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United States District Court,
W.D. Wisconsin.

Berrell FREEMAN, Plaintiff,
v.
Gerald A. BERGE, Stephen Casperson, Secretary of DOC, and John Sharpe, Defendants.

No. 04–C–302–C. | May 27, 2004.

Attorneys and Law Firms

Berrell Freeman, pro se.

Charles D. Hoornstra, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

ORDER

CRABB, J.

***1** Plaintiff Berrell Freeman is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He filed this complaint in the Circuit Court for Dane County, Wisconsin; defendants have removed it to this court pursuant to 28 U.S.C. §§ 1441 and 1446. Plaintiff has objected to the removal. Although I conclude that it was proper for defendants to remove this case to federal court because plaintiff raised federal claims, after screening the complaint, I find that none of the federal claims that plaintiff has alleged survive the screening. With only state claims left, the case will be remanded to state court.

A defendant may remove to federal court any action brought in state court over which the federal court has original jurisdiction. 28 U.S.C. § 1441(a). Plaintiff raises the following federal law claims in his complaint: (1) defendants retaliated against him by keeping him at the Secure Program Facility after he successfully challenged one of his incident reports, in violation of the First Amendment; (2) defendants are denying plaintiff's right to due process under the Fourteenth Amendment by keeping him in administrative confinement without sufficient evidence of wrongdoing; (3) defendants have transferred other inmates out of the Secure Program Facility when they successfully challenged their disciplinary infractions, in violation of the equal protection clause of the Fourteenth Amendment; (4) defendants found plaintiff guilty of misconduct in May 2003 without sufficient evidence, in violation of the due process clause; (5) defendants are keeping plaintiff at the Secure Program Facility, where the conditions are harsher and more restrictive than those at other maximum security prisons, in violation of the equal protection clause.

Plaintiff raises the following state law claims in his complaint: (1) defendant Sharpe failed to comply with Wis. Admin. Code § DOC 303.76(6)(f) in connection with plaintiff's disciplinary proceeding on conduct report # 1412234; (2) defendants are denying plaintiff a right to call witnesses at his "administrative confinement hearings;" and (3) defendants violated state law when they failed to expunge all references to the incident report that resulted in plaintiff's transfer and loss of a job.

Federal courts have original jurisdiction over cases raising questions of federal constitutional law, such as those plaintiff raises in his complaint. Therefore, this court has original jurisdiction over plaintiff's constitutional claims under 18 U.S.C. § 1331. Further, a federal district court may exercise supplemental jurisdiction over state law claims that form part of the same case or controversy as federal law claims. 28 U.S.C. § 1367(a).

Although defendants paid the full filing fee at the time of removal, because plaintiff is a prisoner and defendants are government officers, this court is required to screen the complaint, identify the claims and dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(a), (b).

***2** I conclude that each of plaintiff's federal claims must be dismissed. With respect to plaintiff's First Amendment retaliation claim, I decided in *Freeman v. Wisconsin Dep't. of Corrections,* 02–C–348–C, that plaintiff did not state a claim for retaliation because he admitted in his complaint that the allegedly unconstitutional re-labeling of his disciplinary infraction did not occur as the result of his exercise of a constitutional right. Accordingly, this claim is barred by the doctrine of issue preclusion. With respect to his due process claims, plaintiff has not identified a liberty or property interest that would trigger the protections of the due process clause. Finally, plaintiff's equal protection claims fail because there is a rational basis for any differential treatment he may have received. Because I am dismissing all of plaintiff's federal claims, I decline to exercise supplemental jurisdiction over his state law claims. These claims will be remanded to the Circuit Court for Dane County.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. *Haines v. Kerner,* 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

In his complaint, plaintiff makes the following allegations of fact.

ALLEGATIONS OF FACT

At all relevant times, plaintiff was a prisoner at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Gerald Berge was the warden and defendant John Sharpe was a hearing officer at the Facility. Defendant Stephen Casperson is alleged to be the "DAI" Administrator in the Wisconsin Department of Corrections.

On or about December 9, 1999, plaintiff was found guilty of a major disciplinary infraction and transferred to the Wisconsin Secure Program Facility, where he was placed in administrative confinement. In or around August 2001, plaintiff successfully challenged the disciplinary infraction that precipitated his transfer. Under state law, the disciplinary documents and incident reports should have been expunged from plaintiff's records and not used for any placement decisions. However, because plaintiff successfully challenged the disciplinary infractions leading to his transfer, defendants retaliated against him by creating a document titled "Disturbance Review," which is composed of an incident report related to the expunged incident report and other documents relied upon to bring the charges in the initial incident report. In plaintiff's view, the "disturbance review" is nothing more than a re-labeled disciplinary infraction that was to have been expunged from his record.

The "disturbance review" is based on hearsay, confidential informant statements, "mere allegations" and "bald assertions." Defendants have produced no evidence that plaintiff is an active gang member or affiliated with an active gang. Nevertheless, they are using this review as a reason to keep plaintiff in administrative confinement. Defendants have refused to pay plaintiff the back pay and wages that he lost as a result of the erroneous disciplinary conviction that led to his transfer.

***3** Defendants have denied plaintiff the right to call witnesses at his administrative confinement hearings. Other inmates similarly situated to plaintiff who successfully challenged the disciplinary infractions that led to their transfer to the Wisconsin Secure Program Facility were moved from the Facility and taken out of administrative confinement.

On May 5, 2003, plaintiff was found guilty of conduct report # 1412234. Defendant Sharpe was the hearing officer who found plaintiff guilty. Defendant Berge received plaintiff's appeal but did not make a decision within 60 days of the date he received plaintiff's appeal. Therefore, the hearing officer's decision was deemed affirmed. On July 16, 2003, plaintiff received the record of witness testimony form. The form contained no explanation why the testimony and evidence that plaintiff gave was not credible. Plaintiff presented evidence that he was not guilty of the violation of conduct report # 1412234 and was still found guilty.

The conditions of confinement at the Wisconsin Secure Program Facility are more harsh and restrictive than the normal prison environment. Plaintiff's treatment is inconsistent with the treatment of maximum custody inmates at Dodge, Columbia, Green Bay and Waupun Correctional Institutions.

DISCUSSION

A. *Retaliation*

Plaintiff has made a viable allegation of retaliation. He alleges that "defendants" retaliated against him for mounting a successful challenge against an incident report that served as the ground for removing him from his job and transferring him to the Wisconsin Secure Program Facility, and that defendants did this by creating a document titled "Disturbance Review," which is nothing more than the incident report re-labeled. According to plaintiff, defendants are using this disturbance review to keep him in administrative confinement at the Wisconsin Secure Program Facility and to deny him back pay and lost wages. This allegation of retaliation for exercising his right to file a grievance or lawsuit is sufficiently detailed to put the defendants on notice of the retaliation claim so that they may file an answer. *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir.2002) (indicating that plaintiff's charge that he was placed in lockdown segregation for 11 days after bringing lawsuit satisfied bare minimum facts necessary to put defendant on notice of claim so that he could file answer); *see also Walker v. Thompson,* 288 F.3d 1005, 1009 (7th Cir.2002) (stating that there is no pleading requirement to allege chronology of events from which retaliation may plausibly be inferred). Nevertheless, plaintiff cannot proceed on this claim.

The obstacle to proceeding is that plaintiff has already litigated the claim in this court. In *Freeman v. Wisconsin Dept. of Corrections,* 02–C–348–C, plaintiff alleged that the disciplinary infractions for which he was sent to the Secure Program Facility were expunged after "inmates" successfully challenged the infractions in *State ex rel. Curtis v. Litscher,* 00–CV–1604, *aff'd,* 2002 WI App 172, 256 Wis.2d 787, 650 N.W.2d 43. In *Curtis,* seven inmates challenged disciplinary decisions in which they had been

found guilty of participating in a prison riot in 1999. Both the circuit court and the court of appeals agreed with the inmates that the disciplinary hearings conducted by the prison were invalid under state regulations because the hearing examiner had been a witness to the riot. However, the court of appeals held that the Department of Corrections could hold new hearings to determine whether the inmates engaged in conduct justifying placement in administrative confinement.

***4** In 02–C–348–C, plaintiff alleged that the defendants attempted to avoid the holding of *Curtis* as it applied to him by re-labeling his infraction as a "disturbance review" so that they could keep him at the Secure Program Facility. In the screening order for 02–C–348–C, I concluded that keeping plaintiff in administrative confinement for participating in *Curtis* would state a claim for retaliation under the First Amendment. However, plaintiff later admitted that he was *not* a party to *Curtis,* so I dismissed his retaliation claim in an order dated August 21, 2002:

> Petitioner has responded in a document titled "Plaintiff's Clarification of His Retaliation Claim," informing the court that he was not a plaintiff in *Curtis*. Nevertheless, petitioner contends that he should be allowed to proceed because, regardless whether he was a party in *Curtis,* respondents retaliated against him for exercising a constitutional right. Specifically, he alleges that he had a constitutional right to challenge his disciplinary infractions administratively, and that respondents retaliated against him for doing so by renaming his disciplinary report as a "disturbance review" and keeping him in administrative confinement.
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> I agree with petitioner that his constitutional right to redress of grievances and access to courts includes the right to pursue administrative remedies that must be exhausted before he can seek relief in court. *DeWalt v. Carter,* 224 F.3d 607, 618 (7th Cir.2000). However, there are no allegations in petitioner's complaint that would permit me to infer that respondents retaliated against petitioner for exercising that right. Although in his complaint petitioner does identify as a cause of action that "[t]he defendants conspired to retaliate against plaintiff for successfully challenging the disciplinary infractions," the factual allegations in his complaint are inconsistent with this assertion.
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> Petitioner does not allege in his complaint that respondents re-labeled his disciplinary infractions as a "disturbance review" after he sought administrative review of his infractions. Rather, he alleges that respondents retaliated against him after his infractions were expunged, apparently as the result of the state court's decision in *Curtis.* If petitioner was not a plaintiff in *Curtis,* then he cannot successfully argue that respondents re-labeled his infractions in reaction to the exercise of his constitutional rights. At most, I could infer from petitioner's proposed complaint that respondents re-labeled his infractions as a result of the success of the plaintiffs in *Curtis.* If respondents' actions were the result of *Curtis,* as petitioner alleges they were, then respondents would have taken the same action regardless whether petitioner had challenged his disciplinary infractions. Therefore, even assuming that all the allegations in petitioner's complaint are true, he has not stated a claim for retaliation. Although petitioner is not required to plead all the facts that if true would prove his claim, *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir.2002), or allege a chronology of events, *Walker v. Thompson,* 288 F.3d 1005, 1009 (7th Cir.2002), if the facts he does allege would defeat his claim if proven, then he cannot survive a motion to dismiss, *see Massey v. Helman,* 259 F.3d 641, 645 (7th Cir.2001).
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> ***5** The essence of petitioner's complaint is that he believes that respondents should have transferred him out of administrative confinement as a result of *Curtis,* but they have not. Perhaps petitioner is correct, but even if he is, this does not give rise to a claim under 42 U.S.C. § 1983. Whether *Curtis* should apply to petitioner and, if so, whether *Curtis* would prohibit respondents from re-labeling his disciplinary infractions (or whether how they are labeled affects petitioner's administrative confinement) are matters of Wisconsin, not federal, law and thus cannot be the basis for a § 1983 claim. Accordingly, I will deny petitioner leave to proceed on his retaliation claim.

Plaintiff is attempting to do the same thing in this case that he did in 02–C–348–C, that is, obscure the allegations in his complaint so that it appears as if it was something that *he* did that motivated defendants to "re-label" his disciplinary infraction even though he has admitted that this happened as a result of the *Curtis* decision. Plaintiff never moved this court to reconsider its decision in 02–C–348–C and he never argued that the court had misconstrued his complaint. Accordingly, I conclude that this issue has already been decided against plaintiff. This means that he may not raise it again in another case. *Loeb Industries v. Sumitomo Corp.,* 306 F.3d 469, 496 (7th Cir.2002) (setting forth elements of issue preclusion); *Gleash v. Yuswak,* 308 F.3d 758, 760–61 (7th Cir.2002) (court may raise affirmative defense on its own if it is clear from face of complaint that defense applies).

However, this ruling does not extend to plaintiff's claim that defendants violated state law when they failed to expunge all references to the incident report that resulted in his transfer and loss of a job. Plaintiff can go forward with that claim in state court.

B. *Conduct Report # 1412234 and Administrative Confinement Hearings*

It is unclear from plaintiff's complaint what kind of claims he is raising with respect to conduct report # 1412234 and his administrative confinement hearings. If plaintiff is alleging that his Fourteenth Amendment procedural due process rights were violated because the hearing officer failed to explain on the "record of witness testimony form" why plaintiff's evidence and testimony were not credible, his claim fails. Similarly, if plaintiff is alleging a procedural due process violation because he is unable to call witnesses at what he describes as "administrative confinement hearings," his claim fails. As plaintiff is well aware from his earlier cases in this court, he has no entitlement to Fourteenth Amendment due process protections unless he has a protected liberty or property interest at stake. *Averhart v. Tutsie,* 618 F.2d 479, 480 (7th Cir.1980). 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 impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) (citations omitted). After *Sandin,* in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit increases the length of an inmate's incarceration despite his having earned an earlier release date. *Wagner v. Hanks,* 128 F.3d 1173, 1176 (7th Cir.1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, *Sandin* does not allow suit complaining about deprivation of liberty). In this case, plaintiff does not allege a connection between defendant Sharpe's failure to explain why he ruled the way he did and any increase in the length of his incarceration. He does not allege that the decision to retain him in administrative confinement extends the term of his incarceration. Therefore, the allegations are insufficient to implicate a protected liberty interest under *Sandin.* Plaintiff will not be allowed to proceed on these claims.

***6** Plaintiff does not cite any state law requiring witness testimony forms to include an explanation why his evidence and testimony was not credible. However, Wis. Admin. Code § DOC 303.76(6)(f) requires the decisionmaker to "provide the accused inmate and the inmate's advocate, if any, a written copy of the decision with reasons for the decision." To the extent that plaintiff may be alleging that defendant Sharpe failed to comply with § DOC 303.76(6)(f), the claim is one of a state law violation that must be brought in state court. Because plaintiff is not proceeding in this court on a related federal law claim, I decline to exercise supplemental jurisdiction over this claim. Instead, I will remand this portion of plaintiff's complaint to state court.

Plaintiff does not cite any state law governing "administrative confinement hearings." If there are state laws governing such hearings, and those laws entitle him to call witnesses, I decline to exercise supplement jurisdiction over this claim but instead remand it for review in state court.

C. *Unequal Treatment*

Plaintiff alleges that other inmates who successfully challenged the disciplinary infractions that led to their transfer to the Wisconsin Secure Program Facility were moved from the facility and taken out of administrative confinement. In addition, he alleges that because the conditions of confinement at the Wisconsin Secure Program Facility are more harsh and restrictive than other maximum security prisons, his treatment at the facility is inconsistent with the treatment maximum custody inmates receive at Dodge, Columbia, Green Bay and Waupun Correctional Institutions.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Plaintiff does not allege membership in a suspect class of persons receiving unequal treatment. Therefore, his equal protection claim must be evaluated under the rational basis test. Under rational basis review, classifications "must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

Plaintiff's allegations fall far short of suggesting that he is similarly situated to other inmates whose incident reports have been expunged or that there is no rational basis for treating him differently from the other inmates who were transferred out of the Wisconsin Secure Program Facility after their incident reports were expunged. By their very nature, programming and placement decisions take into account the individual histories and rehabilitative needs of each inmate. Plaintiff's history and rehabilitative needs are unique to him. It is not possible to infer from his allegations that his circumstances are similar to any other inmate's. Therefore, it is not possible to infer that defendants had no rational reason for treating him differently.

***7** With respect to plaintiff's claim that because he is subject to such harsh and restrictive confinement, his treatment at the Wisconsin Secure Program Facility is not comparable to the treatment of inmates at other institutions, I have ruled previously that prison administrators may rationally implement different behavior modification programs for different offenders at different prisons and offer different privileges to prisoners at different levels in the Wisconsin Secure Program Facility, in order to achieve the legitimate goal of safely incarcerating and rehabilitating convicted criminals. *Garrett v. Berge,* 01–C–532–C (W.D.Wis. Sept. 16, 2001). Plaintiff will not be allowed to proceed on his equal protection claims because they are legally meritless.

ORDER

IT IS ORDERED that

1. Plaintiff Berrell Freeman's motion to remand is GRANTED. Plaintiff has failed to state a claim upon which relief may be granted with respect to any of his federal law claims. These claims are DISMISSED WITH PREJUDICE. I decline to exercise supplemental jurisdiction over plaintiff's state law claims that (1) defendant Sharpe failed to comply with Wis. Admin. Code § DOC 303.76(6)(f) in connection with plaintiff's disciplinary proceeding on conduct report # 1412234; (2) defendants are denying plaintiff a right to call witnesses at his "administrative confinement hearings;" and (3) defendants violated state law when they failed to expunge all references to the incident report that resulted in plaintiff's transfer and loss of a job. These claims are REMANDED to the Circuit Court for Dane County, Wisconsin.