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

SHAUN MATZ,

Plaintiff,

v.

GABRIEL GALLOWAY,

Defendant.

OPINION and ORDER

18-cv-748-wmc

In what appears to be a classic case of "no good deed goes unpunished,"[1] *pro se* plaintiff and state prisoner Shaun Matz is suing his former attorney, Gabriel Galloway, for legal malpractice following his *pro bono* representation of Matz in a 2010 civil rights case before this court.[2] *See Matz v. Vandenbrook*, 10-cv-668-bbc (W.D. Wis.). In that case, Matz contended that during his incarceration at Columbia Correctional Institution between 2007 and 2009, prison staff failed to prevent him from engaging in acts of self-harm and housed him in conditions that they knew would exacerbate his mental illness. The defendants in that case obtained summary judgment on several of Matz's claims, and a jury found against Matz on his remaining claims after a one-day trial.

In this case, Matz contends that Galloway's numerous errors caused him to lose at summary judgment and trial in the 2010 case and amounted to legal malpractice under Wisconsin law. Galloway is representing himself in this case and filed an early, unsuccessful motion to dismiss. Neither party filed motions for summary judgment by the

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[1] https://en.wikipedia.org/wiki/No_good_deed_goes_unpunished (last visited Dec. 14, 2023).

[2] The court has subject matter jurisdiction under 28 U.S.C. § 1332, because Matz is a citizen of Wisconsin; Galloway is a citizen of Illinois; and more than $75,000 is allegedly in controversy.

deadline for doing so, meaning that this case appears headed for trial on February 23, 2024. In anticipation of a jury trial, Matz has filed two motions requesting that the court recruit counsel to represent him for the remainder of the case. (Dkt. ##33, 36.) Those motions will be denied for the reasons discussed below.

After reviewing the summary judgment record and trial transcript from Matz's 2010 case, both before the Honorable Barbara B. Crabb, the court further finds that summary judgment for Galloway is likely appropriate on the undisputed facts. Under Federal Rule of Civil Procedure 56(f), therefore, the court will direct plaintiff Matz to respond to this opinion and order by identifying specific evidence that could have been presented in the 2010 case to prove specific elements of his Eighth Amendment claims as discussed below. *See* Fed. R. Civ. P. 56(f) ("After giving notice and a reasonable time to respond, the court may consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.") After the court receives Matz's response, it will determine whether: (1) a response from Galloway is necessary; (2) summary judgment should be granted; or (3) the case should proceed to trial.

OPINION

I. Matz's Motions for Recruitment of Counsel

The court will deny Matz's motions for court assistance in recruiting counsel for three reasons. First, as explained in previous orders, the court may choose to recruit *pro bono* counsel for a *pro se* litigant if the legal and factual difficulties of a case exceed the litigant's abilities. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). Here, Matz's

filings have been well-written and demonstrate a clear grasp of relevant factual and legal issues, and nothing in his submissions reflect that he is suffering from mental deficiencies that affect his ability to litigate the case. To the contrary, Matz managed to defeat Galloway's motion to dismiss, and his recent motions requesting that counsel identify the correct legal standards governing his claims, as well as the evidence he needs to succeed, demonstrate his ability to represent himself.

Moreover, although Matz argues that he needs an expert to prove his case and cannot retain one without the assistance of counsel, the court is not convinced that an expert would substantially aid in the adjudication of this case -- particularly regarding Matz's burden of showing that he could have established the prison officials' subjective intent, which was required to succeed on his deliberate indifference claims in the underlying lawsuit. Rather, for reasons explained below, it appears that Matz could not succeed on either his malpractice or his deliberate indifference claims even with an expert's opinion. *See Vasquez v. Braemer*, 586 F. App'x 224, 226 (7th Cir. 2014) (district court did not abuse discretion in declining to recruit counsel or appoint expert where expert would not have assisted in "establishing the defendants' subjective intent necessary to prove deliberate indifference").

Second, the court must consider "the realities of recruiting counsel in the district." *McCaa v. Hamilton*, 959 F.3d 842, 845 (7th Cir. 2020) ("the *Pruitt* decision to try to recruit counsel can and should be informed by the realities of recruiting counsel in the district"). This district relies on a volunteer panel of attorneys, rather than an involuntary appointment system, and it is incredibly difficult to convince local attorneys to take

prisoner cases. As for this case, it is highly unlikely that any attorney would be willing to take it on: not only would it be extremely unlikely to prevail in this case, but any attorney would understandably be worried that Matz might sue for malpractice if the case were unsuccessful. Accordingly, most if not all, attorneys that this court might attempt to recruit would be uninterested in considering, much less taking on, this representation.

Third, in deciding whether to recruit counsel, the court may consider "the potential merits" of a case, *id.*, and Matz's legal malpractice claim against Galloway appears to have little, if any, chance of success for the reasons discussed below. In fairness to Matz, the court's own review of the record from the 2010 case confirms that defendant Galloway failed to present evidence necessary to support Matz's claims at both summary judgment and trial, and perhaps he should have done more. However, it is not enough for Matz to show that Galloway acted negligently; to prevail on his legal malpractice claim under Wisconsin law, Matz must show that Galloway's negligence *caused* him injury. *Kraft v. Steinhafel*, 2015 WI App 62, ¶ 11, 364 Wis. 2d 672, 869 N.W.2d 506. More specifically, Matz must show that he would have prevailed on the merits of his Eighth Amendment claims against Wisconsin DOC employees but for Galloway's negligent actions. *In re Disciplinary Proc. Against Boyle*, 2015 WI 110, ¶ 43, 365 Wis. 2d 649, 872 N.W.2d 637. Based on the court's review of the record in the underlying case, as well as Matz's assertions in this case, it appears that he cannot make that showing with respect to any of the claims in his 2010 case. While the court explains why in greater detail below, at minimum, Matz's low likelihood of succeeding on the merits of his claim leads the court to deny his requests for recruited counsel.

II. Matz's Malpractice Claim and Rule 56(f)

In the 2010 case, Matz raised four claims under the Eighth Amendment: (1) prison officials exacerbated Matz's mental illnesses by housing him in segregation or administrative confinement for extended periods; (2) they disciplined him for behavior he could not control because of his mental illness; (3) they transferred him to an institution that they knew would harm his mental health; and (4) they failed to prevent him from engaging in acts of self-harm. The court discusses Matz's malpractice claims in the context of these four claims below, explaining why Matz's Eighth Amendment claims failed in the 2010 case and what evidence he would now need to succeed on his malpractice claims.

A. Conditions of Confinement

To succeed on his first claim from the 2010 case, Matz would have had to prove both that: (1) his conditions of confinement were objectively severe, such that they exacerbated his mental illness; and (2) the defendants were deliberately indifferent to these adverse conditions. *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 665 (7th Cir. 2012). Matz's conditions of confinement claim failed at summary judgment before Judge Crabb because he failed to prove either element of his claim. *Matz v. Vandenbrook*, No. 10-CV-668-BBC, 2013 WL 4482989, at *7 (W.D. Wis. Aug. 19, 2013) ("[P]laintiff has not adduced any evidence that the conditions of segregation exacerbated any mental illness that he has, or, if they did, that any of the defendants was aware of that fact.").

Matz now claims in this case that he would have succeeded on his conditions of confinement claim had Galloway submitted expert testimony explaining the effect of

segregation on Matz's mental health. However, that evidence would not have been sufficient to defeat defendants' summary judgment motion, because the lack of expert testimony was not the only reason his claim failed. As Judge Crabb explained, "[e]ven if [the court] assume[s] that it is obvious that long term segregation is harmful, that is not enough to prevail on a claim under the Eighth Amendment." *Id.* Rather, there were two additional reasons that Matz's claim failed.

First, he failed to identify a "feasible alternative" to segregation. *Id.* Judge Crabb pointed out that the defendants had determined that Matz should be placed in administrative confinement based on several factors: he was serving a sentence for murdering two people; he had ties to a gang; and throughout his multiple incarcerations, he had continued to assault staff and other prisoners, make threats, and destroy property. *Id.* at 9. Further, Matz had offered only general population as an alternative placement to segregation, but failed to offer any evidence showing that was a feasible alternative or that defendants had violated the Eighth Amendment by making the placement decisions they had made. *Id.* at *10.

In reaching this conclusion, Judge Crabb relied in part on the Seventh Circuit's decision in *Rice*, which concerned the estate of a pretrial detainee who died while incarcerated and brought several claims against jail officials and medical personnel. Among these claims was a challenge to the constitutionality of confining a mentally ill detainee in administrative segregation for a prolonged period where he was in extreme isolation and likely to decompensate. 675 F.3d at 666. However, as the estate did "not discuss[ ] in detail what alternative placements were available to the jail nor, more importantly, [and]

the differences those placements would have made in terms of [the deceased detainee's] social isolation," the court found summary judgment in the defendants' favor appropriate. *Id.* at 666–67; *see also Walker v. Shansky*, 28 F.3d 666, 673 (7th Cir. 1994) ("Whether [segregation] does in fact violate the Eighth Amendment depends on the duration and nature of the segregation and the existence of feasible alternatives."); *Meriwether v. Faulkner*, 821 F.2d 408, 416–17 (7th Cir. 1987) ("Obviously influencing whether prolonged segregation constitutes cruel and unusual punishment is the existence of feasible alternatives.").

In his complaint and other filings in the present case, Matz still has identified no evidence, much less evidence Galloway negligently failed to present, that would have satisfied his burden to show "feasible alternatives" to administrative confinement at Columbia Correctional Institution. In particular, while he points to expert reports from Drs. Kenneth Robbins and Terry Kupers about the psychiatric effects of prison conditions from a case involving segregation at Waupun Correctional Institution, those expert opinions would not have been sufficient to satisfy his burden involving Columbia from 2007 to 2009. Those experts did not provide any opinions about what particular conditions at Columbia were exacerbating Matz's mental illness *or* alternative placements available at that institution that would be appropriate for Matz.

Second, and perhaps more significant, Matz failed to present evidence at summary judgment sufficient to satisfy the subjective element of his conditions of confinement claim. Thus, even if opinions could have been provided from experts showing that conditions in administrative confinement exacerbated Matz's particular mental illness and

caused him unnecessary suffering -- and that there were viable alternative housing options or changes that could have been made to lessen his suffering -- Matz still lacked evidence that the *named* defendants knew this. In short, there was no evidence showing that the specific defendants believed the conditions of confinement inappropriate for inmates suffering serious mental illness nor for Matz in particular. *Matz*, 2013 WL 4482989, at *7 (noting Matz failed to submit any evidence "that any defendant believed … plaintiff's conditions were causing him serious mental harm") (citing *Scarver v. Litscher*, 434 F.3d 972, 975 (7th Cir. 2006) (Scarver "failed to cite evidence to overcome the defendants' denials that they knew these conditions were making his mental illness worse."); *see also Giles v. Godinez*, 914 F.3d 1040, 1052 (7th Cir. 2019) ("Even if Giles could establish an objectively serious condition, he ultimately fails to establish the necessary subjective component of his claim: the defendants' culpable state of mind. . . . No reasonable jury could find that the defendants consciously disregarded an excessive risk to Giles's health by keeping him in segregation when the mental health professionals continually reported it was appropriate to do so."); *Vasquez*, 586 F. App'x at 227 ("Regardless of what an expert might have opined about the plaintiffs' mental health issues, the court properly concluded that an expert would not have helped establish the subjective deliberate-indifference standard.")

Even now, Matz does not allege in his complaint or other filings in this case that Galloway or he had access to, or could have obtained, evidence sufficient to support the subjective element of his conditions of confinement claim. Without such evidence, Matz could not succeed on his Eighth Amendment claims; nor can he succeed on his malpractice claims.

Although all of this strongly suggests summary judgment is appropriate on his conditions of confinement claim, Matz will be given an opportunity to submit admissible evidence under Rule 56(f) that was available to Galloway at the time of summary judgment in the 2010 case showing:

- there were feasible alternatives to his placement in segregation or administrative confinement available at Columbia Correctional Institution; *and*
- the named defendants knew or recklessly disregarded evidence that Matz's conditions of confinement were exacerbating his mental illness.

B. Disciplinary Decision

Matz's second claim from his 2010 case -- that he was punished with segregation for engaging in self-harm -- failed at summary judgment because he submitted no admissible evidence that: (1) he could not control his compulsion to engage in self-harm; and (2) the defendants, who were not medical professionals, knew Matz was powerless to stop himself but punished him anyway. *Matz,* 2013 WL 4482989, at *11. In addition, Judge Crabb noted that Matz had failed to cite any legal authority prohibiting prison staff from placing an inmate with a history of frequent self-harm in segregation, where his behavior could at least be monitored and managed. *Id.*

While Matz contends in this case that Galloway was negligent for failing to submit expert testimony to prove that his self-harming behavior was compulsive and involuntary. as Judge Crabb explained at summary judgment, such evidence would not "carry the day unless plaintiff has evidence that defendants [] believed plaintiff could not control his

actions." *Id.* at 10. Thus, even if Galloway was negligent, his negligence would not qualify as a "but for" reason that this claim failed. Under Rule 56(f), therefore, to proceed further, Matz must submit admissible evidence that was available to Galloway at the time of summary judgment in his original case showing:

- the specific defendants (Lane and Salter) knew of or recklessly disregarded information that would have led them to believe Matz was powerless to stop himself; *and*
- those defendants knew of or recklessly disregarded evidence making it improper to house Matz in segregation to manage his compulsive acts of self-harm.

C. Transfer to Green Bay Correctional Institution

Matz's third claim from the 2010 case was that certain defendants violated his Eighth Amendment rights by transferring him to Green Bay, despite knowing that there was a substantial risk that he would harm himself there. As with his previous claims, this claim failed at summary judgment due to a lack of evidence, *id.* at *11, and this court is skeptical that any evidence was available to Galloway at the time of the summary judgment decision. Thus, to proceed further with this claim, Matz must submit admissible evidence under Rule 56(f) that:

- there were relevant differences between the conditions of confinement or the available mental health treatment at Green Bay over Columbia where Matz wanted to stay; *and*

- the defendants knew or recklessly disregarded evidence that Green Bay was an inappropriate placement for Matz, other than his own subjective opinion as to proper placement.

D. Failure to Prevent Self-Harm

Finally, Matz's fourth claim -- that prison officials failed to protect him from harming himself on specific occasions -- proceeded to a jury trial against certain defendants, but the jury found against Matz. He now contends that he would have succeeded at trial had Galloway called inmates witnesses to corroborate Matz's version of events. Here, too, Matz's argument appears speculative at best. At bottom, the jury resolved his claim based on Matz's credibility versus that of the defendant correctional officers and psychologists. Among other things, Matz testified that: he had hundreds of self-harm incidents in his life; the defendants had notified psychological services staff or placed him on observation status on other occasions in the past; and while he knew of no reason why they would want to hurt him, defendants failed to help him after he told them he was going to hurt himself on two specific dates in 2007 and 2009. (Trial Trans. 10-cv-668-bbc (dkt. #151) 80–90.) In contrast, the defendants testified more plausibly that they could not remember specific conversations from specific days from several years ago, but that they had no recollection of ignoring any of Matz's threats of self-harm or requests for help. (*Id.* at 110–12, 124–27.) The defendants also testified, obviously persuasively, to the jury about their normal practices when an inmate asks to consult a psychologist or says he is in crisis, specifically

stating that if Matz had asked for help, their practice would have been to respond appropriately. (*Id.*)

While Matz now asserts that Galloway acted negligently by failing to call inmates who could have corroborated his version of events, the court finds it highly unlikely that any inmate testimony would have altered the outcome of the trial. Matz's own testimony was the strongest evidence to support his claim, and inmates in the vicinity would not likely have offered anything beyond cumulative, less-specific testimony. To proceed on this claim, therefore, Matz must at minimum submit admissible evidence under Rule 56(f) in the form of sworn affidavits from specific inmates, who would have provided credible, relevant testimony to support Matz's version of events regarding alleged conversations that occurred in 2007 and 2009 between Matz and the defendants.

ORDER

IT IS ORDERED that:

1. Plaintiff Shaun Matz's motions for assistance in recruiting counsel (dkt. ##33, 36) are DENIED.
2. On or before January 16, 2024, plaintiff must submit evidence showing:
    a. there were feasible alternatives to his placement in segregation or administrative confinement available at Columbia Correctional Institution;
    b. the relevant defendants believed Matz's conditions of confinement were exacerbating his mental illness and that there were feasible alternatives available;
    c. the specific defendants in the 2010 case (Lane and Salter) knew of or recklessly disregarded information that would have led them to believe that Matz was powerless to stop himself;

d. the defendants knew or recklessly disregarded evidence that it was improper to house Matz in segregation for engaging in compulsive acts of self-harm.

e. there were relevant differences between the conditions of confinement or the available mental health treatment at Green Bay prison over Columbia prison where Matz wanted to stay;

f. the defendants knew Green Bay was an inappropriate placement for Matz; and

g. inmates who would have provided credible, relevant testimony to support Matz's version of events regarding the alleged conversations that occurred in 2007 and 2009 between Matz and the defendants.

3. In light of this opinion and order, the trial date and all other remaining dates are STRUCK.

Entered this 14th day of December, 2023.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge