IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GREGORY SEAN GORAK,

Plaintiff,

OPINION AND ORDER

11-cv-130-bbc

v.

JOHN PAQUIN, RICK RAEMISCH
and GARY H. HAMBLIN,

Defendants.

- -

Judgment was entered in this case on April 18, 2011, after I dismissed plaintiff Gregory Sean Gorak's complaint because success on his claim would necessarily imply that he was deprived of good time credits in violation of the Constitution, which means that he could not bring the claim under 42 U.S.C. § 1983. Edwards v. Balisok, 520 U.S. 641, 646 (1997), and Heck v. Humphrey, 512 U.S. 477 (1994). Now before the court is plaintiff's motion to alter or amend the judgment under Fed. R. Civ. P. 59 and a motion for leave to amend his complaint under Fed. R. Civ. P. 15. For the reasons stated below, I am granting both motions.

In his original complaint, plaintiff alleged that defendants had refused to allow him

to present evidence at a prison disciplinary hearing, which led to the loss of good time and other sanctions. Although plaintiff did not make it clear in his complaint, I understood from attachments to his complaint that he had received two hearings on the same charge, one in 2008 and another in 2010 after the Circuit Court for Dane County invalidated the first hearing because it concluded that plaintiff had not waived his right to present evidence as argued by John Paquin and Rick Raemisch, the respondents in the petition of a writ of certiorari. I construed his complaint as challenging the result of the second hearing that affirmed the finding of guilt and the punishment imposed from the first hearing. I dismissed the complaint under Heck and Edwards, in which the Supreme Court held that a prisoner could not bring a claim under § 1983 if doing so would call into question the fact or duration of the prisoner's confinement. In that situation, the prisoner may not seek relief under § 1983 until the disciplinary decision has been overturned in state court or through a petition for writ of habeas corpus under 28 U.S.C. § 2254.

In his new filings, plaintiff makes it clear that he is not challenging the constitutionality of his second hearing. Rather, his amended complaint is limited to raising a claim that prison officials violated his right to due process in the context of the first hearing. With this limitation, I do not see any barrier to allowing plaintiff to proceed.

Heck and Edwards do not bar that claim because the Circuit Court for Dane County has invalidated the first hearing and any conclusion by this court regarding the first hearing

could not call into question the decision to revoke plaintiff's good time credits after the second hearing. Further, plaintiff's amended complaint states a claim upon which relief may be granted because it is well established that prisoners have a right under the due process clause to present evidence at disciplinary hearings that could result in the loss of good time credits. Wolff v. McDonnell, 418 U.S. 539, 564 (1974). Although plaintiff's damages may be limited, that is not a reason to deny the claim. Casna v. City of Loves Park, 574 F.3d 420, 426 (7th Cir. 2009) (plaintiff may recover nominal damages of $1 for due process violation even if he suffers no harm other than violation itself).

Finally, the state court's decision cannot bar plaintiff's claim under the doctrine of claim preclusion because claim preclusion "does not ordinarily apply" to certiorari actions because "'certiorari is a limited form of review, while a claim under § 1983 exists as a uniquely federal remedy that is to be accorded a sweep as broad as its language.'" Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (quoting Hanlon v. Town of Milton, 235 Wis. 2d 597, 612 N.W.2d 44 (2000)). I need not decide at this stage whether defendants are barred under the doctrine of issue preclusion from relitigating the question whether the first hearing violated the due process clause.

Even after judgment has been entered, a plaintiff may amend the complaint with leave of court if the request is made in conjunction with a motion to vacate the judgment under Rule 59. Chaudhry v. Nucor Steel-Indiana, 546 F.3d 832, 838-39 (7th Cir. 2008); Paganis

v. Blonstein, 3 F.3d 1067, 1072 (7th Cir. 1993). Because plaintiff's Rule 59 motion is timely and his amended complaint states a claim upon which relief may be granted, I will grant both motions.

The only remaining question is the personal involvement of each of the named defendants. "An official satisfies the personal responsibility requirement of section 1983 . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye. In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995).

In addition to the three original defendants, plaintiff seeks leave to add two new defendants, Gary Bausch and Karen Solomon. Because plaintiff alleges that Bausch and Solomon were on the disciplinary committee that denied his right to present evidence, I will allow him to proceed against those defendants.

Defendants Paquin's and Raemisch's involvement was that they denied a grievance plaintiff filed regarding the alleged denial of due process at the first hearing. In George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007), the court limited the extent to which a prisoner may sue an official for denying a grievance:

Only persons who cause or participate in the violations are responsible. Ruling

> against a prisoner on an administrative complaint does not cause or contribute to the violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not.

Id. at 609-10. A broad reading of this statement would suggest that administrators can never be sued for denying a grievance. However, one reading is that the limitation applies only to a "completed act of misconduct." That is, it may be possible to sue grievance examiners if they have the ability to correct the violation. For example, an examiner cannot undo a physical assault, but he could stop ongoing censorship of banned publication. In this case, Paquin and Raemisch could have corrected the problem by providing plaintiff due process, but they declined to do so. Because this area of the law is unclear, I will allow plaintiff to proceed against defendants Paquin and Raemisch. However, defendants remain free to argue at later stages in the case that Paquin and Raemisch did not have sufficient involvement in the alleged constitutional violation.

The last named defendant is Gary Hamblin, the current Secretary of the Wisconsin Department of Corrections. Plaintiff does not mention Hamblin in the body of his complaint and it is not reasonable to infer that Hamblin had any involvement in the alleged violation because he because he did not become Secretary until this year. To the extent plaintiff believes that Hamblin may be held responsible simply because he supervises the other defendants, plaintiff is wrong. Burks v. Raemisch, 555 F.3d 592, 593-94 (7th Cir.

2009)("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise."). Accordingly, I am dismissing the complaint as to defendant Hamblin.

ORDER

IT IS ORDERED that

1. Plaintiff Gregory Sean Gorak's motion to alter or amend the judgment under Fed. R. Civ. P. 59, dkt. #9, is GRANTED. The April 18, 2011, judgment is VACATED.

2. Plaintiff's motion for leave to amend to his complaint, dkt. #10, is GRANTED.

3. Plaintiff is GRANTED leave to proceed on his claim that defendants John Paquin, Rick Raemisch, Gary Bausch and Karen Solomon violated his right to due process by refusing to allow him to call witnesses at his disciplinary hearing in December 2008.

4. The complaint is DISMISSED as to defendant Gary Hamblin for plaintiff's failure to state a claim upon which relief may be granted.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

7. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

8. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 9th day of May, 2011.

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