IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

ALAN DAVID McCORMACK,

ORDER

Plaintiff,

12-cv-535-bbc

v.

GARY H. HAMBLIN, Secretary, his Wardens,
Superintendents, Agents, Designees, and any Successors,
COREY BENDER, JODINE DEPPISCH,
KAREN GOURLIE, ANGELA HANSEN,
CATHY A. JESS, FLOYD MITCHELL,
MOLLY S. OLSON, JAMES PARISI,
WELCOME F. ROSE, RENEE SCHUELER
and MARK K. HEISE,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In this civil action, pro se plaintiff Alan David McCormack brought claims that various prison officials retaliated against him for filing a lawsuit about perceived overcrowding in Wisconsin prisons by refusing to transfer him to minimum security custody. In a March 13, 2014 order, I denied plaintiff's partial motion for summary judgment, granted defendants' motion for summary judgment and directed the clerk of court to enter judgment for defendants and close the case.

Now before the court are two post judgment motions for plaintiff: a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), dkt. #116, and a

motion for relief from judgment under Fed. R. Civ. P. 60, dkt. #118. Altering or amending a judgment under Rule 59(e) is permissible when there is newly discovered evidence or there has been a manifest error of law or fact. Harrington v. City of Chicago, 433 F.3d 542, 546 (7th Cir. 2006). Vacating a judgment under Rule 60(b) is permissible for a variety of reasons including mistake, excusable neglect, newly discovered evidence, and fraud. Id. Plaintiff raises several arguments in his motions that I will discuss in turn below. None of them persuades me that relief under Rules 59 or 60 is appropriate, so I will deny plaintiff's motions.

Plaintiff continues to argue that he was treated more harshly than other prisoners serving life sentences and repeatedly characterizes his claims as equal protection claims under a "class of one" theory. However, as I stated in the summary judgment order, I explicitly denied him leave to proceed on such claims in the court's January 11, 2013 screening order because "class of one equal protection claims are not cognizable if the challenged action by its nature 'involve[s] discretionary decision-making based on a vast array of subjective, individualized assessments.'" Dkt. #114 at 17-18 (quoting dkt. #21 at 26-27). Nothing plaintiff presents in his new motions persuades me this was an incorrect determination.

Turning to the retaliation claims on which plaintiff was allowed to proceed, plaintiff seems to believe that I erred in stating that he failed to present proof indicating that defendant Mark Heise altered his security-level recommendation in retaliation for his filing a state court lawsuit about overcrowding. As evidence of this, plaintiff points to the court's January 10, 2013 screening order in which I recounted his allegations that Heise altered the

recommendation; he seems to think that because I assumed the allegations in his complaint to be true at the screening stage, those allegations must be considered true at the summary judgment stage. However, the allegations in plaintiff's complaint are not evidence proving his case. Plaintiff had the obligation to come forward with evidence showing Heise's retaliatory motive and failed to do so.

Plaintiff argues that I should have granted his previous motions to strike defendants' affidavits because they were "made in willful and wanton malfeasant bad faith," but as I stated in the summary judgment order, plaintiff's position "amounts to nothing more than his disagreement with the version of events set forth by defendants." Dkt. #114 at 4. After considering his new motions, I come to the same conclusion.

Plaintiff argues that I erred in denying his motion for an evidentiary hearing, but as I stated in the summary judgment order, this argument is "nothing more than a rehash of his arguments regarding his motions to strike." Id. Had plaintiff submitted proposed findings of fact that created genuine disputes about material factual issues, the case would have gone to trial. Because plaintiff ultimately supported his retaliation claim with nothing more than his speculation that defendants meant to retaliate against him, he failed to show that there was a genuine dispute of fact, so there was no need for a trial.

Plaintiff also reiterates his argument that the court should have stayed a summary judgment decision while he pursued discovery, but the record shows that plaintiff waited until the last minute to begin making discovery requests. Plaintiff argues that his ability to conduct discovery was hampered by interference with his mail, but he presented no proof

of this; instead, the record shows that plaintiff has had no apparent problem filing dozens of documents with the court.

Additionally, plaintiff believes that I erred in denying his motions for the court's assistance in recruiting him counsel, but his arguments boil down to the idea that counsel would have done a better job litigating the case. That is true (as it would be for most pro se cases) but it is beside the point. Plaintiff's own neglect in pursuing timely discovery is a mistake a lawyer would not make but it was a simple-enough task given plaintiff's demonstrated abilities in this and his other lawsuits in this court. In short, plaintiff's tardiness in conducting discovery does not show that the case was too complex for him.

To sum up, many of plaintiff's arguments share a common thread: plaintiff's failure to support his *belief* that defendants retaliated against him with *admissible evidence* supporting that belief. Summary judgment has been described as the "put up or shut up moment" in the case, at which "the non-moving party is required to marshal and present the court with the evidence []he contends will prove [his] case." Porter v. City of Chicago, 700 F.3d 944, 956 (7th Cir. 2012) (quoting Goodman v. National Security Agency, Inc., 621 F.3d 651, 654 (7th Cir. 2010). None of plaintiff's arguments come close to persuading me that plaintiff's failure to present adequate evidence of retaliation should be excused or that I otherwise erred in granting defendants' motion for summary judgment. Accordingly, I will deny his motions under Rules 59 and 60.

ORDER

IT IS ORDERED that

1. Plaintiff Alan David McCormack's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), dkt. #116, is DENIED.

2. Plaintiff's motion for relief from judgment under Fed. R. Civ. P. 60, dkt. #118, is DENIED.

Entered this 22d day of May, 2014.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge