IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALAN DAVID McCORMACK,

OPINION AND 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.

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In an order entered on January 11, 2013, I allowed plaintiff Alan David McCormack to proceed on a claim that defendants retaliated against him for filing a lawsuit regarding prison conditions, parole decisions and security classifications. I also denied plaintiff leave to proceed on various claims relating to alleged prison overcrowding, the parole system and the security classification system. Plaintiff has now filed a motion for preliminary injunction, dkt. #23, a motion for a Spears hearing, dkt. #24, and two motions to amend his complaint. Dkts. ##34, 38.

I will deny the motion for preliminary injunction because the alleged retaliation is unrelated to the claims in this case. Because the motion for a spears hearing concerns the newly alleged retaliation claims, I will deny it as well. Last, I will deny the motions to amend, which are more appropriately classified as motions for reconsideration and for leave to amend. Most of plaintiff's legal arguments are not persuasive and he has identified no new factual allegations that would state a claim. Plaintiff does point out correctly that I failed to screen his claim 17 in the previous order. After reviewing the allegations relevant to that claim, I will deny his motion for leave to proceed on that claim.

Plaintiff has also filed a motion for sanctions, arguing that defendants' answer contains numerous unwarranted denials. Dkt. #45. "Under [Fed. R. Civ. P.] 11, attorneys are required to make a reasonable inquiry to determine whether pleadings . . . are well-grounded in fact and warranted by existing law." Insurance Benefits Administrators, Inc. v. Martin, 871 F.2d 1354, 1357 (7th Cir. 1989). Plaintiff misunderstands this standard. A lawyer or party violates Rule 11 if he or she does not make a reasonable inquiry into the facts, but none of plaintiff's arguments suggests that is the case in this instance. The motion for sanctions will be denied.

Before addressing plaintiff's motions specifically, I note that plaintiff continues to mention the work he is performing to collect evidence for a class action lawsuit. Plaintiff should be aware that his motion for class certification was denied and he is not proceeding on any claims for which a class action would be appropriate.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff has filed a "motion for emergency relief, protections and contempt of court," which I interpret as a motion for preliminary injunction. Plaintiff alleges that defendant Renee Schueler conspired with six other prison officials who are not defendants in this case to terminate him from his prison employment, convict him on a false conduct report about alleged work rule violations, transfer him from a single to a double cell and deny his complaints related to these actions and that she has done all this because he filed this lawsuit. As I explained previously in this case, dkts. ##13, 20, when a plaintiff alleges that the defendants have retaliated against him for bringing a lawsuit, it is the policy of this court to require the retaliation claim to be brought in a lawsuit separate from the one that allegedly provoked the retaliation. The court recognizes an exception to this policy only where it appears that the alleged retaliation directly and physically impairs the plaintiff's ability to prosecute his lawsuit.

Plaintiff was allowed to proceed on his claim that defendants retaliated against him for trying to challenge his security classification and prison conditions, which is distinct from the new allegations about retaliation. The new allegations involve six individuals who are not parties to this suit. The only defendant he mentions is Scheuler, who denied plaintiff's inmate complaints in both cases. Moreover, plaintiff has not alleged that the retaliation is impairing his ability to litigate this case. Being in a double cell does not interfere with his ability to litigate. Although plaintiff alleges that he needed to apply for legal loans because of his termination from his prison job, he does not allege that he was denied loans or that

he was unable to litigate this case for lack of funds. On the contrary, plaintiff has filed numerous motions, documents and third-party affidavits. The motion for preliminary relief will be denied. Because the motion for a Spears hearing concerns the alleged termination and accompanying actions that are not part of this case, I will deny that motion as well.

MOTION TO AMEND COMPLAINT, CLAIM #12

In an order entered on November 2, 2012, I dismissed plaintiff's claim 12 in which he alleged that defendants violated prisoners' constitutional rights by maintaining a deficient internal system for reviewing inmate grievances. Dkt. #9, at 2-3. In his first motion to amend, plaintiff argues that he should be allowed to pursue this claim as a claim for "abuse of process." Dkt. #34. Because there is no cause of action for "abuse of process" under federal law, he may intend this to be a supplemental tort claim under state law. I will deny plaintiff's motion for leave to amend because a claim for abuse of process may not be based on abuse of the prison grievance process. Perkins v. Silverstein, 939 F.2d 463, 471-72 (7th Cir. 1991) (although a plaintiff has right to amend as a matter of course, court "may deny leave to amend if the proposed amendment fails to cure the deficiencies in the original pleading" or if it "could not survive" a motion to dismiss).

Under Wisconsin law, a defendant commits the tort of "abuse of process" when it "uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed." Thompson v. Beecham, 72 Wis. 2d 356, 362, 241 N.W.2d 163, 165 (1976) (quoting Restatement (First) of Torts § 682). To state a claim for abuse of

process, plaintiff must allege two elements: (1)"a willful act in the use of process not proper in the regular conduct of the proceedings;" and (2) an "ulterior motive." Brownsell v. Klawitter, 102 Wis. 2d 108, 115, 306 N.W.2d 41, 44 (1981) (citation omitted).

I have found no cases in Wisconsin or elsewhere holding that the tort of "abuse of process" applies to a prison grievance system, and it is generally accepted that the term "legal process" is limited to *judicial* processes. Gordon v. Community First State Bank, 255 Neb. 637, 648-49, 587 N.W.2d 343, 352 (1998) (summarizing case law). States disagree about whether abuse of process claims should be limited to documents issued under official seal, such as the issuance of a writ or subpoena, Community National Bank v. McCrery, 156 Ill. App. 3d 580, 509 N.E.2d 122 (1987), or cover any litigation action, such as complaints, discovery requests or deposition notices. Barquis v. Merchants Collection Association, 7 Cal. 3d 94, n.4, 124, 496 P.2d 817, 839 (1972). Nevertheless, numerous cases refuse to extend abuse of process claims to administrative procedures because the tort is meant to protect the integrity of the judicial process. E.g. O'Hayre v. Board of Education for Jefferson County School Dist., 109 F. Supp. 2d 1284, 1296-97 (D. Colo. 2000) (school suspension procedures); Stolz v. Wong Communications Ltd., 25 Cal. App. 4th 1811, 1822-24, 31 Cal. Rptr. 2d 229 (1994) (Federal Communication Commission broadcast licensing procedure); Char v. Matson Terminals Inc., 817 F. Supp. 850, 859 (D. Haw. 1992) (unemployment insurance benefits procedure); Blubaugh v. American Contract Bridge League, IP 01-358-C H/K, 2004 WL 392930, *18-19 (S.D. Ind. Feb. 18, 2004) (disciplinary procedure of voluntary association).

The Wisconsin cases are generally consistent with this rule. The court of appeals has explained that the "trigger for an abuse of process claim" can be "either the commencement of a suit or the misuse of process after the suit is started." Schmit v. Klumpyan, 2003 WI App 107, ¶ 12, 264 Wis. 2d 414, 663 N.W.2d 331 (citations omitted). I found no published opinions approving of an abuse of process claim relating to anything other than a judicial processes. In an *unpublished* decision, prisoners brought an abuse of process claim alleging that correctional officers filed and pursued false conduct reports. Wesley v. Nickels, 167 Wis. 2d 487, 482 N.W.2d 669 (Ct. App. 1992) (unpublished). The court dismissed the claim because the inmates had not alleged that the officers misused the process for a collateral purpose, only that they had a bad motive. The court had no need to decide whether prison disciplinary procedures constituted a "legal process," so Wesley does not suggest the claim met this element of an abuse of process claim. In any case, it is an unpublished opinion with no precedential value. Wis. Stat.§ 809.23(3)(a). I conclude that Wisconsin would follow the general rule that a plaintiff cannot state a claim for "abuse of process" by alleging that officers misused an administrative procedure like the inmate complaint review system.

MOTION TO AMEND

In his second 36-page "motion to amend," plaintiff raises a host of legal arguments, most of which are undeveloped or legally unsubstantiated. I will address only plaintiff's legal

arguments that were developed enough to suggest the argument's basis and those portions of the motion in which plaintiff proposes new factual allegations.

A. Dismissed Parties

Plaintiff was denied leave to proceed against Dodge County because he failed to allege facts to support a claim under Monell v. City of New York Dept. of Social Services, 436 U.S. 658 (1978), and against the Department of Justice because it is a "state" and not a "person" within the meaning of § 1983. In the motion to amend, plaintiff argues that he has stated a claim against Dodge County (or Dodge County Circuit Court) and the Department of Justice under Monell, because high-ranking officials in each of these entities have adopted policies that permit constitutional violations to occur. First, as I explained previously, plaintiff cannot avoid absolute judicial immunity by suing the county for Judge Steven Bauer's alleged actions. Second, government liability under Monell is limited to municipalities and does not apply to the Department of Justice, which is an arm of the state. Joseph v. Board of Regents of University of Wisconsin System, 432 F.3d 746, 748–49 (7th Cir. 2005).

Plaintiff was also denied leave to proceed under 18 U.S.C. § 1983 against J.B. Van Hollen, Kathryn Anderson and Helen Kennebeck because he had not alleged that they were personally involved in any constitutional violations. Plaintiff argues that he has stated a claim against these individuals because they knew about various alleged violations, had the authority to determine whether the Department of Justice or Department of Corrections

Office of Legal Counsel would investigate the violations and chose not to investigate. However, none of these individuals participated in the retaliation against plaintiff and he cannot hold them liable simply because they did not investigate his complaints. Burks v. Raemisch, 555 F.3d 592, 596 (7th Cir. 2009).

Plaintiff also argues that he should be permitted to proceed against Van Hollen for prospective relief to improve the policies at the Department of Justice. Under Ex parte Young, 209 U.S. 123 (1908), private parties may sue state officials in their official capacity for prospective relief to enjoin ongoing violations of federal law. MCI Telecommunication Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 337 (7th Cir. 2000). However, because I concluded in the previous order that plaintiff did not state a claim for any constitutional violations by Van Hollen or the Department of Justice, he has no claim to bring under Ex parte Young.

B. Direct Claims under the Fourteenth Amendment

Next, in an effort to circumvent various limits of § 1983 (its limit to "persons," state immunity, its personal involvement requirement), plaintiff argues that he should be allowed to bring several of his claims directly under the Fourteenth Amendment and 18 U.S.C. § 1331. Although the United States Supreme Court has created an implied right of action against federal officials under the Fourteenth Amendment, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), courts have uniformly held that plaintiffs cannot bring a claim directly under the Fourteenth Amendment against state officials to avoid the

limitations of § 1983. Jamison v. McCurrie, 565 F.2d 483, 485 (7th Cir. 1977); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998) ("We decline to imply a Bivens action against state actors merely because § 1983 does not provide the plaintiff with a remedy."); Williams v. Bennett, 689 F.2d 1370, 1390 (11th Cir. 1982); Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978); Thomas v. Shipka, 818 F.2d 496, 499 (6th Cir. 1987), vacated on other grounds, 488 U.S. 1036 (1989).

C. Claim 2: State Law Prison Overcrowding

I dismissed plaintiff's claim 2 because he was relying on state laws designed to reduce prison overcrowding but those laws did not create a private right of action. Plaintiff now argues that he may bring a cause of action under 18 U.S.C. § 3626, but that statute does not create a free-standing cause of action. Rather, it limits the types of injunctive relief that courts may order to remedy constitutional violations, including violations *caused by* overcrowding.

D. Claims 3 and 4: Eighth Amendment Prison Overcrowding

I dismissed plaintiff's claims 3 and 4 that the prison's overcrowding and infection control policy violate the Eighth Amendment because plaintiff had not pleaded sufficient facts to satisfy Fed. R. Civ. P. 8(a)(2). In his motion for leave to amend, plaintiff identifies one inmate who contracted an MRSA infection while double-celling and asserts that he will file additional "documentary evidence" about the prison's policies to support his claims.

First, the allegation that one individual contracted a disease while in a double cell is not sufficient to allege that overcrowding is causing an unreasonable risk of illness. Second, plaintiff cannot revive claims 3 or 4 by filing evidence because neither of those claims was dismissed for lack of *evidence*. They were dismissed because plaintiff failed to include sufficient *allegations of fact* in his complaint to state a claim. If plaintiff wishes to reassert these claims, he must file an amended complaint that includes factual allegations that address the deficiencies in his complaint that I identified in the previous order.

E. Claim 18: Procedural Due Process Claim against Barbara Brandt

In his claim 18, plaintiff alleged that Judge Steven Bauer and Helen Kennebeck, an assistant attorney general, violated his right to due process by engaging in ex parte communications. I dismissed these claims on the basis of absolute judicial and prosecutorial immunity. In his motion for leave to amend, plaintiff asserts that Barbara Brandt, Judge Bauer's judicial assistant, "initiated" the ex parte communications. However, plaintiff cannot avoid judicial immunity by suing the judge's assistant. Absolute judicial immunity extends to "quasi-judicial conduct of non-judicial officials who have an integral relationship with the judicial process," Coleman v. Dunlap, 695 F.3d 650, 652 (7th Cir. 2012), which would include a secretary speaking with parties on the judge's behalf.

F. Claim 17: Prison Disciplinary Procedures Violate Due Process

In claim 17, plaintiff alleged that the procedures in the prison disciplinary system violate due process and that he was placed in segregation for five days in retaliation for filing subpoenas in his habeas case. In the screening order, I said that the general allegations in claim 17 had been dismissed in an order entered on November 13, 2012. I also noted that plaintiff raised specific allegations about segregation but I dismissed any claim on that basis under Fed. R. Civ. P. 8.

As plaintiff points out, this statement was incorrect. In the order entered on November 13, 2012, I dismissed plaintiff's claim that deficiencies in the *inmate complaint review system* violate a prisoner's right to due process. Dkt. #9, at 2-3. I listed plaintiff's general allegations about the *disciplinary system* in the claims under lawsuit #2, id. at 5, which I later determined could be brought together with the claims in this lawsuit. Dkt. #20, at 8. Accordingly, plaintiff's claim 17 still needs to be screened. In addition, plaintiff's motion to amend included new allegations in response to the Rule 8 dismissal. Having reviewed the allegations in claim 17 of the complaint and in his motion for leave to amend, I will dismiss claim 17 for failure to state a claim and deny his motion for leave to amend as futile.

In claim 17 of the complaint, plaintiff alleges that the prison's disciplinary procedures are deficient. Each warden receives funding to hire advocates for inmates facing disciplinary hearings but none of the prisons hire independent advocates and all use prison staff, which poses a conflict of interest. The prisons withhold security tapes and witnesses. The department prohibits hearings from being recorded, which encourages hearing officers to

misrepresent what happens during hearings. Hearing officers typically decide the case before the hearing and rely on prefabricated reasons for the decision.

In his motion for leave to amend, plaintiff also alleges that Mark Schomisch, the security director of Fox Lake Correctional Institution, ordered plaintiff to be placed in segregation for five days without a conduct report. He also repeats the allegations included in his motion for emergency relief. Plaintiff received 15 days of room confinement for a conduct report charging him falsely with inadequate work performance. The hearing officer, Captain John Cogdon, refused to let plaintiff question his inmate witnesses. At the hearing, plaintiff's advocate was replaced without any notice to plaintiff. The staff witnesses did not appear for the hearing and no one ever contacted them or asked them plaintiff's list of questions. Cogdon misrepresented what happened at the hearing and issued a decision based on "prefabricated" reasoning.

To state a procedural due process claim, a plaintiff must allege facts suggesting that he was deprived of a "liberty or property interest" and that this deprivation took place without the procedural safeguards necessary to satisfy due process. Sandin v. Conner, 515 U.S. 472, 483-84 (1995). In the absence of a protected liberty or property interest, "the state is free to use any procedures it chooses, or no procedures at all." Montgomery v. Anderson, 262 F.3d 641, 644 (7th Cir. 2001). In the prison context, liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the

ordinary incidents of prison life." Sandin, 515 U.S. at 483-84. Transfer from the general population to disciplinary segregation is not such an atypical hardship that it implicates a protected liberty interest, unless the segregation is for a significant period of time. Marion v. Columbia Correction Institution, 559 F.3d 693, 698-99 (7th Cir. 2009) (collecting cases holding segregation up to 70 days does not implicate liberty interests).

Plaintiff cannot challenge the prison disciplinary procedures in the abstract because he must allege that he was deprived of liberty or property without due process of law. His allegations are insufficient to show he was deprived of a constitutionally protected interest. Five days in segregation is too short to trigger due process protections. Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005) (demotion in security status, 60 days in segregation and transfer "suffered because of [prisoner's] disciplinary conviction . . . raise no due process concerns"). Accordingly, I will deny plaintiff leave to proceed on his claim that his right to due process were violated by the prison disciplinary system.

ORDER

IT IS ORDERED that

1. Plaintiff Alan David McCormack's motion for emergency relief, protections and contempt of court, dkt. #23, is construed as a motion for a preliminary injunction and DENIED.

2. Plaintiff's motion to amend complaint claim #12, dkt. #34, is DENIED.

3. Plaintiff's motion to amend complaint, dkt. #38, is DENIED.

4. Plaintiff's motion for sanctions, dkt. #45, is DENIED.

4. Plaintiff is DENIED leave to proceed on his claim that the prison disciplinary system violated his right to due process.

Entered this 5th day of April, 2013.

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