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

MONTRELL L. ELLIS,

Plaintiff,

v.

SERGEANT SCHUNK,
HILLARY BROWN,
DARCY ZIELER,
MARIO CANZIANI, and
REED RICHARDSON, et al.,

Defendants.

OPINION AND ORDER

16-cv-390-wmc

Plaintiff Montrell Ellis filed this proposed civil action pursuant to 42 U.S.C. § 1983, in the Eastern District of Wisconsin, claiming that the defendants violated his constitutional rights when they handled his conduct report and inmate complaint. The lawsuit was subsequently transferred to this court, and his complaint is now ready for screening pursuant to 28 U.S.C. § 1915A. For the reasons set forth below, the court will permit Ellis to proceed, but only on a First Amendment claim against Sergeant Schunk.

ALLEGATIONS OF FACT[1]

Ellis was incarcerated at Stanley Correctional Institution ("SCI") during the time period relevant to his claims. Defendants, all SCI employees, are Sergeant Schunk, Unit Manager Hillary Brown, Complaint Examiner Darcy Zeiler, Deputy Warden Mario Canziani and Warden Reed Richardson.

[1] Courts must read the allegations in *pro se* complaints generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For purposes of this order, the court accepts all well-pled allegations in Ellis's complaint as true.

On February 22, 2015, Ellis received permission from Sergeant Schunk to borrow some scotch tape from a fellow inmate. Yet when Ellis received the tape, Schunk questioned the two inmates about what they passed and made Ellis return it. As Ellis walked away, he told the other inmate that he planned to write an inmate complaint about the incident. Having apparently overheard Ellis, Schunk called the inmates back to the officers' station and asked Ellis what he had said. Ellis repeated his intention to file a complaint, and Schunk responded that he would start writing Ellis conduct reports.

Ellis wrote a complaint that day, and later learned that Schunk had written him a conduct report for disruptive conduct and disobeying orders. On February 23, 2015, Ellis received the conduct report. Hillary Brown held a hearing on the conduct report, and Ellis received fifteen days of room confinement without electronics as punishment. Ellis appealed that decision to Mario Canziani, and on March 2, 2015, Canziani affirmed Brown's decision.

The next day, Ellis filed his inmate complaint against Schunk for retaliation. Darcy Zeiler reviewed the complaint and rejected it, stating that the complaint was challenging the factual basis of a conduct report. Ellis appealed Zeiler's decision to Reed Richardson, who denied it, stating that the complaint was appropriately rejected.

OPINION

Plaintiff claims that defendants violated his rights under the First, Eighth and Fourteenth Amendments. In particular, he argues that defendants retaliated against him by filing a conduct report against him; Brown and Canziani failed to investigate the

underlying facts concerning the conduct report and thus improperly punished him; and Zeiler and Richardson did not properly evaluate his inmate complaint.

I. First Amendment

Plaintiff claims that defendants retaliated against his decision to file an inmate complaint by issuing him a conduct report and affirming it, as well as by dismissing his inmate complaint. "An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). To state a claim for retaliation under the First Amendment, a plaintiff must allege that: (1) he was engaged in constitutionally protected activity; (2) the defendant's conduct was sufficiently adverse to deter a person of "ordinary firmness" from engaging in the protected activity in the future; and (3) the defendant subjected the plaintiff to adverse treatment because of the plaintiff's constitutionally protected activity. *Gomez v. Randle*, 680 F.3 d 859, 866-67 (7th Cir. 2012); *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009).

Plaintiff has a constitutionally-protected right to file grievances. *Gomez*, 680 F.3d at 866; *Powers v. Snyder*, 484 F.3d 929, 933 (7th Cir. 2007). However, only non-frivolous grievances are protected by the First Amendment. *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1005 (7th Cir. 2005); *see also Gillis v. Pollard*, 554 F. App'x 502, 506 (7th Cir. 2014) (unpubl.) (citing *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000)). Accepting plaintiff's allegations as true, a jury might infer that Schunk wrongfully made plaintiff return the scotch tape to his fellow inmate, and then punished Schunk when he threatened to file a grievance. As it does not appear on the face of his pleading that his

statements were false, the court will consider his grievance non-frivolous at this stage.

As to the second and third elements, issuance of a conduct report resulting in a punishment of fifteen days of cell confinement without electronics, is sufficiently adverse to chill the speech of an ordinary person in plaintiff's position. Given the allegations that Schunk told plaintiff he would give him a conduct report if Ellis filed a complaint against him, plaintiff has also sufficiently pled that Schunk took this action because of plaintiff's plan to file a grievance against him. Accordingly, plaintiff will be permitted to proceed on his First Amendment retaliation claim against Schunk.

In contrast, although plaintiff claims that all of the other defendants retaliated against him, he has alleged *no* facts suggesting or permitting an inference that the decisions made by Brown, Canziani, Zeiler or Richardson were motivated by plaintiff's grievance against Schunk or by plaintiff's exercise of any other constitutionally protected activity. Accordingly, he cannot proceed against those defendants. *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (defendants liable under § 1983 only if they were personally involved in depriving plaintiff of constitutional rights).

II. Eighth Amendment

Plaintiff has not alleged any facts suggesting that any of the defendants violated his Eighth Amendment rights. "The 'unnecessary and wanton infliction of pain' on a prisoner violates his rights under the Eighth Amendment." *Lewis v. Downey*, 581 F.3d 467, 475 (7th Cir. 2009) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). Thus, prison officials have a duty to provide "humane conditions of confinement" and to

ensure that "reasonable measures" are taken to guarantee inmate safety and prevent harm. *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994). To demonstrate that prison conditions violate the Eighth Amendment, a plaintiff must allege facts showing that existing conditions denied him "the minimal civilized measure of life's necessities," *id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)), or "exceeded contemporary bounds of decency of a mature, civilized society," *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994).

Moreover, to be liable for such a violation, a prison official or other defendant must have acted with "deliberate indifference" to a substantial risk of serious harm to the prisoner, which means that the defendant knew that the plaintiff faced a substantial risk of serious harm yet disregarded that risk by failing to take reasonable measures to address it. *Id.*; *Farmer*, 511 U.S. at 847. It is not enough to allege that a defendant acted negligently or that he or she should have been aware of the risk. *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004).

Here, plaintiff complains that the punishment he received constituted cruel and unusual punishment, but these facts do not suggest that he experienced any pain, or risk of pain or serious harm as a result of his fifteen-day room confinement without electronics. Nor has he suggested that the conditions during that short time frame left him without the minimal of life's necessities. Rather, he objects to the fact that he was being punished for threatening to file a grievance against Schunk. As pleaded, therefore, plaintiff's complaint states a First, but not an Eighth, Amendment claim.

III. Fourteenth Amendment (Due Process)

Finally, plaintiff claims that the defendants violated his Fourteenth Amendment right to due process. "A prisoner challenging the process he was afforded in a prison disciplinary proceeding must meet two requirements: (1) he has a liberty or property interest that the state has interfered with; and (2) the procedures he was afforded upon that deprivation were constitutionally deficient." *Scruggs v. Jordan*, 485 F.3d 934, 939 (7th Cir. 2007). A prisoner's placement in segregation may create a liberty interest "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 (7th Cir. 2009); *see also Townsend v. Cooper*, 759 F.3d 678, 687 (7th Cir. 2014); *Hardaway v. Meyerhoff*, 734 F.3d 740, 743-44 (7th Cir. 2013) (even a relatively short segregation term may "give rise to a prisoner's liberty interest" when accompanied with "exceptionally harsh conditions.")

Here, plaintiff has not alleged sufficient facts to create an inference that his punishment implicated a liberty interest. Again, his punishment was limited to fifteen days of cell confinement without electronics; he was not sent to segregation for a long period of time, or subjected to any conditions that would suggest that his punishment involved "unusually harsh" treatment. Accordingly, his due process claim fails for that reason alone.

More importantly, even if plaintiff's relatively-short loss of liberty were sufficient to support the first prong of his due process claim, he received sufficient process. A prisoner facing transfer to and confinement in segregation is only "entitled to informal, nonadversarial due process." *Westefer v. Neal,* 682 F.3d 679, 684 (7th Cir. 2012) (citing

Wilkinson v. Austin, 545 U.S. 209, 211-12 (2005); *Hewitt v. Helms,* 459 U.S. 460, 476 (1983)). "Informal due process requires only that the inmate be given an 'opportunity to present his views'" to a neutral decisionmaker; it does not require a hearing with the inmate present. *Westefer,* 682 F.3d at 685. "If the prison chooses to hold hearings, inmates do not have a constitutional right to call witnesses or to require prison officials to interview witnesses." *Id.* (citations omitted).

Here, Brown is alleged to have investigated the conduct report, held a hearing and issued her decision, which Canziani later affirmed. There are also no facts alleged suggesting or permitting an inference that either defendant was not neutral. Accordingly, plaintiff has pled his way out of a due process claim under the Fourteenth Amendment.

ORDER

IT IS ORDERED that:

(1) Plaintiff Montrell Ellis is GRANTED leave to proceed on a First Amendment retaliation claim against defendant Sergeant Schunk.

(2) Plaintiff is DENIED leave to proceed on all other claims. Defendants Hillary Brown, Darcy Zeiler, Mario Canziani and Reed Richardson are DISMISSED.

(3) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than 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 defendant or to the defendant's attorney.

(4) 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.

(5) Pursuant to an informal 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 defendant. 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 defendant.

(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 failure to prosecute.

Entered this 19th day of October, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge