UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JEREMY M. BLANK,

Plaintiff,

v. **Case No. 19-CV-534**

TAMMY POESCHL,

Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Jeremy M. Blank, a prisoner currently confined at Jackson Correctional Institution who is representing himself, brings this lawsuit under 42 U.S.C. § 1983. (ECF No. 1.) Blank claims that defendant Tammy Poeschl retaliated against him in violation of the First Amendment. Poeschl moves for summary judgment. (ECF No. 44.) For the reasons stated below, Poeschl's motion for summary judgment is denied.

FACTS

At all relevant times, plaintiff Jeremy Blank was an inmate at Redgranite Correctional Institution (RCGI). (ECF No. 51, ¶ 1.) Defendant Tammy Poeschl was a correctional officer at RCGI and one of her job duties was to assist in supervising inmate attendance at the RCGI library. (*Id.*, ¶ 2.)

On August 29, 2018, Blank asked for extra law library time for legal research for the week of September 3, 2018. (*Id.*, ¶ 9.) On September 4, 2018, correctional officer Shy Medrano (not a defendant) called the library and told Poeschl that Blank would not be attending his 7:20 p.m. and 8:15 p.m. reserved library times. (ECF No. 46, ¶ 10.) The parties dispute when Medrano called Poeschl. Poeschl alleges that Medrano called at 7:15 p.m. (ECF No. 46, ¶ 10.) Blank states Medrano called Poeschl at his request at 6:38 p.m., (ECF No. 51, ¶ 10), and points to a surveillance video, stating that it demonstrates that Medrano called at 6:38 p.m. The court reviewed the video. Based off the time stamp on the video, an inmate approaches the Sergeants' desk around 18:39 (6:39 p.m.); has a discussion with the officer at the desk; and the officer picks up the phone. (ECF No. 54-2 at 39:00-41:20.) The video does not have audio and it is unclear who the inmate is and who the officer at the desk is.

It is undisputed that the reason Blank cancelled his library time is because he had been at an off-site medical appointment for most of the day and was not feeling well that evening. (ECF No. 51, ¶ 11.) However, Poeschl states that at the time Medrano called, she was not aware of those circumstances, and had she been aware of the reason Blank was cancelling his appointment, she would have excused him from missing his appointment. (ECF No. 46, ¶¶ 11-12.) Because she thought that Blank was cancelling his appointment for no reason, she ordered Blank to take "lay-in" status for the remainder of the evening on September 4. (*Id.*, ¶ 11.) When an inmate is placed on "lay-in" status, he his excused from work or program

assignments and confined to his cell until the next workday or program assignment. (*Id.*, ¶ 14.) Poeschl asserts that inmates are aware that they can face disciplinary action for failing to attend scheduled library time because it states as much on the request form. (*Id.*, ¶ 13.) She further asserts that at the time, she believed placing Blank on "lay-in" status was the appropriate disciplinary action because she was aware that other officers who have assisted with library attendance in the past have placed inmates on "lay-in" status for missing library appointments. (*Id.*, ¶ 17.)

After speaking with Poeschl, Medrano told Blank that Poeschl was putting him on "lay in" status for cancelling his library time. (ECF No. 53, ¶ 6.) Blank then got out his RCGI handbook and showed Medrano that putting him on "lay-in" status was not the appropriate response for missing a library appointment. (*Id.*) He also noted that the library appointment form contains an exception clause. (*Id.*) Medrano told Blank to take it up with the Sergeant on duty. (*Id.*)

Blank then talked to Sergeant Jane Ramsden (not a defendant). (*Id.*, ¶ 7.) Ramsden called Poeschl, and according to Blank, told Poeschl that Blank believed giving him "lay in" status was not appropriate and that he had an excuse for missing his library time because he had an off-site medical appointment earlier in the day and was not feeling well. (*Id.*; ECF No. 51, ¶ 15.) When Ramsden hung up with Poeschl, she allegedly told Blank, "Now she's thinking about writing you a conduct report." (ECF No. 53, ¶ 8.)

Poeschl states that Ramsden called her to tell her that Blank was refusing "lay-in" status. (ECF No. 46, ¶ 15.) Because Blank refused "lay-in" status, Poeschl

states that she issued Blank a conduct report "for disobeying orders and for punctuality and attendance." (*Id.*, ¶ 16.) As further evidence that Poeschl issued the conduct report for Blank's refusal of "lay-in" status, Poeschl cites an email in her reply brief, which she states shows her asking her supervisor whether she was supposed to issue Blank a conduct report or "lay-in" status for missing his library appointment, and that she was told to try "lay-in" status before issuing a conduct report. (ECF No. 55 at 3.) A copy of the email exchange shows that Poeschl wrote an email to Elizabeth Mills at 7:12 p.m. on September 4, 2018, which states:

> Hi Miss Mills, inmate Blank had the officer on the unit call the library that he was not going to attend his scheduled sessions for law. I wrote him a conduct report for it. When they don't show up isn't that considered Lay—in status? Gravunder used to get them for that.

(ECF No. 47-1 at 2.) Elizabeth Mills forwarded the email to Barbara Wulfers on September 5, 2018, at 9:33 a.m. (*Id.* at 1.) Wulfers responded a few minutes later stating, "She may go for 'lay-in' status if she wishes, but she wrote the conduct report so that option is off the table—maybe next time, she can use 'lay-in' status." (*Id.*)

Blank states that Poeschl issued the conduct report because he orally complained to Ramsden that putting him on "lay-in" status was inappropriate. (ECF No. 51, ¶ 16.) Blank highlights that the conduct report he received does not mention his refusal of "lay-in" status as the reason for issuing the conduct report. (*Id.*) Specifically, the conduct report says, "At approximately 7:15 P.M. officer Medrano called the Library to tell me inmate Blank, Jeremy [redacted] was not

going to attend his Extra Law sessions from 7:20 p.m. through 8:55 p.m. On the Extra Law Application it states, 'inmates are required to attend all their scheduled times or disciplinary action may occur.'" (ECF No. 48-4.)

SUMMARY JUDGMENT STANDARD

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. The mere existence of some factual dispute does not defeat a summary judgment motion. A dispute over a "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In evaluating a motion for summary judgment, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, when the nonmovant is the party with the ultimate burden of proof at trial, that party retains its burden of producing evidence which would support a reasonable jury verdict. *Celotex Corp.*, 477 U.S. at 324. Evidence relied upon must be of a type that would be admissible at trial. *See Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009). To survive summary judgment, a party cannot rely on his pleadings and "must set forth specific facts showing that there is a

genuine issue for trial." *Anderson*, 477 U.S. at 248. "In short, 'summary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party.'" *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 414 (7th Cir. 2005) (citing *Turner v. J.V.D.B. & Assoc., Inc.*, 330 F.3d 991, 994 (7th Cir. 2003)).

ANALYSIS

Blank was allowed to proceed on a First Amendment retaliation claim against defendant Tammy Poeschl for allegedly giving Blank a conduct report after he complained that she inappropriately put him on "lay-in" status as a punishment. Poeschl argues that summary judgment is warranted because Blank cannot show a genuine issue of material fact as to his claim. Alternatively, Poeschl argues that she is entitled to summary judgment on the basis of qualified immunity.

1. The Merits

"The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual for retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "To make out a prima facie case on summary judgment, the plaintiffs must show that: (1) they engaged in activity protected by the First Amendment; (2) they suffered a deprivation that would likely deter First Amendment activity; and (3) the First Amendment activity was at least a motivating factor in the officer's decision." *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012). "[A] 'plaintiff need only show that a violation of his First Amendment rights was a 'motivating factor' of the harm he's complaining of;'

once he shows that, 'the burden shifts to the defendant to show that the harm would have occurred anyway.'" *Id.* (quoting *Greene v. Doruff*, 660 F.3d 975, 977-78 (7th Cir. 2011)).

Poeschl argues that Blank did not engage in protected speech because Blank was refusing to accept "lay-in" status, which "is inconsistent with Poeschl's legitimate interest in discipline and library administration." (ECF No. 45 at 9.) However, there is a material question of fact as to whether Blank was merely refusing to accept "lay-in" status and being disobedient or whether he was lodging an oral complaint about the inappropriateness of receiving "lay-in" status as a punishment when he had an excuse for missing library time. Oral complaints to prison staff about prison conditions constitute protected speech. *Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018) ("[T]he filing of a prison grievance is a constitutionally protected activity supporting a First Amendment retaliation claim, as are oral complaints about prison conditions."). Taking the facts in a light most favorable to Blank, a reasonable jury could conclude that Blank made an oral complaint.

Poeschl argues that even if Blank was lodging an oral complaint, it is still unprotected speech under *Turner v. Safley*, 482 U.S. 78 (1986) and *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010) because Blank had an alternative means available—namely he could have filed a written grievance. Yet, the Wisconsin Department of Corrections Complaint Procedures require inmates to "attempt to resolve [an] issue by following the designated process specific to the subject of the

complaint" before "filing a formal complaint." Wis. Admin. Code § DOC 310.07(1). In this case, Blank asserts that he was required to attempt to informally resolve the issue with the unit sergeant before filing a written complaint, which is exactly what he did. (ECF No. 52 at 5.) Thus, when taking the facts in a light most favorable to Blank, no reasonable factfinder could conclude that his speech was unprotected.

For the purposes of summary judgment, Blank establishes a prima facie case of retaliation. When taking the facts in a light most favorable to him, he engaged in protected speech when he complained to Ramsden; by incurring a conduct report, he suffered a deprivation that would likely deter his speech; and he established that complaining to Ramsden was at least a motivating factor in Poeschl issuing the conduct report. Thus, the burden shifts to Poeschl to demonstrate that there is no genuine dispute that she would have issued a conduct report regardless of whether Blank complained to Ramsden.

Poeschl does not meet this burden. Three pieces of evidence contradict Poeschl's version of events and could reasonably support Blank's version. First, the contents of the conduct report contradict Poeschl's version of the events. Poeschl says she issued the conduct report because Blank "disobeyed orders and for punctuality and attendance," and argues this demonstrates she would have issued the conduct report regardless of whether Blank complained. (ECF No. 46, ¶ 16.) However, the text of the conduct report directly contradicts this. The conduct report states that Blank was given a conduct report for missing his scheduled library time

and makes no mention of Blank disobeying orders or refusing "lay-in" status. (ECF No. 48-4.)

Second, Poeschl's e-mail contradicts Poeschl's version of events. Poeschl asserts the email demonstrates that she would have issued the conduct report whether or not Blank had complained because it shows that she was following the proper procedure of (1) first putting the inmate on "lay-in" status and then, (2) if "lay-in" status is refused, issuing a conduct report. However, the email does not demonstrate Poeschl was following the correct procedure and actually suggests that there was no procedure to follow. The text of the email shows that by the time Poeschl wrote the email, she had already issued Blank a conduct report. Also, Poeschl does not state in the email that she had put Blank on "lay-in" status that he then refused. Additionally, the email does not show that she asked if a conduct report was appropriate. At most she asks whether "lay-in" status was an option. And, her question was not answered until the next day, where her supervisor confirms that "lay-in" status could be an option, but it does not matter in this instance because Poeschl had already issued the conduct report.

Third, the surveillance video and the time-stamp on Poeschl's email contradict Poeschl's version of the timeline of events. Poeschl asserts that Medrano did not call to cancel the library appointment until 7:15 p.m. However, Blank asserts that Medrano actually called closer to 6:38 p.m. While the surveillance video does not definitively confirm Blank's versions of the facts (because it is unclear to the court if it is actually Blank who approached the Sergeant's desk and if it is

actually Medrano sitting at the desk), the video contains sufficient information to raise a question as to whose version of the events is correct. Additionally, Poeschl's email is time-stamped 7:12 p.m., suggesting that she had already issued Blank a conduct report before 7:15 p.m., also raising a question about Poeschl's version of the timeline. Thus, the contradictory evidence creates a question of material fact as to whether Poeschl would have issued the conduct report regardless of whether Blank complained.

In sum, there is a genuine dispute of material fact as to whether Blank complained about being put on "lay-in" status because a reasonable factfinder could conclude that he lodged a complaint. There is also a genuine dispute of material fact as to whether Poeschl would have issued the conduct report even if Blank had not complained. And because resolution of these disputes turns on credibility, a finding of summary judgment in Poeschl's favor is inappropriate. When deciding a motion for summary judgment, the court may not make credibility determinations. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.*

2. Qualified Immunity

Poeschl argues that even if the court concludes there is a genuine issue of material fact, the court should nevertheless grant summary judgment in her favor because she is entitled to qualified immunity. To determine whether qualified immunity applies, the court must consider "(1) whether the defendants violated a

constitutional right, and (2) whether the constitutional right was clearly established." *Broadfield v. McGrath*, 737 F. App'x 773, 775 (7th Cir. 2018).

As discussed above, a reasonable juror could conclude that Poeschl violated Blank's constitutional rights when she issued him the conduct report. The only question remaining is whether operating under the law as it existed in September 2018, a reasonable prison official would have known that an inmate had a constitutional right to lodge an oral complaint about prison conditions. An inmate's First Amendment right to complain about prison conditions, including wrongful discipline, whether formal or informal, oral or written, is clearly established. *See Daugherty*, 906 F.3d at 610 (7th Cir. 2018); *Antoine v. Ramos*, 497 F. App'x 631, 635 (7th Cir. 2012); *Gomez v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012); *Powers v. Snyder*, 484 F.3d 929, 933 (7th Cir. 2007); *Babcock v. White*, 102 F.3d 267, 276 (7th Cir. 1996). As such, Poeschl is not entitled to qualified immunity, and her motion for summary judgment is denied.

Because Blank's claim survived summary judgment, the court will recruit counsel to represent him. Once an attorney is recruited, the court will provide Blank with an agreement, which he may sign if he agrees to accept representation under the conditions the court provides. Once counsel is on board, the court will set up a scheduling conference with the lawyers, to discuss next steps.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Poeschl's motion for summary judgment (ECF No. 44) is **DENIED.**

IT IS FURTHER ORDERED that counsel will be recruited to represent Blank.

Dated at Milwaukee, Wisconsin this 9th day of April, 2021.

BY THE COURT:

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge