IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEREK M. WILLIAMS,

Plaintiff,

v.

RICK RAEMISCH, WILLIAM POLLARD, PETER ERICKSEN, WILLIAM SWIEKATOWSKI, THOMAS CAMPBELL, ROBIN LINDMEIER, PETER GAVIN, MICHAEL SCHULTZ and CHRISTOPHER STEVENS,

Defendants.

OPINION AND ORDER

11-cv-411-slc

Before the court is Derek Williams's motion for reconsideration, pursuant to Fed. R. Civ. P. 59(e), of this court's March 29, 2013 order granting summary judgment to defendants on all of plaintiff's claims. Dkt. 109. Plaintiff asks the court to reconsider his claims of retaliation against defendants Swiekatowski and Lindmeier and his conditions of confinement claim related to cell temperatures against defendants Pollard, Ericksen, Schultz and Campbell. For the reasons stated below, I am denying the motion.

I. Plaintiff's Failure to Comply with Summary Judgment Procedure

Plaintiff argues generally that I failed to take his pro se status into account when I disregarded evidence that was not the subject of a proposed finding of fact and contends that I should have allowed him an opportunity to correct his submissions. Plaintiff, however, fails to point to any critical evidence that I ignored or that would have made a difference to the outcome of his case. As noted in the order, most of the additional evidence that plaintiff submitted that was not included in a proposed finding of fact was irrelevant or immaterial, and in most cases, I explained why. Absent a showing that I disregarded admissible material evidence, there is no basis to find that plaintiff was prejudiced by my procedural ruling.

II. Retaliation Claims

With respect to my rulings on his retaliation claims, plaintiff first argues that I committed an error of law by requiring him to prove, at the summary judgment stage, that he would not have received the challenged conduct reports but for his protected activity. Citing *Greene v. Doruff*, 660 F.3d 975 (7th Cir. 2011), and *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 489 (2012), plaintiff points out that although a plaintiff must ultimately prove but-for causation *at trial*, at the summary judgment stage, the burden of proof is split between the parties, with the plaintiff only having to "produce evidence that his speech was at least a motivating factor—or, in philosophical terms, a 'sufficient condition'—of the employer's decision to take retaliatory action against him." *Kidwell*, 679 F.3d at 965 (citing *Greene*, 660 F.3d at 979–80). If the plaintiff meets that burden, then it becomes defendant's burden to rebut the causal inference raised by the plaintiff's evidence; otherwise, the plaintiff has established the but-for causation needed to succeed on his claim. *Id*. Plaintiff argues that I failed to apply this burden-shifting framework to his claim.

Plaintiff is incorrect. In the March 29, 2013 order, I properly stated and applied the parties' respective burdens. Op. and Order, dkt. 95, at 16 (noting that if plaintiff showed that his protected activity was a motivating factor in defendant's retaliatory action, "then defendants still may prevail *if they can establish* that they would have taken the same action . . .) (emphasis added); *id.* at 19 (because plaintiff established prima facie case of retaliation, "*the burden shifts to the defendant* to demonstrate that animus was not necessary condition of harm) (emphasis added).

Contrary to plaintiff's understanding, I did not grant summary judgment to defendants because I found plaintiff had not carried his burden of showing but-for causation. Rather, I granted summary judgment to defendants because plaintiff had not produced evidence to refute the evidence submitted by *defendants* which countered the inference of causation. Although this is not discussed expressly in *Greene* and *Kidwell*, there is a *third* analytical step when–as in this case–a defendant meets his burden of production: the plaintiff then "must produce evidence upon which a rational finder of fact could infer that [defendants'] explanations were lies." *Massey v. Johnson*, 457 F.3d 711, 717 (7th Cir. 2006). *See also Zellner v. Herrick*, 639 F.3d 371, 378 (7th Cir. 2011). Having re-examined my opinion, I am satisfied that I properly allocated and the parties' respective burdens in this case.

Moving from the general to the specific, plaintiff challenges my rulings with respect to two defendants: Swiekatowski, who plaintiff says retaliated against him by filing Conduct Report 2180862 for Enterprise and Fraud, and Lindmeier, who plaintiff says retaliated against him by filing Conduct Report 2180886, charging plaintiff with Conspiracy to Possess Intoxicants. Each of these defendants submitted sworn affidavits stating that they had issued the respective disciplinary reports against plaintiff based on his or her belief that plaintiff had committed the rules violations with which he was charged. Swiekatowski averred that his belief was founded upon a letter addressed from plaintiff to Renee Pendzimas that had been returned by the post office and provided to Swiekatowski by mailroom staff. The letter writer (whom Swiekatowski apparently assumed was plaintiff because it was in an envelope bearing his return address and which contained another letter bearing his signature) asked the recipient to set up MySpace and Facebook accounts to sell clothing. Lindmeier averred that her belief was founded

upon information provided by confidential informants, known to have been reliable in the past, who indicated that plaintiff was selling drugs in the institution. This information was corroborated by phone recordings and a letter from inmate Robert Smith to Karen Banek, whom the informants had identified as plaintiff's outside contact who obtained and smuggled drugs into the institution. I am satisfied that I properly found this evidence sufficient to meet defendants' burden of adducing evidence sufficient to establish that they would have filed the respective conduct reports against plaintiff regardless of any retaliatory animus.

That being so, the question becomes whether any reasonable juror could disbelieve defendants' proffered explanations. If this were a case where the disciplinary charges were based merely on Swiekatowski's or Lindmeier's reported first-hand observations of conduct that plaintiff swore he did not commit, then it would be proper–indeed*, necessary*–to deny the motion for summary judgment and submit this case to a jury. *See, e.g., Antoine v. Ramos*, 497 Fed.Appx. 631, 634-635, 2012 WL 6031483, *3 (7th Cir. 2012) (non-precedential disposition) ("Whether or not Antoine made the threat is a disputed fact for a jury to decide. Antoine testified by affidavit and at his deposition that he never threatened Robertson. Antoine's account directly contradicts Robertson's affidavit stating that he issued the disciplinary ticket because Antoine had threatened to sue him.") (internal citation omitted).

But the evidence in this case is more meaty than a bare-boned swearing contest. Both Swiekatowski and Lindmeier drew their conclusions from additional evidence from other sources and they presented this evidence at the disciplinary hearing. Swiekatowski had the letter addressed to Pendzimas; Lindmeier had the statements from the confidential informants, the letter written by Robert Smith, monitored phone calls between Banek and other inmates,

including James Sibila, and knowledge that on March 7, 2010 Sibila had been put in segregation for having possessed marijuana and drug paraphernalia.

In a situation like this, plaintiff cannot evade summary judgment simply by denying that he had engaged in the alleged conduct, or by accusing the defendants of "falsifying" the charges; rather, he "must identify such weaknesses, implausibilities, inconsistencies, or contradictions" in defendants' stated reasons for filing the conduct reports "that a reasonable person could find [it] unworthy of credence." *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007) (applying the pretext standard in the discrimination context). *See also Argyropoulos v. City of Alton*, 539 F.3d 724, 736 (7th Cir. 2008) (Pretext includes "more than just faulty reasoning or mistaken judgment . . . it is a 'lie, specifically a phony reason for some action.'") (quoting *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir. 2006)); *Filipovich v. K & R Exp. Systems, Inc.*, 391 F.3d 859, 865-866 (7th Cir. 2004) (jury's verdict for plaintiff could not be upheld where plaintiff did not offer a story which the jury could choose to believe, but instead "offered only a bald assertion that [defendant] was lying." Plaintiff's denials alone, in the face of defendant's documentation of plaintiff's misconduct, were not enough to justify submitting plaintiff's case to the jury).

Having read and considered plaintiff's arguments in support of reconsideration, I remain convinced that no reasonable juror could find that defendants' stated reasons for filing the respective conduct reports–namely, that they genuinely believed that plaintiff had committed the charged conduct based on the evidence they received–were lies. With respect to Swiekatowski, plaintiff argues that a jury could find his explanation incredible because he has not been consistent: plaintiff points out that although Swiekatowski wrote in the conduct report

that plaintiff had "written" the letter to Pendzimas that included the MySpace and Facebook references, during summary judgment Swiekatowski "changed up" his story, averring that plaintiff would still be guilty of enterprise/fraud even if he had not authored the letter. This argument is unpersuasive. Swiekatowski's post-hoc testimony stating that actual authorship was immaterial to a finding of guilt does not suggest that at the time he wrote the conduct report, he did not honestly believe that plaintiff had written the letter.

As for Lindmeier, plaintiff insists that the missing confidential informants' statements and Lindmeier's admission that she did not listen to the actual phone recordings are enough to show that the charge for conspiracy to distribute drugs was fabricated. This argument is no more persuasive now than it was when I considered it during summary judgment proceedings. As noted in this court's March 29, 2013 order, although the missing informants' statements could have raised a genuine concern if they were the only evidence on which Lindmeier had relied, they were not: Lindmeier also had the still-extant letter from Robert Smith and the summaries of phone recordings between Baneck and several inmates, including plaintiff, Sabir Wilcher and James Sibila, all of which corroborated the information that she reported having received from the confidential informants. Plaintiff points out that only one of these phone recordings presently exists (the others reportedly having been damaged) and argues that the alleged loss of this evidence reasonably permits an inference at this time that it never existed. I disagree. At the disciplinary hearing, Plaintiff and Wilcher did not deny calling Banek and they did not deny having made the statements that were attributed to them. Instead, they simply denied that their statements were coded references to drug transactions. For plaintiff now to argue that the recordings never existed or were transcribed incorrectly is an unpersuasive and opportunistic

change in position. Plaintiff's hypothesis that Lindmeier fabricated *everything*–pulling out of thin air the charge, some imaginary CI statements and nonexistent telephone recordings, then pursuing this passel of lies through the prison disciplinary hearing and in sworn statements to this court–does not defy the laws of nature, but it is purely conjectural and unsupported.

Finally, plaintiff asks this court to consider new evidence in support of his retaliation claim. *See* Plt.'s Mem. in Supp. of Mot. for Reconsideration, dkt. 109 at 8 (referring to testimony of Angie Laufenberg). However, motions to reconsider under Rule 59(e) cannot be used to present evidence that could have been introduced earlier. *Egonmwan v. Cook County Sheriff's Dept.*, 602 F.3d 845, 852 (7th Cir. 2010). Not only has plaintiff failed to submit an affidavit from Laufenberg, but he fails to offer any reason why he could not have presented this evidence during the summary judgment proceeding. Accordingly, I decline to consider it.

III. Conditions of Confinement Claim

Plaintiff also asks the court to reconsider its decision granting summary judgment to defendants Pollard, Erickson, Schultz and Campbell on plaintiff's claim that the temperature in his cell was unreasonably low. In the March 29, 2013 order, I found that although plaintiff had "probably" presented enough evidence from which a jury could conclude that he was subjected to a substantial risk of serious harm as a result of cold cell temperatures, his claim failed because he had presented no evidence from which a jury could conclude that the defendants were deliberately indifferent to that condition. In particular, I found that plaintiff had not submitted any admissible evidence showing that any of the defendants except for Raemisch and Pollard

were aware of the problem, and that neither of these two defendants' alleged inaction rose to the level of deliberate indifference.

In seeking reconsideration, plaintiff still does not point to any admissible evidence showing that Erickson, Schultz and Campbell knew or should have known that plaintiff's cell was uncomfortably cold. Plaintiff refers to a complaint that he filed with the Institution Complaint Examiner on January 13, 2011 (dkt. 67, exh. 7), as proof that these defendants were notified. I presume that plaintiff is referring to a statement he wrote in the complaint, wherein he indicated that he had written to Erickson, Schultz, Campbell and others about his cold cell, but no one had written him back. As an out-of-court statement, offered for the truth of the matter, plaintiff's statement in his offender complaint constitutes inadmissible hearsay. *See* Fed. Rs. Evid. 801[c] and 802. Accordingly, this exhibit cannot be used to defeat defendants' motion for summary judgment. *See* Fed. R. Civ. P. 56[c]

Plaintiff argues generally that, having met his burden of showing that his cell was extremely cold, defendants should be presumed to have been aware of it. However, the fact that plaintiff's cell was cold does not refute defendants' evidence showing that the temperature on the wing is maintained at 74 degrees during the winter and that no repairs were done on the heating system during the winter of 2010-2011. Therefore, it is entirely possible that defendants were not aware of how cold it was in plaintiff's cell. Further, plaintiff has not presented any evidence showing how often Erickson, Schultz and Campbell were physically present on the wing during the winter of 2010-2011. Although plaintiff is entitled to have all reasonable inferences drawn in his favor, the meager evidence presented by plaintiff simply does not permit a reasonable inference of knowledge on the part of these defendants.

ORDER

IT IS ORDERED that Derek Williams's motion for reconsideration, dkt. 109, is DENIED.

Entered this 10th day of June, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge