IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY SEAN GORAK,

OPINION AND ORDER

Plaintiff,

11-cv-130-bbc

v.

JOHN PAQUIN, AMY SMITH,
RUSSELL BAUSCH and KAREN SOLOMON,

Defendants.

- -

In this prisoner civil rights case brought under 42 U.S.C. § 1983, pro se plaintiff Gregory Sean Gorak is proceeding on a claim that defendants John Paquin, Amy Smith, Russell Bausch and Karen Solomon violated his right to due process by refusing to allow him to submit documentary evidence to support his defense at a disciplinary hearing. The parties have filed cross motions for summary judgment, which are ready for review. Dkt. ##42 and 48.

Although the parties raise many arguments, I need consider only one of them, which is whether plaintiff had a right to present particular documents at the hearing. Plaintiff's brief writing skills are impressive, but he has not made any showing that the documents were relevant to the issues at the hearing. Accordingly, I am granting defendants' motion for summary motion and denying plaintiff's motion.

Plaintiff has filed several other motions, which I am denying as well. First, he has filed a motion for leave to amend his complaint to seek declaratory and injunctive relief. Dkt. #40. In light of my conclusion that defendants are entitled to summary judgment on the merits, that motion is moot. In a *second* motion for leave to amend his complaint, plaintiff seeks to raise a new due process claim about a different hearing. Dkt. #70. However, he did not file the second motion until after the motions for summary judgment had been briefed. It is far too late to start over in this case with a new claim. Conner v. Illinois Dept. of Natural Resources, 413 F.3d 675, 679 (7th Cir. 2005) (upholding district judge's refusal to consider a claim raised for the first time in a response to motion for summary judgment); Bethany Pharmacal, Inc. v. QVC, Inc., 241 F.3d 854, 861-62 (7th Cir. 2001) (court did not err in denying motion to amend complaint when defendant had already filed motion for summary judgment). Finally, plaintiff has filed an "objection" to the affidavit of Mandy Matheson and many of the exhibits attached to the affidavit. Dkt. #41. Because I did not need to consider the affidavit or disputed exhibits to resolve the summary judgment motions, I am denying this motion as unnecessary.

OPINION

Plaintiff's claim arises out of a conduct report he received on December 12, 2008, for attempted escape, possession of contraband and fraud. Because the security director determined that the conduct report would proceed as a "major offense," Wis. Admin. Code § DOC 303.76 gave plaintiff the option of having a "formal due process hearing" to resolve

the conduct report. Plaintiff later signed a waiver of his rights under § 303.76 in favor of more streamlined procedures under Wis. Admin. Code § DOC 303.75. However, he wrote on the waiver, "I have the right to present evidence!" (§ DOC 303.75 is silent on whether a prisoner may submit documentary evidence at a streamlined hearing.)

At the hearing, plaintiff admitted guilt on the contraband charge, but he disputed the charges related to escape and fraud. He says that defendants Bausch and Solomon refused to allow him to submit documentary evidence in defense of the latter two charges. (There seems to be some dispute regarding what happened at the hearing, but for the purpose of deciding this motion, I will assume that plaintiff's version is true.) After plaintiff was found guilty of all charges, he appealed the decision to defendant Paquin, who reversed as to the fraud charge, but affirmed the decisions on the other two charges. Plaintiff then filed a petition for a writ of certiorari in state court, which concluded that plaintiff's waiver was "at best ambiguous and limited." The court reversed the decision as to the escape charge and remanded "for a hearing at which Gorak may exercise the right he did not waive." (Plaintiff was found guilty of attempted escape again after the second hearing, but that hearing is outside the scope of this case.) Plaintiff brought this action to recover the expenses he incurred from bringing the certiorari action because those expenses cannot be awarded in state court. Wis. Stat. § 814.25(2).

Defendants do not argue that plaintiff is barred from bringing his claim by the doctrine of claim preclusion because of the similarity between this case and the certiorari action in state court. As I noted in the screening order, 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)).

In addition, defendants assume in their summary judgment materials that plaintiff was entitled at the hearing to the procedural protections listed in Wolff v. McDonnell, 418 U.S. 539, 563-67 (1974): (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Those requirements apply when the prisoner loses good time credits. Although the disciplinary decision does not show that plaintiff lost any good time, defendants do not dispute plaintiff's proposed finding of fact that he lost 90 days. Dfts.' Resp. to Plt.'s PFOF ¶ 57, dkt. #63.

The problem with plaintiff's claim is that he has failed to make any showing that even a single document he wanted to submit at the hearing was actually relevant to his defense. Even under Wolff, prisoners do not have a right under the due process clause to submit irrelevant evidence. Scruggs v. Jordan, 485 F.3d 934, 940 (7th Cir. 2007); Forbes v. Trigg, 976 F.2d 308, 318 (7th Cir. 1992). Although defendants raised this argument in their summary judgment motion, plaintiff did not discuss the content of any of the documents in his briefs or proposed findings of fact or explain how any of them could have advanced his defense. Instead, plaintiff relies on the fact that defendant Paquin reversed part of the

disciplinary decision: "[o]bviously, these [documents] were highly relevant . . . because as a result of them . . . , that charge [for fraud] was overturned by the warden for lack of evidence supporting a guilty finding." Plt.'s Br., dkt. #58, at 11. (It is undisputed that Paquin reviewed at least some of plaintiff's documents before deciding the appeal. Plt.'s Resp. to Dft.'s PFOF ¶¶ 62-63.)

Plaintiff's argument is not persuasive. To begin with, if defendant Paquin reviewed the documents that plaintiff wanted to present, this suggests that any error by defendants Solomon and Bausch was harmless, particularly because Paquin did not change the discipline that plaintiff received. Jones v. Cross, 637 F.3d 841, 846-47 (7th Cir. 2011) (harmless error analysis applies to review of prison disciplinary proceedings); Piggie v. Cotton, 344 F.3d 674, 678 (7th Cir. 2003) (same). In any event, Paquin's decision states only that the "evidence does not support that inmate was trying to [de]fraud the general public." Dkt. #36-2. He did not cite or mention any documents plaintiff submitted. Further, the six-page statement plaintiff attached to his appeal does not direct Paquin's attention to any documentary evidence that Bausch and Solomon failed to consider. Thus, without any explanation from plaintiff as to why the documents might have supported his defense, I cannot infer that Paquin overturned the decision because of plaintiff's documents.

Plaintiff says that defendants should be barred under the doctrine of issue preclusion from arguing that they did not violate his right to due process, but that doctrine (also called "collateral estoppel") applies only to issues that were "actually litigated" in the first action. May v. Tri–County Trails Commission, 220 Wis. 2d 729, 734, 583 N.W.2d 878, 880 (Ct.

App. 1998). See also Best v. City of Portland, 554 F.3d 698, 701 (7th Cir. 2009) ("To determine the collateral estoppel effect of a state court ruling in a later federal court case, the district court should . . . us[e] [the state's] law of collateral estoppel."). In the certiorari action, the state court decided only that plaintiff had not waived his rights under Wis. Admin. Code § DOC 303.76; it did not decide whether any of the documents plaintiff wished to submit were relevant to his defense. Accordingly, I conclude that issue preclusion does not apply.

Plaintiff raises a number of other issues in his briefs, such as the scope and adequacy of the rights provided under Wis. Admin. Code. § DOC 303.75 and other alleged problems with the disciplinary decision. However, the only claim on which I allowed plaintiff to proceed was that defendants denied his right to due process by refusing his request to submit documentary evidence at the disciplinary hearing. Because plaintiff has made no showing that the documents would have supported his defense, I am granting defendants' motion for summary judgment on that claim.

ORDER

IT IS ORDERED that

1. Plaintiff Gregory Sean Gorak's motion for summary judgment, dkt. #48, is DENIED, and the motion for summary judgment filed by defendants John Paquin, Amy Smith, Russell Bausch and Karen Solomon, dkt. #42, is GRANTED.

2. Plaintiff's motions for leave to amend his complaint, dkt. ##40 and 70, and his

"objections" to Mandy Matheson's affidavit and attached exhibits, dkt. #41, are DENIED.

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

Entered this 13th day of June, 2012.

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