IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ORLANDO LARRY,

Plaintiff,

v.

JoANNE ANDERSON,

Defendant.

OPINION AND ORDER

06-C-223-C

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This is a civil action for monetary relief under 42 U.S.C. § 1983. Plaintiff Orlando Larry contends that his Fourteenth Amendment due process rights were violated when his probation and parole agent, defendant JoAnne Anderson, detained him at the Dane County jail pending a probation revocation hearing but did not provide him with a preliminary hearing. Jurisdiction is present under 28 U.S.C. § 1331.

Now before the court is defendant's motion for summary judgment, in which defendant contends that plaintiff waived his constitutional right to a preliminary hearing when he signed a statement admitting to violating a condition of his probation. The outcome of this motion turns exclusively on whether, shortly after being detained, plaintiff admitted to violating the probation condition requiring him to report to defendant for

appointments. Although plaintiff disputes the circumstances surrounding his alleged admission, he does not dispute that he provided defendant with a signed statement and that the content of the statement reflects what he wrote.

Although copies of this court's summary judgment procedures were sent to the parties, in certain instances, plaintiff did not properly support his proposed facts with admissible evidence, such as an affidavit. In other instances, plaintiff disputed facts that were immaterial to the outcome of this case. I have disregarded proposed facts that did not conform to these procedures.

Because plaintiff has failed to establish facts from which a reasonable jury could conclude that he did not admit to violating a condition of his probation, I conclude that he could not prove he did not waive his due process right to a preliminary hearing. Therefore, defendant's motion for summary judgment will be granted.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Orlando Larry is an adult resident of Wisconsin. At all times relevant to this action he was on probation under the supervision of defendant JoAnne Anderson, a

Probation and Parole Agent employed by the Wisconsin Department of Corrections Division of Community Corrections. Defendant's duties include field supervision of probationers and parolees. At all times relevant to this action defendant was the agent assigned to supervise plaintiff.

B. Violation of Condition of Probation

The goals of probation supervision include rehabilitation of offenders and protection of the public. Probationers are provided with referrals to services and encouraged to pursue a productive, crime-free life. Monitoring of probationers through in-person visits with their probation and parole agents is essential to prevent recidivism, as is insuring their compliance with rules of community supervision and court-ordered conditions of supervision. Probation and parole agents help enforce these conditions of probation by initiating probation revocation proceedings with the consent of a probation and parole supervisory staff member. These probation revocation proceedings are frequently preceded by the probationer's detention on a probation hold.

Defendant was assigned to supervise plaintiff's probation after the Circuit Court for Dane County sentenced plaintiff to a three-year probation that included certain conditions of probation enumerated in a document entitled "Rules of Community Supervision." Rule 16 of the document states that "You shall report to your agent as directed for scheduled and

unscheduled appointments." Plaintiff signed the Rules of Community Supervision on April 26, 2005. The document was valid for the remainder of 2005.

On August 26, 2005, plaintiff called defendant and left her a phone message, telling her he was uncertain when his next appointment with her was supposed to take place. Plaintiff also informed defendant that because his phone was disconnected, she could leave a message on his mother's phone. The following day, when defendant called plaintiff's mother's phone, plaintiff's sister answered. Defendant left a message with her, informing her that plaintiff's next scheduled appointment with defendant was August 30, 2005.

Plaintiff did not report for that appointment. Because plaintiff still had not reported to defendant by September 9, 2005, defendant left a message on plaintiff's home phone, which was now working, asking him to contact her as soon as possible. Plaintiff returned defendant's call on September 12, 2005, leaving her a message that he could be reached at his home and work phones.

On September 23, 2005, defendant received a police report indicating that plaintiff had had contact with a woman named Lakeshia Collier, had taken off with her car and had "backhanded" her, in violation of one of the conditions of his probation. Because Ms. Collier was involved in several of the offenses resulting in plaintiff's probation sentence, the court had made it a condition of probation that plaintiff was not to have any contact with Ms. Collier.

Upon receiving the police report, defendant called plaintiff's home on September 23, 2005 and left him a message to contact her as soon as possible. However, plaintiff did not contact defendant in response to this call. Given the seriousness of the allegations in the police report, on September 23, 2005, defendant issued an apprehension order for plaintiff's arrest. Plaintiff was arrested by the Madison Police Department on October 21, 2005, and placed on a probation hold by defendant.

On October 31, 2005, plaintiff provided a signed, three-page written statement that included the following question and plaintiff's response:

> Did you report to your agent on August 30, 2005 as scheduled or thereafter, until your arrest on 10/21/05? Why not?
>
> I reported by telephone that I was aware of the fact that I may've missed our scheduled appointment due to me starting work and training and that if there was anything specific that she wanted me to do, to leave me a message on my answering service. Her message stated Orlando Larry contact Joanne Anderson at 266-???? 266-5079

C. No Preliminary Hearing

After plaintiff was detained on a probation hold, defendant and the probation and parole supervisory staff decided to seek revocation of plaintiff's probation on several grounds, including his failure to report to defendant for his scheduled appointment on August 30, 2005. Plaintiff did not receive a preliminary hearing because he admitted in his written statement to failing to report for a scheduled appointment with defendant, which

was a violation of Rule 16 of the conditions of his probation. A final revocation hearing was held on February 1, 2006. The presiding administrative law judge revoked plaintiff's probation after finding that plaintiff had violated conditions of his probation and ordered that he be credited with the time he served from February 22, 2005 to April 28, 2005, August 9, 2005 to August 15, 2005 and continuously from October 21, 2005 to the date of sentencing.

OPINION

A. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-moving party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Even if facts are in dispute, unless they are material, summary judgment is permitted. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. The Right to a Preliminary Hearing

An individual on parole has a protected liberty interest associated with his status as a parolee. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Consequently, parole may not be revoked without providing the parolee due process of the law. In Morrissey, the United States Supreme Court held that persons detained because of suspected parole violations are entitled to two separate hearings under the due process clause of the Fourteenth Amendment: a preliminary hearing soon after the individual's initial detention and a hearing before a final decision is made on revocation. These rights extend to persons on probation. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

In Morrissey, the Court stated that the purpose of the preliminary hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Id. at 485. The Court required that the hearing occur "as promptly as convenient after arrest" and that "someone not directly involved in the case" make the probable cause determination. Id.

However, the right to a preliminary hearing is not absolute. In the wake of Morrissey and Gagnon, courts have highlighted several exceptional situations in which a preliminary hearing is not required. The exception applicable to the present case is an admission by a probationer that he has committed acts that violate the conditions of his probation. Starnes v. Markley, 343 F.2d 535 (7th Cir. 1965).

C. Plaintiff's Admission

Although plaintiff disputes the circumstances surrounding his alleged admission, he has raised no genuine issue of material fact that would preclude the court from granting summary judgment to defendant. It is undisputed that one of the conditions of plaintiff's probation was to report to defendant for appointments. Further, it is undisputed that within ten days of his arrest, plaintiff provided a written statement to defendant in which he admitted to "report[ing] [to defendant] by telephone that [he] was aware of the fact that [he] may've missed [his] scheduled appointment" with her.

Plaintiff argues that the court should not read his statement as an admission because the contraction "may've" suggests only the possibility that he missed his appointment. Plaintiff's argument is disingenuous. Common sense dictates that, given the context, the statement be understood as an admission. Plaintiff admits in his statement not only that he told defendant by telephone that he "may've" missed a scheduled appointment, but also that he explained the reason for his failure to appear ("due to [plaintiff] starting work and training"). Plaintiff admits that he informed defendant at that time that "if there was anything specific that she wanted [him] to do, to leave [him] a message on [his] answering service." An ordinary person reading plaintiff's statement would understand that plaintiff was admitting to his failure to appear at a scheduled appointment and providing an

explanation that he hoped would mitigate the effect of that failure.

Because plaintiff has not established facts sufficient to support a finding that he did not admit to a violation of his conditions of probation, no reasonable jury could find that he was constitutionally entitled to a preliminary hearing. Plaintiff's claim cannot meet the threshold requirement of a showing that his Fourteenth Amendment due process rights were violated. Therefore, defendant's motion for summary judgment will be granted.

D. Sanctions

In a brief in support of her motion for summary judgment, defendant asks that the court impose an appropriate sanction upon plaintiff for his intentional misrepresentation of a dispositive fact in his response to this court's order of May 12, 2006. In that order, I stayed a decision whether to grant plaintiff leave to proceed in forma pauperis on his due process claim and gave plaintiff an opportunity to submit a supplement to his complaint, indicating whether he had admitted to his probation officer or any other law enforcement officer at or near the time he was detained that he had engaged in conduct that violated the terms of his probation. I explained to plaintiff that if, soon after his detention, he had admitted to violating a condition of his probation, he would not have been entitled to a preliminary hearing. Instead of withdrawing his claim then, plaintiff responded to the order with a letter dated May 22, 2006 in which he stated,

> My name is Orlando Larry in regards to case order 06-C-223-C you requested that I send you some additional information (for confirmation) to see if I admitted to any of the alleged violations pertaining to my probation rules in which I was placed in custody and revoked for while being held in the Dane County jail from 10-21-05 to April 5, 2006. Enclosed with this letter is a copy of my statement made by me and submitted to my agent. This document will verify that I never admitted to such violations prior to my final revocation hearing.

The statement that plaintiff attached to his letter consisted of a page labeled "page 2 of 3" and a page labeled "page 3 of 3." I noted this oddity in an order dated May 25, 2006, but concluded that although it was possible that there may have been more to plaintiff's statement, "I must assume that the answers [plaintiff] provided are the entirety of his admissions to [defendant] Anderson." On the basis of that assumption, I allowed plaintiff to proceed with his due process claim.

Plaintiff took full advantage of the grant of leave to proceed. He moved the court for appointment of counsel and sought production of documents from defendant. Not surprisingly, defendant moved promptly for summary judgment and supported the motion with the missing page from plaintiff's statement. That page contains the admission that doomed plaintiff's claim and that would have ended his case from the outset.

Plaintiff openly admits that he purposely withheld the first page of his statement. In his brief in opposition to defendant's motion for summary judgment he states,

> It's true that the petitioner intentionally withheld the first page of the 3-page statement, and the petitioner would like to apologize for any inconveniences,

> but his intentions were never to mislead the Court. The petitioner felt that it was imperative that the Court know all the facts revolving around his statements and his situation overall so he withheld the document to first raise the awareness of the Court about its contents.
>
> The petitioner knew that once the Court saw his statement to the first allegation that it would be misconstrued as being an admission so he submitted only pp. 2 of 3 and 3 of 3 to first demonstrate to the Court that the defendant, with the approval of her supervisor, conspired to deprive the petitioner of his liberty by falsely accusing him of admitting to allegations after he gave his statements to them in efforts to justify her acts.

In summary, plaintiff's withholding of the first page of his statement was not mere negligence or inadvertence. It was a deliberate effort to avoid providing the court with information plaintiff knew would likely result in the dismissal of his case. This is sanctionable conduct.

Defendant does not suggest under what authority this court should impose sanctions on plaintiff, but there are two possible sources. Fed. R. Civ. P. 11 permits a court to sanction a party for a pleading or other document that is presented for an improper purpose or makes factual representations that are without reasonable evidentiary support. Alternatively, a court has inherent authority to impose sanctions for actions taken "in bad faith, vexatiously, wantonly, or for oppressive reasons." Johnson v. Cherry, 422 F.3d 540, 548-49 (7th Cir. 2005)(citing Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991)). Whether such sanctions are to be imposed under Rule 11 or the court's inherent authority, however, there is a prerequisite that must be satisfied. A district court will abuse its

discretion if it imposes sanctions on its own initiative without first giving the party notice of the specific conduct for which it is contemplating sanctions and an opportunity to show cause why sanctions should not be imposed. Johnson v. Cherry, 422 F.3d at 551. A general notice that the court is considering sanctions is not sufficient; the offending party must be on notice of the specific conduct for which he is potentially subject to sanctions. Id. at 551-552.

By deliberately omitting the first page of the statement given to defendant shortly after his detention, plaintiff caused an unnecessary expenditure of judicial resources and forced defendant to defend against plaintiff's baseless claim. A financial sanction is appropriate and necessary to dissuade plaintiff and other litigants from engaging in such conduct in the future. Under ordinary circumstances, I would be inclined to impose a sanction equal to the costs defendant incurred in defending against this action. However, a lesser amount is justified here, where plaintiff has demonstrated through his admission and apology that he recognizes his wrongdoing and accepts responsibility for his inappropriate behavior. Therefore, I will give plaintiff ten days in which to show cause why he should not be sanctioned in the amount of $150 for his intentional misrepresentation to this court.

ORDER

IT IS ORDERED that defendant JoAnne Anderson's motion for summary judgment

is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and to close this case.

Further, IT IS ORDERED that plaintiff may have until December 18, 2006, in which to show cause why he should not be sanctioned in the amount of $150 for his failure to disclose the entirety of his statement to defendant, as ordered by the court on May 12, 2006. If, by December 18, 2006, plaintiff fails to respond to this order, I will impose a sanction of $150 on plaintiff, which must be paid to the court before he will be allowed to proceed in any further action in this court, unless the action alleges imminent danger of serious physical harm.

Entered this 7th day of December, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge