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

EFRAIN CAMPOS, JUAN NIETO, and
STANLEY NEWAGO,

Plaintiffs,

v.

OPINION & ORDER

MICHAEL DITTMAN,
LINDA ALSUM O'DONOVAN,
DAVID KURKOWSKI, LUCAS M. WEBER,
KEVIN W. PITZEN, BRAD HOMRE, and
CINDY O'DONNELL,

17-cv-545-jdp

Defendants.

Pro se plaintiffs Efrain Campos, Juan Nieto, and Stanley Newago are inmates in the custody of the Wisconsin Department of Corrections (DOC) currently housed at the Columbia Correctional Institution (CCI). They bring this proposed class action under 42 U.S.C. § 1983 alleging that defendants, CCI and DOC officials, terminated plaintiffs from their prison work assignments in retaliation for plaintiffs' comments during a prison investigation and in violation of plaintiffs' procedural due process and equal protection rights. In an October 31, 2017 order, I reviewed their complaint and concluded that it did not meet the pleadings requirements of Federal Rule of Civil Procedure 8. Dkt. 36. I offered them an opportunity to file an amended complaint alleging facts showing each defendant's retaliatory or improper purpose in terminating them. I also denied their motion for certification of a class action. I denied Campos's renewed motion for class certification in a December 1 order. Dkt. 40.

Now plaintiffs have filed an amended complaint. Dkt. 43. I must screen it 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, just as I did with the original complaint. Plaintiffs have also renewed their motion for class certification. Dkt. 42. And Newago has renewed his motion to use release account funds to pay the remainder of his filing fee. Dkt. 41. I will deny plaintiffs leave to proceed on their claims, deny the motion for class certification as moot, and deny Newago's motion to use release account funds.

ALLEGATIONS OF FACT

I draw the following facts from the amended complaint. Dkt. 43.

Plaintiffs Efrain Campos, Juan Nieto, and Stanley Newago are inmates at CCI. Until recently, they each worked at the Badger State Industries (BSI) printing shop within CCI. Approximately 10 other inmates worked in the printing shop too.

On January 3, 2017, all BSI employees at the CCI printing shop were placed on Temporary Lock Up status and could not work pending an investigation because a "dirty magazine" and an inmate's legal materials were found in the BSI shop. *Id.* at 6. Plaintiffs concede that these items of contraband were found in the BSI shop, but they state that they were found in areas of the BSI shop where plaintiffs did not work and that plaintiffs did not know about the items.

On January 6, defendants CCI Security Director Lucas M. Weber, Security Captain Kevin W. Pitzen, and BSI supervisor Dave Kurkowski summoned the BSI employees to the shop. Five BSI employees who worked in the areas of the shop in which the contraband was found admitted that the contraband was theirs. Those five employees received conduct reports,

and after due process hearings on the conduct reports, were sent to segregation for 360 days and terminated from their BSI positions.

Plaintiffs were asked if they knew about the contraband; plaintiffs each said that they did not know about the contraband and weren't involved with it. Plaintiffs did not receive conduct reports, but they were terminated from their BSI positions "because of not knowing about the contraband." *Id.* at 7. Records were placed in each plaintiff's file indicating that the termination was "for not assisting other to prevent the discovery of the contraband materials and they could have received conduct reports for" aiding and abetting. *Id.* at 8.

Plaintiffs filed grievances complaining about their termination. Defendants CCI Institution Complaint Examiner Linda Alsum O'Donovan, CCI Warden Michael Bittman, DOC Corrections Complaint Examiner Brad Homre, and Cindy O'Donnell, a designee of the DOC secretary, reviewed and dismissed plaintiffs' grievances. Plaintiffs state that the dismissal was "because of your first amendment behavior of not knowing anything in the very least assisted the others to prevent the discovery of the contraband materials and they could have received a conduct report for aiding and abetting." *Id.* at 13.

ANALYSIS

I begin by screening plaintiffs' claims as stated in their amended complaint.

A. Retaliation claims

As I explained in my October 31 order, a claim for retaliation under the First Amendment requires allegations of (1) engagement in a constitutionally protected activity; (2) one or more retaliatory actions taken by defendants that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible

to infer that plaintiffs' protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009). The First Amendment protects telling the truth in response to an investigation, and losing a well-paying prison job could deter a person of ordinary firmness from telling the truth in the future. But the original complaint did not include factual allegations raising a plausible connection, so I directed plaintiffs to submit an amended complaint alleging facts showing that each defendant caused plaintiffs to lose their jobs because plaintiffs told the truth rather than remain silent.

Plaintiffs' allegations are confusing, which would be reason enough to dismiss them. But reading the allegations generously, I take plaintiffs to allege that defendants fired plaintiffs, and dismissed plaintiffs' grievances about the firing, simply because plaintiffs told the truth during the investigation. This is a conclusory allegation and not one that is facially plausible. Plaintiffs argue that a conclusory allegation of a connection is enough, as long as they have identified the constitutionally protected activity and the retaliatory act, pointing to *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). But *Higgs* relied on the notice pleading standard articulated in *Conely v. Gibson*, 355 U.S. 41, 45–46 (1957), which was abrogated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010). Now, a complaint must state "a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *accord Swanson*, 614 F.3d at 404 (explaining that under the plausible-pleading regime, "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together").

Plaintiffs point to the lack of a conduct report as support for their conclusion that defendants terminated them (and dismissed their grievances) because they told the truth during the investigation, and not because defendants believed that they lied during the

investigation. If defendants thought plaintiffs were lying, plaintiffs say, they would have issued each plaintiff a conduct report for lying. But this is not a reasonable inference from the allegations. Prison officials exercise discretion when disciplining inmates. The lack of a conduct report does not mean that defendants believed plaintiffs were telling the truth. And the allegation that defendants said plaintiffs *could have received* a conduct report indicates that defendants believed plaintiffs were lying about what they knew about the contraband incident. So even drawing all reasonable inferences from the allegations in plaintiffs' favor, plaintiffs' allegations do not plausibly state a claim under the First Amendment. Defendants would have been entitled to terminate plaintiffs from the BSI jobs on the basis of a suspicion that plaintiffs were lying about contraband.

B. Equal protection claims

As I explained in my October 31 order, a class-of-one equal protection claim requires, at a minimum, allegations that defendants intentionally treated plaintiffs differently from others similarly situated and that there is no rational basis for the difference in treatment. Plaintiffs allege that the termination decision was a discretionary one, so they must allege that defendants possessed an improper purpose, or "something like animus, or the lack of justification based on public duties for singling out the plaintiff." *Del Marcelle v. Brown County Corp.*, 680 F.3d 887, 914 (7th Cir. 2012) (Wood, J., dissenting).

Plaintiffs shift focus from the decision to terminate to the method of termination for their equal protection claim. They state that defendants terminated them without a conduct report, whereas the five employees who admitted guilt received conduct reports. This difference in treatment harmed plaintiffs, because a conduct report comes with specific procedures, including a "due process" hearing and the right to a staff representative. *See* Wis. Stat. §§ DOC

303.83, 303.84. But again, even reading plaintiffs' allegations generously, there's no indication that defendants terminated them without issuing a conduct report (and dismissed their grievances concerning the method of termination) *because* they said they didn't know about the contraband, unlike the five employees who admitted their guilty knowledge. Rather, the allegations indicate that defendants terminated plaintiffs without issuing a conduct report for a legitimate reason: they believed that plaintiffs were lying but didn't think that plaintiffs took an active part in the improper conduct. Plaintiffs do not allege an improper purpose or animus, so they do not state equal protection claims, either.

C. Class certification

Because I am denying plaintiffs leave to proceed, I will deny their motion for class certification, Dkt. 42, as moot.

D. Filing fee payment

Finally, Newago asks the court to issue an order directing prison officials to allow him to use funds from his release account to pay the remainder of his filing fee. Dkt. 41. This is the second time Newago has made this motion, and I will deny it for the same reasons Magistrate Judge Peter Oppeneer denied the first motion. *See* Dkt. 33, at 2–3. But I will provide a more detailed explanation for the denial.

It is up to prison officials to decide how to apply the release-account regulations; federal courts generally cannot tell state officials how to apply state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). There is no federal law permitting this court to require state officials to submit an entire appellate filing fee by accessing a prisoner's release account funds. It is only when a prisoner's general account has insufficient funds to pay an initial partial filing fee payment that the Prisoner Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b)

permits this court to order an institution to access a prisoner's release account funds to satisfy that payment. *See, e.g.*, *Mosby v. Wommack*, No. 08-cv-677, 2009 WL 2488011 (W.D. Wis. Aug. 12, 2009) ("[W]ith the exception of initial partial payments, [federal district courts] do not have the authority to tell state officials whether and to what extent a prisoner should be able to withdraw money from his release account."); *see also Artis v. Meisner*, No. 12-cv-589, 2015 WL 5749785, at *5–6 (W.D. Wis. Sept. 30, 2015) ("Absent some authority *requiring* the prison to disburse [plaintiff's] release account funds, the court declines to interfere in the administration of Wisconsin state prisons . . . .").

Newago points to *Spence v. Cook*, 222 Wis. 2d 530, 587 N.W.2d 904 (Ct. App. 1998), which held that prisoner litigations count use release account funds to pay the Wisconsin court of appeals' initial partial filing fee. In a footnote, the *Spence* court noted that it saw "no reason why other litigation fees and costs within the meaning of § 814.29, STATS., would not be payable with release account funds." *Id.* at 907 n.9. *Spence* concerned Wisconsin's version of the PLRA, not the federal statute at issue in this case. As Newago points out, our sister court in the Eastern District of Wisconsin has permitted prisoners to pay filing fees from their release accounts, in reliance on the language of the federal PLRA. *See, e.g.*, *Spence v. McCaughtry*, 46 F. Supp. 2d 861 (E.D. Wis. 1999). But this court interprets the language of the federal PLRA differently. *See Carter v. Bennett*, 399 F. Supp. 2d 936, 937 (W.D. Wis. 2005) ("[N]othing in the fee collection provision of § 1915 can be read as requiring the state to allow a prisoner to pay off the balance of a federal court filing fee from money carried over several months in his release account . . . ."). So I will deny Newago's motion because I do not have the authority to grant access to his release account funds for payment of the remainder of his filing fee. Newago must continue to pay the remaining balance from his trust account.

ORDER

IT IS ORDERED that:

1. Plaintiffs Efrain Campos, Juan Nieto, and Stanley Newago are DENIED leave to proceed on their claims against defendants, and the complaint is DISMISSED with prejudice for failure to state a claim upon which relief can be granted.

2. Plaintiffs' motion for class certification, Dkt. 42, is DENIED as moot.

3. Newago's motion to use release account funds to pay the remainder of his filing fee, Dkt. 41, is DENIED.

4. The clerk of court is directed to close this case.

Entered February 6, 2018.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge