner will be dismissed.

To the extent that plaintiff has named Warden Meisner due to his supervisory position, he still cannot proceed against him. A supervisory defendant cannot be held liable under § 1983 for a subordinate's conduct simply because of his or her position as a supervisor. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001). To maintain a claim against a supervisory defendant, plaintiff must allege facts showing that the supervisor had sufficient *personal* responsibility in the allegedly unconstitutional conduct. Said another way, the facts must support a finding that the supervisor "directed the conduct causing the constitutional violation, or . . . it occurred with [his] knowledge or consent." *Sanville v. McCaughtry*, 266 F.3d 724, 739-40 (7th Cir. 2001) (internal citations omitted). Here, plaintiff neither alleges that Meisner was aware of defendant Jakusz's or Ziegler's alleged misconduct, nor had adopted unconstitutional policy or procedures condoning it. Thus, he must be dismissed from this lawsuit. This then leaves plaintiff's claims against the other two defendants, which the court will address in turn.

I. First Amendment Retaliation

However unlikely, plaintiff has pled sufficient facts to proceed on First Amendment retaliation claims against Jakusz and Ziegler. Specifically, to state a claim for retaliation, a plaintiff must allege that: (1) he engaged in activity protected by the Constitution; (2) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity; and (3) the treatment was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future. *Gomez*

v. Randle, 680 F.3d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009).

The first prong is fulfilled. Although plaintiff's complaint to Ziegler is not the type of written grievance that the court accepts as protected as a matter of law, *see Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1005 (7th Cir. 2005), it appears that plaintiff was not violating any sort of prison policy when he raised his concerns with Ziegler. Indeed, Ziegler allegedly told plaintiff to memorialize his complaint about Jakusz in a written request. At this stage, therefore, the court will accept plaintiff's complaint to Ziegler as constitutionally protected activity. *Watkins v. Kasper*, 59 9F.3d 791, 794-95 (7th Cir. 2010) (prisoners' speech is protected by the First Amendment so long as it is expressed "in a manner consistent with legitimate penological interests").

The same is true of the second prong. After complaining about the confiscation of some of his corrective tapes, plaintiff alleges that: (1) the remainder of his tape was confiscated; and (2) he was issued a conduct report, then punished with five days of cell confinement and loss of electronics. While this was not an overly harsh punishment *and* it was reversed, the court will, for purposes of screening, accept that a reasonable jury could still infer that someone in plaintiff's position may be deterred from complaining about an officer's actions given defendants Jakusz's and Ziegler's decision to issue him the conduct report and the possible adverse penalties that could have followed.

Finally, as to the third prong, plaintiff alleges that defendants Jakusz and Ziegler plotted to issue him a conduct report *immediately* after he complained to Ziegler about Jakusz's conduct. This timing supports a reasonable inference that they intended to punish

him for filing the grievance. As such, the court will permit plaintiff proceed on a First Amendment retaliation claim against Ziegler and Jakusz.

In allowing plaintiff to go forward with this claim on his pleading, plaintiff should appreciate that he will still have to *prove* his claim, rather than relying only on 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). Indeed, even when the exercise of the right and the adverse action occur close in time, this is rarely enough to prove an unlawful motive. *Sauzek v.Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000) ("The mere fact that one event preceded another does nothing to prove that the first event caused the second."). Rather, plaintiff will have to come forward with specific evidence either at summary judgment or at trial suggesting that Jakusz's and Ziegler's motivations were not supported by a legitimate (even if ultimately wrong) purpose. *Id*.

II. Due Process Deprivation of Property

Finally, plaintiff's allegations about his conduct report implicate the Due Process Clause of the Fourteenth Amendment, which prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. To prevail on a § 1983 procedural due process claim, a plaintiff must demonstrate that he: (1) has a cognizable interest; (2) has suffered a deprivation of that interest; and (3) was denied due process. *Khan v. Bland,* 630 F.3d 519, 527 (7th Cir. 2010). "A protected property interest is a 'legitimate claim of entitlement' that is 'defined by existing rules or

understandings that stem from an independent source such as state law.'" *Tenny v. Blagojevich*, 659 F.3d 578, 581 (7th Cir. 2011) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)).

Here, plaintiff's original punishment of five days of cell confinement without electronics is simply insufficient to implicate a liberty interest. Indeed, the Seventh Circuit has repeatedly emphasized 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 Corr. Inst.*, 559 F.3d 693, 697-98 (7th Cir. 2009). Accordingly, courts in this circuit have generally held that even short-term placements in *segregation* -- typically less than six months -- do not involve a liberty interest. Longer periods of segregation *do* require inquiry into the conditions to determine if they impose an "atypical, significant" hardship. *Id.* at 697 (citing *Wilkinson v. Austin*, 545 U.S. 209, 214, 224 (2005) (prisoners' liberty interests implicated when placed in segregation depriving them of virtually all sensory stimuli or human contact for an indefinite period of time). Obviously, plaintiff's much shorter stint in regular cell confinement does not support a reasonable inference that he suffered an atypical hardship.

However, that does not completely end the inquiry since plaintiff also alleges that he ultimately lost both his correction tapes and was never compensated for that loss, even after his successful appeal. Since the Constitution is not a source of property interests, a plaintiff must cite a state law or other independent source of law that creates an entitlement. *Thornton v.* Barnes, 890 F.2d 1380, 1386 (7th Cir. 1989). Unfortunately for plaintiff, while he alleges that corrective tape had been an authorized property item for

multiple years before Jakusz confiscated it, the Wisconsin Court of Appeals has held that "prison administrative rules are not enacted for the benefit of individual inmates and do not create in them any liberty or property interests." *Richards v. Cullen*, 152 Wis. 2d 710, 713 449 N.W.2d 318, 319 (Wis. Ct. App. 1989). Nevertheless, since it is not apparent that plaintiff lacks a property right in his confiscated correction tape as a matter of law, the court will not dismiss his claim for this reason alone.

Still, there is final hurdle that plaintiff must clear to proceed with a claim that his property was confiscated without the process he was due. In these circumstances, where defendants Ziegler and Jakusz allegedly ignored prison policy permitting correction tape, due process only requires that an adequate post-deprivation remedy exist. *See Zinermon v. Burch*, 494 U.S. 113, 128-30 (1990). Even though Ziegler improperly presided over the initial conduct report hearing, plaintiff was still able to successfully challenge the results of that hearing. What is lacking is any evidence that plaintiff then sought to renew his original grievance. Absent that, the fact that plaintiff's tape was eventually destroyed does not mean procedures were unavailable to him to seek relief.

Moreover, even if his grievance could not have been pursued within the DOC (and there is no evidence of that), Wisconsin affords statutory procedures to address random, unauthorized deprivations of property by government actors. *See* Wis. Stat. §§ 893.35 (action to recover personal property after wrongful taking, conversion, or wrongful detention); 893.51 (action for damages from injury to property); *see also Hamlin v. Vaudenberg*, 95 F.3d 580, 585 (7th Cir. 1996) (inmate complaint review system, certiorari review under Wisconsin law, and Wisconsin tort remedies are adequate remedies for

deprivation of good-time credits by prison officials); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 871 (7th Cir. 1983) (Wisconsin tort remedies are adequate for deprivation of property resulting from sheriff's execution of outdated writ of restitution). Because plaintiff fails to allege that the deprivation of his property resulted from an established prison procedure or that Wisconsin's post-deprivation statutory remedies were ultimately denied him, he has failed to state a viable due process claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Willie Davis is GRANTED leave to proceed on a First Amendment retaliation claim against defendants Sergeant Jakusz and Tim Ziegler, as provided above.

2. Plaintiff is DENIED leave to proceed on any other claims, and defendant Michael Meisner is DISMISSED.

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 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.

4. For the time being, plaintiff must send the defendant 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 defendant. 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 defendant or to the 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 plaintiff's obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered this 27th day of July, 2020

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge