COURT OF APPEALS
DECISION
DATED AND RELEASED

February 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3180

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WAYNE L. BREWER,

Plaintiff-Appellant,

v.

WENDY BRUNS, ROBERT KENT, CAPT. HOOVER AND ALL OFFICERS AT THE GREEN BAY CORRECTIONAL INSTITUTION,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Wayne L. Brewer appeals from an order dismissing his complaint, based primarily on 42 U.S.C. § 1983, against three employees of the Green Bay Correctional Institute. Brewer alleged that the defendants violated his constitutional rights when Brewer received a conduct

report and was disciplined based on a statement made in an inmate grievance. We affirm.

The facts are undisputed. Brewer filed an inmate complaint under the Inmate Complaint Review System after staff refused his request for "pork-free toothpaste." In his inmate complaint, Brewer referred to a staff member as "the bitch." Shortly thereafter, Brewer received a conduct report, alleging a violation of WIS. ADM. CODE § DOC 303.25.[1] The violation was classified as a minor offense. An adjustment committee found Brewer guilty, and imposed seven days of cell confinement.

Brewer appealed the decision, and the warden reversed the adjustment committee. The warden cited WIS. ADM. CODE § DOC 310.13, which provides that inmate complaints "shall be confidential" and that "[n]o sanction may be applied against an inmate for filing a complaint." WISCONSIN ADM. CODE DOC § 310.13(1) and (6). The warden ordered that records of the discipline be expunged from Brewer's file. Brewer had already served the cell confinement when the disciplinary order was reversed.

Brewer then commenced this § 1983 action. The trial court granted the defendants' motion to dismiss for failure to state a claim.

The question is whether Brewer's complaint states a claim upon which relief can be granted. In determining whether a complaint should be dismissed, the facts pleaded and all reasonable inferences from the pleadings are taken as true. ***State v. American TV,*** 146 Wis.2d 292, 300, 430 N.W.2d 709, 712 (1988). The legal sufficiency of a complaint is a question of law which this court reviews without deference to the trial court. ***Irby v. Macht***, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11 (1994), *cert. denied*, 115 S.Ct. 590 (1994).

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[1] An inmate violates WIS. ADM. CODE § DOC 303.25 when he or she "overtly shows disrespect for any person performing his or her duty as an employe of the state of Wisconsin ... whether or not the subject is present ... Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling ... and other acts intended as public expressions of disrespect for authority and made to other inmates and staff."

Brewer's complaint is grounded in the procedural due process aspect of § 1983. To survive a motion to dismiss for failure to state a claim, Brewer must allege that he was deprived of a protected liberty interest without due process of law. *See* ***Casteel v. McCaughtry,*** 176 Wis.2d 561, 579, 500 N.W.2d 277, 281 (1993). A court examines whether there exists a liberty interest which has been interfered with by the State and whether the procedures attendant upon that deprivation were constitutionally sufficient. ***Id.***, *citing* ***Kentucky Dept. of Corrections v. Thompson,*** 490 U.S. 454, 460 (1989).

The State does not challenge the trial court's conclusion that Brewer had a protected liberty interest in not being confined to his cell. *See* ***Irby v. Macht,*** 184 Wis.2d at 841-42, 522 N.W.2d at 13. Therefore, we turn immediately to the issue of whether the deprivation occurred without due process of law.

Generally, due process requires that notice and an opportunity to be heard be provided before a constitutional deprivation occurs. ***Id.*** at 843, 522 N.W.2d at 13. However, when the deprivation results from "random and unauthorized" acts of state employees, providing meaningful predeprivation process is impracticable. ***Id.*** at 842-43, 522 N.W.2d at 14. Because of the random nature of the acts, the State cannot predict their occurrence, and due process is satisfied if the State makes available adequate postdeprivation remedies. ***Id.*** at 843, 522 N.W.2d at 14.

Brewer alleged that the defendants violated his rights when they issued him a conduct report based on a statement made by Brewer in an inmate complaint. As noted by the warden who overturned the discipline, the issuance of the conduct report violated prison regulations. Because the defendants did not have the authority to issue the conduct report, their acts were random and unauthorized. *See* ***id.*** at 846-47, 522 N.W.2d at 15.

Faced with a random and unauthorized act of a state employee that deprives a person of a constitutionally protected interest, the next question is whether adequate postdeprivation remedies are available. If so, due process is satisfied. ***Id.*** at 847, 522 N.W.2d at 15. Postdeprivation remedies are considered adequate unless they can "readily be characterized as inadequate to the point that [they are] meaningless or nonexistent." ***Id.*** at 847, 522 N.W.2d at

15-16, *quoting,* ***Scott v. McCaughtry,*** 810 F. Supp. 1015, 1019 (E.D. Wis. 1992) (further citations omitted). "[T]he adequacy of postdeprivation remedies must be measured by the nature of the alleged unauthorized deprivation." ***Id.*** at 848, 522 N.W.2d at 16.

The punishment received by Brewer, cell confinement, is a "type of confinement inmates should reasonably anticipate." ***Id.*** at 848, 522 N.W.2d at 16. Cell confinement is less onerous than administrative segregation, the confinement at issue in ***Irby***. Brewer appealed the decision of the adjustment committee to the institution warden, and he obtained a reversal of the decision and expunction of his records. In ***Irby,*** the supreme court found that the Inmate Complaint System, coupled with certiorari review, provided adequate postdeprivation remedies. We conclude likewise. Therefore, Brewer's complaint fails to state a § 1983 due process claim upon which relief can be granted.[2]

Brewer also contends that his complaint alleges a § 1983 cause of action because the defendants were retaliating against him for filing an inmate complaint. While prison disciplinary proceedings cannot be retaliatory, ***Cain v. Lane,*** 857 F.2d 1139, 1145 (7th Cir. 1988), an unjustified disciplinary charge will be actionable under § 1983 only if the charges were issued in retaliation for the exercise of a constitutional right. ***Black v. Lane,*** 22 F.3d 1395, 1402-03 (7th Cir. 1994).

Brewer's complaint does not allege a § 1983 retaliation claim. An inmate does not retain full First Amendment rights. "In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." ***Jones v. North Carolina Prisoners' Union,*** 433 U.S. 119, 129 (1977). We have no hesitation in holding that a prisoner does not have a First Amendment right to call a staff member a "bitch." *See also* WIS. ADM. CODE § DOC 303.25 ("Disrespect" is defined as including "derogatory or profane

[2] We agree with the trial court's conclusion that Brewer's complaint cannot be read to allege an equal protection claim. As stated by the trial court: "Brewer does not allege to have been treated differently than any other inmate utilizing the ICRS. He does not claim to be a member of a suspect class. Nor does he identify a fundamental right which has been infringed upon." We need not further discuss this claim.

writing, remarks or gestures, name-calling ... intended as public expressions of disrespect.").

Finally, we conclude that Brewer's complaint does not state a claim for damages under any state law theory of recovery because he did not strictly comply with § 893.82(3), STATS., the notice of injury statute. Brewer sought damages from the defendants for actions done in the course of their employment as state employees. Under § 893.82(3),

> no civil action ... may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the[ir] ... duties, ... unless within 120 days of the event causing the ... damage ... the claimant ... serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim ... and the names of the persons involved, including the name of the state officer, employe or agent involved.

A copy of the notice of injury is not in the circuit court record. However, Brewer included a copy of the notice in his appellate appendix, and the State does not dispute its accuracy or that Brewer timely served the notice on the Attorney General. The State, however, does argue that the notice does not strictly comply with the statute. We agree. Section 893.82(3), STATS., requires that a notice of injury include "the name[s] of the state officer, employe or agent involved" in the underlying incident. Brewer's notice does not identify the staff members involved in the incident. The statute is designed "to enable the attorney general to investigate claims before they become stale." ***Lewis v. Sullivan,*** 188 Wis.2d 157, 168, 524 N.W.2d 630, 634 (1994). If the claimant does not identify the state employees involved in the incident, the ability to investigate is significantly hindered. The notice of injury statute must be complied with strictly. Section 893.82(2m). Failure to do so defeats any claim. *See* ***Ibrahim v. Samore,*** 118 Wis.2d 720, 726, 348 N.W.2d 554, 557 (1984). Because Brewer's notice of injury did not strictly comply with § 893.82(3), any claim for damages under state law fails.

The trial court correctly dismissed Brewer's complaint for failure to state a claim upon which relief can be granted.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.