IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AUSTIN C. SZYMANKIEWICZ,

Plaintiff,

v.

DAVID PICARD, CONRAD REEDY, HAYLEY HERMANN, DAVID TARR, MIKE DITTMAN and DENICE DOYING,

Defendants.

OPINION AND ORDER

04-C-186-C

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In this civil action brought under 28 U.S.C. § 1983, plaintiff Austin Szymankiewicz seeks declaratory and monetary relief for alleged violations of his rights under the First and Fourteenth Amendments by defendants David Picard, Conrad Reedy, Hayley Hermann, David Tarr, Mike Dittman and Denice Doying. Plaintiff argues that defendants retaliated or conspired to retaliate against him for filing inmate complaints. In addition, plaintiff contends that defendants violated Wis. Admin. Code §§ DOC 310.16(1), 309.155(5), 309.29(3)(f) and ch. 302. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is defendants' motion for summary judgment. (Plaintiff

has filed a "motion in opposition to defendants' motion for summary judgment," which is unnecessary.) Because nothing in plaintiff's proposed facts supports an inference that defendants Picard, Reedy, Dittman, Tarr and Hermann retaliated or conspired to retaliate against him, I will grant defendants' motion as it applies to these defendants. However, because defendants failed to propose as fact what defendant Doying knew or did not know about the right of inmates to possess the legal work of other inmates in their cells, a reasonable juror could infer that Doying retaliated against plaintiff when she removed legal documents from plaintiff's cell during a search on July 18, 2003. Therefore, I will deny defendants' motion as to that claim. Because it is undisputed that plaintiff has not filed a Notice of Claim with the Attorney General in accordance with Wis. Stat. § 893.82, I will grant defendants' motion as it relates to plaintiff's state law claims.

As an initial matter, I must point out several flaws with plaintiff's response to defendants' proposed findings of fact. Although plaintiff received a copy of this court's Procedure to be Followed on Motions for Summary Judgment as part of the pretrial conference order issued on July 7, 2004, PTC Order, dkt. #10, plaintiff failed to follow the instructions on how to respond to proposed findings of fact. In many instances, plaintiff cites his complaint as supporting evidence of his response. See, e.g., Plt.'s Resp. to Dfts.' PFOF, dkt. #32, ¶¶35, 42, 45, 50, 68, 69, 71, 84, 88, 98 and 102. A complaint is not admissible evidence and cannot be used to support a proposed finding or a response.

Procedures to Be Followed on Motions for Summary Judgment, I.C.1. In other responses, plaintiff cites his affidavit or the affidavit of another but does not explain how he or the other person has personal knowledge about the issue to which they attest. See, e.g., Plt.'s Resp. to Dfts.' PFOF, dkt. #32, ¶¶32, 37, 60, 64, 74 and 79; Fed. R. Civ. P. 56(e). For example, in his response to defendants' proposed fact ¶79 that defendant Doying believed that plaintiff was in involuntary unassigned status because he had been terminated from his law library clerk job, plaintiff responds that he was not terminated from his law clerk job and that he had informed Doying that he had not been terminated from that job. For support, plaintiff cites his complaint and the affidavit of Lonnie Gatlin. Plaintiff fails to show how Gatlin had personal knowledge of Doying's belief about plaintiff's status. As a result, I have treated these proposed facts as undisputed. As the Court of Appeals for the Seventh Circuit has stated repeatedly, summary judgment is the "put up or shut up" moment in a lawsuit. A plaintiff's failure to show what evidence he has to convince a trier of fact to accept his version of the facts will result in summary judgment for the opposing party. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

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

UNDISPUTED FACTS

A. The Parties

At all times relevant to this action, plaintiff Austin Szymankiewicz was an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin. Defendants are employed by the Wisconsin Department of Corrections in the following capacities: David Picard is Educational Director at the Kettle Moraine Correctional Institution; Conrad Reedy is the librarian at the Kettle Moraine Correctional Institution; Hayley Hermann is an inmate complaint examiner; David Tarr is Administrative Captain at the Kettle Moraine Correctional Institution; Mike Dittman is Security Director at the institution; and Denice Doying is a correctional officer at the institution. Defendant Picard supervises defendant Reedy.

Beginning in January 2001, plaintiff worked as a clerk in the law library in the afternoons and evenings. Plaintiff worked more evenings than the other clerk at the law library and did a good job.

Inmates are allowed to assist one another with legal work but not during paid work time and inmates may not accept payment from other inmates for their legal assistance.

B. Complaint Against Defendant Reedy

On April 29, 2003, plaintiff filed complaint #KMCI-2003-15127, alleging that

defendant Reedy allowed inmates without court deadlines to use the law library in the evening, against the law library's policies and procedures. Defendant Hermann discussed the complaint with defendant Reedy as part of her duty to investigate plaintiff's complaint. Reedy told Hermann that he required inmates to produce some type of court document showing that they are working with the courts before he allowed inmates additional law library time in the evening, but inmates have been known to fabricate court documents and due dates. Reedy told Hermann that he did his best to insure that an inmate had a bona fide case before giving the inmate additional time in the law library.

Under Wis. Admin. Code § DOC 310.16, Hermann can reveal the identity of a complainant and the nature of the complaint only to the extent necessary to investigate the complaint. Reedy may have suspected the source of the complaint because he asked Hermann who filed it. Hermann told Reedy that a library worker filed the complaint, but did not mention plaintiff by name. On May 29, 2003, Hermann recommended dismissal of the complaint. That same day, Deputy Warden Mike Thurmer dismissed plaintiff's complaint.

On July 3, 2003, plaintiff filed complaint #CCE-2003-23621 against defendant Hermann, alleging that she divulged his identity during the investigation of his complaint against defendant Reedy. On July 18, 2003, Cindy O'Donnell, Deputy Secretary of the Wisconsin Department of Corrections, dismissed the complaint against defendant Hermann.

C. Cell Search by Defendant Picard

In June 2003, defendants conducted a routine lockdown at the Kettle Moraine Correctional Institution to search for weapons and other contraband. During the search, defendant Picard found documents in the library addressed to plaintiff that seemed to indicate that he was doing legal work in the library during paid work time and was receiving some type of compensation from the inmates for his help. On June 23, 2003, Picard wrote conduct report #1384672, alleging that plaintiff had violated Wis. Admin. Code §§ DOC 303.62 (inadequate work) and 303.63 (violations of institution policies and procedures). Under the circumstances, Picard had a duty and obligation under the administrative code to issue the conduct report. Defendant Picard informed defendant Reedy about the conduct report against plaintiff. Reedy told Picard that he suspected that plaintiff was performing legal work for other inmates during paid work time because plaintiff chose to work evenings when Reedy was not at the library to supervise him. The same day that Picard issued a conduct report, defendant Reedy completed an offender performance evaluation for plaintiff. A satisfactory score for a performance evaluation is 19 or above. Plaintiff's score was 10.

Pending a hearing on conduct report #1384672, defendants restricted plaintiff from working as law library clerk and did not allow him into the school building where the library is located. During this time, plaintiff was on involuntary unassigned status but defendants paid him at the rate of a library clerk.

On June 24, 2003, defendant Dittman reviewed conduct report #1384672 and decided that the documents gave rise to the possibility that plaintiff was using paid work time to assist an inmate with legal work and was being paid for that work with canteen vouchers. The conduct report met the criteria as a major offense under Wis. Admin. Code § DOC 303.68. Dittman did not know that plaintiff had filed a complaint against defendant Reedy until plaintiff filed this lawsuit.

On July 3, 2003, a hearing was held on conduct report #1384672. The hearing officer did not find plaintiff guilty of either violation and dismissed the conduct report. That same day, plaintiff tried to return to his job as the law library clerk. However, defendant Reedy had already hired another inmate for the position and informed plaintiff that his job was no longer available. Plaintiff wrote to defendant Tarr, asking to be returned to his law library clerk position. Tarr reviewed plaintiff's performance evaluations that Reedy had prepared as well as his conduct record during his incarceration and decided to uphold plaintiff's job termination. Tarr did not discuss the matter with either defendant Reedy or defendant Picard.

On July 14, 2003, plaintiff filed a formal complaint about the loss of his library clerk position. Defendant Hermann investigated the complaint and recommended that plaintiff be returned to his library clerk job with a one-rate reduction in pay and back pay. Plaintiff returned to his library clerk position in August 2003. Upon returning to work, plaintiff's

performance improved. Plaintiff worked as the law library clerk until he was transferred to the New Lisbon Correctional Institution on June 8, 2004.

D. Mowing Lawns

On July 1, 2003, defendant Doying believed plaintiff to be in involuntary unassigned status because he had been terminated from his law library clerk position. Defendant Doying is authorized to assign inmates in involuntary unassigned status to mow the lawns at the Kettle Moraine Correctional Institution. Doying ordered plaintiff to mow the lawns and told him that if he refused, she would issue a conduct report to him and place him in temporary lockup for refusing a direct order. Doying ordered other inmates to mow the lawns as well. Plaintiff obeyed the order and spent the day mowing the lawns. At 7:30 a.m. the next day, Doying ordered plaintiff to mow the lawns again. Plaintiff wanted to have a "lay-in" because he claimed to feel nauseated from mowing lawns the previous day. An inmate that needs a lay-in for medical reasons must notify the housing unit sergeant by 6:00 a.m. Because plaintiff's lay-in request was past the deadline, Doying denied plaintiff's request and ordered him to mow the lawns. Doying informed him that if he refused, she would place him in temporary lockup for disobeying a direct order. Plaintiff obeyed the order and spent the day mowing the lawns. After mowing the lawns for two days, plaintiff secured a two-week "no-work restriction" from the Health Services Unit and shortly after

that he returned to his library clerk position.

On July 7, 2003, plaintiff filed complaint #KMCI-2003-23158 about being ordered to mow lawns. Defendant Hermann investigated plaintiff's complaint and recommended that it be dismissed "since the inmate was in pay status and unable to work in the library [and] can be assigned to another position within the institution if there is a need for workers." On July 24, 2003, Deputy Warden Mike Thurmer accepted defendant Hermann's recommendation and dismissed plaintiff's complaint.

E. Cell Searches by Defendant Doying

Correctional staff at Kettle Moraine Correctional Institution search every cell randomly about once every month. Defendant Doying searched plaintiff's cell on July 18, 2003 and on September 4, 2003. On July 18, 2003, Doying removed excess property from plaintiff's cell and wrote conduct report #1481632. The property included legal documents belonging to other inmates. Doying placed the items she removed from plaintiff's cell into the contraband locker pending the hearing on the conduct report.

On July 22, 2003, plaintiff filed complaint # KMCI-2003-25097 concerning Doying's July 18, 2003 search of his cell and alleging confiscation of legal documents. Defendant Hermann investigated plaintiff's complaint and recommended its rejection on the ground that the complaint was outside the scope of the inmate complaint review system because it

involved a conduct report.

After receiving a call from the Wisconsin Department of Justice, defendant Hermann reviewed the items taken from plaintiff and found documents belonging to inmates Walls and Rollins, but none of the legal documents that plaintiff alleged were missing. Defendant Hermann discussed the items with Charles Hoornstra at the Department of Justice, who informed her that the judge intended to provide plaintiff with copies of the allegedly missing documents. On July 30, 2003, defendant Hermann returned Walls's and Rollins's legal work to plaintiff and told him to contact her if he had any problems getting to the library. In addition, she told plaintiff that defendant Doying would be contacted by a security supervisor regarding inmates' possession of other inmates' legal work.

During the September 4, 2003, search, Doying removed highlighters from plaintiff's cell, placed them into the contraband locker and wrote conduct report #1538325. Doying did not remove or destroy any legal documents from plaintiff's cell during this search. Plaintiff filed complaint #KMCI-2003-30271 about Doying's search of his cell on September 4, 2003 and the alleged confiscation of legal documents. Defendant Hermann investigated the complaint and recommended that it be dismissed because Doying had told her that the only items she confiscated during the search were highlighters.

D. State Law Claims

Plaintiff has not filed a Notice of Claim with the Attorney General in accordance with Wis. Stats. § 893.82 regarding his state law claims.

OPINION

A. Retaliation and Conspiracy

Plaintiff raises several retaliation arguments. The first relates to defendant Picard's alleged retaliation in writing the conduct report that led to plaintiff's removal from his job in the law library. The second is defendant Reedy's performance evaluation of plaintiff the same day that Picard wrote conduct report #1384672. Plaintiff contends that Reedy's evaluations of him are suspect because Reedy had never evaluated plaintiff's job performance before the day that Picard issued the conduct report and because Reedy evaluated him a second time on July 3, 2003 even though plaintiff had not worked in the law library since the first evaluation on June 23, 2003. The third is defendant Dittman's failure to dismiss Picard's conduct report, showing that Dittman was part of a conspiracy to retaliate against him for filing a complaint about defendant Reedy. Plaintiff points out that the adjustment committee eventually dismissed Picard's conduct report, calling into question defendant Dittman's motive for upholding the conduct report. The fourth is defendant Tarr's denial of plaintiff's request to return to his law library position on the basis of dismissed conduct report #1384672. Plaintiff maintains that Tarr knew that Picard and Reedy were retaliating

against him.

The fifth instance of alleged retaliation is defendant Doying's forcing plaintiff to mow lawns on July 1 and 2, 2003, even though he was officially assigned to work in the library until July 7, 2003. Plaintiff alleges that before Doying asked him to mow lawns, she spoke to Reedy and learned that plaintiff was terminated from the library. The sixth and seventh instances are Doying's search of plaintiff's cell on July 18, 2003 and September 4, 2003 and confiscating legal documents from his cell. The eighth and last instance is defendant Hermann's dismissal of several complaints about plaintiff's alleged mistreatment by defendants Picard, Reedy and Doying, despite her knowledge that the mistreatment was in retaliation for filing complaints about them.

A state official who takes action against an inmate to retaliate against him for exercising a constitutional right, such as filing inmate complaints, may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor in a defendant's actions, that is, that the prisoner's protected conduct was one of the reasons a defendant took adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). "Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of

the evidence that the same actions would have occurred in the absence of the protected conduct." Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

To establish a claim of civil conspiracy, plaintiff must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under § 1983. However, a bare allegation of conspiracy is insufficient to support a conspiracy claim. Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts from which a trier of fact could reasonably conclude that a meeting of the minds occurred among all members of the conspiracy and that each member of the conspiracy understood its objective to inflict harm on the alleged victim. Hernandez v. Joliet Police Dept., 197 F.3d 256, 263 (7th Cir. 1999).

Nothing in plaintiff's proposed facts would allow a jury to draw an inference that defendants Picard, Reedy, Dittman, Tarr and Hermann retaliated against him or conspired to do so. It is undisputed that defendant Picard found documents in the library addressed to plaintiff that seemed to indicate that he was doing legal work in the library during paid

work time and was receiving some type of compensation from the inmates for his help. Plaintiff has not adduced facts to put into dispute Picard's duty under the Wisconsin Administrative Code to issue a conduct report about plaintiff's behavior. In addition, Reedy told Picard that he suspected that plaintiff was performing legal work for other inmates during paid work time because plaintiff chose to work evenings when Reedy was not at the library to supervise him. Defendant Dittman believed it was possible that plaintiff was using paid work time to assist an inmate with legal work and was being paid for that work with canteen vouchers. He did not know that plaintiff had filed a complaint against defendant Reedy until plaintiff filed this lawsuit. Given Picard, Reedy and Dittman's belief that plaintiff was doing legal work in the library during paid work time and receiving compensation, it was legitimate for them to issue and uphold a conduct report and undertake a performance evaluation of plaintiff.

It was not until almost two months had passed after plaintiff had complained about Reedy's library policy violation that Picard issued the conduct report and Reedy made his evaluation of plaintiff. This gap in time undercuts any implication that either act was motivated by a desire to retaliate against plaintiff because of his complaints. Plaintiff offers no admissible evidence to show that the actions by Picard, Reedy and Dittman were taken in retaliation for his filing a complaint against defendant Reedy.

Furthermore, plaintiff offers no admissible evidence to show that defendant Tarr was

part of a conspiracy to retaliate against him when he upheld plaintiff's job termination from the library. It is undisputed that Tarr made the decision after reviewing plaintiff's performance evaluations that Reedy had prepared as well as his conduct record during his incarceration, and that Tarr did not discuss the matter with either defendant Reedy or defendant Picard. Because no evidence exists to show retaliatory motives behind the behavior of defendants Picard, Reedy, Dittman and Tarr, I will grant defendants' motion as it applies to plaintiff's retaliation claims against defendants Picard, Reedy, Dittman and Tarr.

As for defendant Doying, it is undisputed that on July 1, 2003, she asked plaintiff to mow lawns because she believed plaintiff to be in involuntary unassigned status and she is authorized to assign inmates in involuntary unassigned status to mow the lawns at the Kettle Moraine Correctional Institution. In addition, it is undisputed that Doying denied plaintiff's request for a lay-in on July 2, 2003 because plaintiff made the request too late. Plaintiff has adduced no evidence that defendant Doying ordered him to mow lawns in retaliation for his complaint against defendant Reedy or that she even had any contact with defendant Reedy through which she might have learned that plaintiff had complained about Reedy.

However, Doying's search of plaintiff's cell on July 18, 2003 raises an implication of retaliation. It is undisputed that plaintiff filed complaint #KMCI-2003-23158 on July 7,

2003, about being ordered to mow lawns by defendant Doying. Only eleven days later, on July 18, 2003, Doying removed from plaintiff's cell legal documents belonging to inmates Walls and Rollins. It is undisputed that inmates are allowed to assist one another with legal work and that defendant Hermann told plaintiff that defendant Doying would be contacted by a security supervisor regarding inmates' possession of other inmates' legal work. Drawing all inferences in favor of the nonmoving party, a reasonable jury could conclude that Doying removed the legal documents of inmates Walls and Rollins from plaintiff's cell in retaliation for the complaint that plaintiff had filed about her eleven days earlier. Furthermore, because defendant Hermann told plaintiff that Doying would be contacted by a security supervisor about inmate possession of others' legal work, one could reasonably assume that it was the policy at Kettle Moraine Correctional Institution that inmates may possess the legal documents of other inmates in their cells. Because defendants failed to propose as fact what defendant Doying knew about inmates' possession of the legal work of other inmates in their cells, defendants have not met their burden of showing they are entitled to summary judgment on this claim. Therefore, I must deny defendants' motion as it applies to defendant Doying's July 18, 2003 search of plaintiff's cell.

As for defendant Doying's September 4, 2003 search of plaintiff's cell, it is undisputed that the only items Doying removed during that search were highlighters that she placed into the contraband locker. Plaintiff filed complaint #KMCI-2003-30271 about

Doying's search of his cell on September 4, 2003, alleging confiscation of legal documents. Because plaintiff adduced no evidence to show that it was improper for Doying to remove highlighters from plaintiff's cell, no reasonable jury could conclude that the removal was motivated by a desire to retaliate against plaintiff for his complaints. I will grant defendants' motion for summary judgment as it applies to Doying's search of plaintiff's cell on September 4, 2003 and her lawn-mowing order on July 1 and 2, 2003.

Plaintiff has adduced no evidence to show that defendant Hermann retaliated against him during any of her investigations of plaintiff's complaints. In fact, defendant Hermann acted in plaintiff's favor with regard to plaintiff's complaint about Doying's July 18, 2003 search of his cell and he recommended that plaintiff be returned to his library job after plaintiff filed a complaint about it. It is undisputed that defendant Hermann returned the legal work of inmates Walls and Rollins to plaintiff and told him to contact her if he had any problems getting to the library. In addition, she told plaintiff that defendant Doying would be contacted by a security supervisor regarding inmates' possession of other inmates' legal work. I will grant defendants' motion as it applies to defendant Hermann.

Finally, plaintiff has provided no explanation of how defendants would have conspired to retaliate against him. Plaintiff has failed to allege when the conspiracy was formed. Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999) ("A conspiracy is an agreement and there is no indication of when an agreement between

[defendants] was formed.") The basis for plaintiff's conspiracy claim appears to be that each defendant played a role in issuing or upholding conduct reports or performance evaluations that were adverse to plaintiff's interests. Plaintiff's asserts that defendants Picard and Reedy are friends, but he has no evidence that defendants agreed with one another to injure plaintiff. Therefore, I will grant defendants' motion as it relates to plaintiff's conspiracy claim.

B. State Law Claims

Defendants argue that plaintiff's state law claims under Wis. Admin. Code §§ DOC 310.16(1), 309.155(5), 309.29(3)(f) and ch. 302 must dismissed because plaintiff failed to file a notice of injury under Wis. Stat. § 893.82(3), which provides:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved.

It is undisputed that plaintiff has not filed a Notice of Claim with the Attorney General in accordance with Wis. Stat. § 893.82 regarding his state law claims. "Where the

plaintiff has failed to comply with this notice of claim statute, the court lacks jurisdiction to hear the claim." Saldivar v. Cadena, 622 F. Supp. 949, 959 (W.D. Wis. 1985) (noting that Wis. Stat. § 893.82 "imposes a condition precedent to the right to maintain an action"). Therefore, I will grant defendants' motion for summary judgment as it relates to plaintiff's state law claims.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants David Picard, Conrad Reedy, Hayley Hermann, David Tarr, Mike Dittman and Denice Doying is GRANTED as it relates to plaintiff Austin C. Szymankiewicz's retaliation and conspiracy claims against defendants Picard, Reedy, Hermann, Tarr and Dittman;

2. Defendants' motion for summary judgment is DENIED as it relates to plaintiff's claim that defendant Doying retaliated against him when she searched his cell on July 18, 2003; it is GRANTED as it relates to plaintiff's claim that defendant Doying retaliated against defendant when she searched his cell on September 4, 2003 and when she ordered him to mow lawns;

3. Defendants' motion for summary judgment is GRANTED as it relates to plaintiff's state law claims;

4. Defendants Picard, Reedy, Hermann, Tarr and Dittman are DISMISSED from this case, which shall proceed against only defendant Doying and only with respect to her July 18, 2003 removal of legal papers from plaintiff's cell.

Entered this 16th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge