COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2391 **Cir. Ct. No. 2004CV1499**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SCOTT A. HEIMERMANN,

PLAINTIFF-APPELLANT,

V.

GARY R. MCCAUGHTRY, MARK W. CLEMENTS, JOHN O'DONOVAN, JOHN DEHAAN, JOANNE SWYERS, MICHAEL J. SULLIVAN, CINDY O'DONNELL, STEVEN B. CASPERSON, STEPHEN M. PUCKETT, SAM SCHNEITER, TIMOTHY DOUMA, LYNDA J. SCHWANDT, JOHN DOE AND JOHN DOE 2,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed and cause remanded with directions*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Scott Heimermann appeals a series of orders that dismissed his multi-claim civil action against a number of public employees, most

of whom were prison officials,[1] and refused to allow him to amend his complaint to add additional claims against the one non-prison employee and several additional defendants. We affirm for the reasons discussed below.

BACKGROUND

¶2 Heimermann's initial forty-eight page complaint, filed in 2004, sought civil damages on a variety of theories under common law and 42 U.S.C. § 1983, most of which stemmed from underlying allegations that prison officials had made a number of false promises to Heimermann in exchange for his cooperation with the undercover investigation of a prison guard. Although Heimermann did not explicitly name or number all of the claims set forth in his complaint, those he discusses on the present appeal can be grouped into the following categories: (1) prison officials denied Heimermann substantive due process and allowed him to be unlawfully confined by refusing to turn over exculpatory information they allegedly gained during the course of the investigation of the prison guard; (2) prison officials retaliated against Heimermann by issuing and condoning unfounded conduct reports against him when he insisted upon having a separate cell for his safety and instigated litigation to obtain the treatment he believed he had been promised in return for his cooperation; (3) prison officials violated Heimermann's Eighth Amendment rights by compelling him to participate in a dangerous investigation and failing to protect

[1] The complaint names eleven defendants and asserts additional claims against unknown defendants. We will collectively refer to Gary McCaughtry, Mark Clements, John O'Donovan, John Dehaan, Michael Sullivan, Cindy O'Donnell, Steven Casperson, Stephen Puckett, Sam Schneiter, Timothy Douma, Lynda Schwandt—all of whom are or were employees at Waupun Correctional Institution, Columbia Correctional Institution, or the Department of Corrections—as the "prison officials." The remaining defendant, Joanne Swyers, is or was an investigator for the Dodge County Sheriff's Office.

his safety from other inmates who viewed him as a snitch due to his cooperation in the investigation, with adverse consequences to Heimermann's mental health; and (4) prison officials interfered with Heimermann's First Amendment and due process rights by restricting his ability to communicate about business activities relating to a patent. The circuit court issued an order on September 27, 2007, dismissing the due process and retaliation claims without prejudice for failure to state a claim.

¶3 Further circuit court proceedings were then placed on hold while Heimermann appealed from the dismissal of another claim that is not at issue on this appeal. Once the matter was remanded, the circuit court denied a pending motion to amend the complaint to add additional claims and defendants under the Racketeer Influenced and Corrupt Originations Act (RICO) and Wisconsin Organized Crime Control Act (WOCCA), in an order entered on June 15, 2009. By separate order entered the same day, the court also granted summary judgment on Heimermann's remaining First and Eighth Amendment claims and dismissed the entire complaint with prejudice.

¶4 Heimermann challenges the September 27, 2007, and June 15, 2009, orders on appeal. We will set forth additional facts as necessary in our discussion of the individual claims below.

STANDARD OF REVIEW

¶5 A motion to dismiss a claim tests the legal sufficiency of the complaint. ***M&I Bank v. Guaranty Fin.***, 2011 WI App 82, ¶5, 334 Wis. 2d 173, 800 N.W.2d 476. We independently review whether the allegations in the complaint and any reasonable inferences drawn therefrom are sufficient to state a claim upon which relief can be granted. ***Id.***

¶6 A circuit court has discretion whether to allow a party to amend the pleadings more than six months after the complaint has been filed, and we will uphold the court's decision so long as the court applied the correct legal standard to the facts of record in a reasonable manner. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463.

¶7 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

DISCUSSION

Substantive Due Process Claims

¶8 Heimermann acknowledges that the circuit court properly dismissed his substantive due process and acquiescence to unlawful confinement claims, which stemmed from his allegations regarding postconviction access to exculpatory evidence. *See* ***Heck v. Humphry***, 512 U.S. 477 (1994) (requiring that a criminal conviction be set aside as a prerequisite to a 42 U.S.C. § 1983 claim premised on a claim of actual innocence). The only issue before us with respect to those claims is whether the circuit court should have dismissed them without

prejudice, allowing Heimermann to refile them when and if he is able to overturn his conviction.[2]

¶9 The State concedes that Heimermann's ***Heck*** claims should have been dismissed without prejudice, but suggests that there was no error because the order dismissing those claims was, in fact, without prejudice. The State's position ignores the different procedural status of the non-final order that ruled on the ***Heck*** claim and the final judgment that dismissed the entire action with prejudice. To clarify the matter, we direct that the final judgment be modified to explicitly state that the complaint is dismissed with prejudice only with respect to the non-***Heck*** claims.

Retaliation Claims

¶10 The circuit court dismissed Heimermann's claims that prison officials filed retaliatory conduct reports against him on the grounds that he had failed to adequately exhaust his administrative remedies from a decision on an inmate complaint dealing with that issue. Heimermann does not dispute that he failed to adequately exhaust his administrative remedies with respect to inmate complaint WCI-2003-39925, but argues that he did not even need to file that complaint because his claims of retaliation were already preserved and addressed on their merits in his administrative appeals of conduct reports 973072, 1081793, and 1547011-1197.

[2] Heimermann also submitted additional authority attempting to challenge the applicability of the ***Heck*** rule to his due process claims, but this court will not consider issues that were not preserved in the appellant's opening brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

¶11 WISCONSIN STAT. § 801.02(7)(b) (2009-10)[3] and WIS. ADMIN. CODE § DOC 310.05 (Dec. 2006)[4] require an inmate to exhaust all administrative remedies, regardless whether they might be futile, before commencing a civil action against prison employees. ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶¶1, 9, 22, 245 Wis. 2d 607, 629 N.W.2d 686. Effective exhaustion requires compliance with applicable rules governing the administrative grievance procedure. ***Pozo v. McCaughtry***, 286 F.3d 1022, 1025 (7th Cir. 2002).

¶12 An inmate must appeal a disciplinary decision by the adjustment committee to the warden within ten days after receiving a copy of the decision. WIS. ADMIN. CODE § DOC 303.76(7)(a). The warden's decision is final with respect to the sufficiency of the evidence, but alleged procedural errors may be further appealed through the inmate complaint review system (ICRS). WIS. ADMIN. CODE § DOC 303.76(7)(d).

¶13 Because Heimermann's retaliation claims were procedural in nature, rather than relating to the sufficiency of the evidence, the administrative decisions on the conduct reports were not final with respect to those claims. Heimermann needed to raise them in an ICRS complaint, and, although he filed an ICRS complaint, he failed to timely follow through with that procedure. Therefore, the claims were properly dismissed for failure to adequately exhaust administrative remedies.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

Failure-to-Protect Claims

¶14 Claims of failure to protect an inmate are rooted in the Eighth Amendment's prohibition against cruel and unusual punishment. ***Brown v. Budz***, 398 F.3d 904, 909 (7th Cir. 2005) (citation omitted). To prevail, an inmate must establish that: (1) he is incarcerated under "conditions posing a substantial risk of serious harm"; and (2) prison officials acted with "deliberate indifference" to that risk. ***Id.*** (citation omitted). State officials may also violate a person's civil rights by affirmative action that "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." ***Reed v. Gardner***, 986 F.2d 1122, 1126 (7th Cir. 1993).

¶15 As threshold matters, Heimermann contends that the circuit court improperly ignored his summary judgment materials relating to this issue, and that he should have been granted a continuance to obtain additional discovery. However, Heimermann's summary judgment materials were in the form of a "verified complaint." While that may be, as Heimermann contends, permitted in federal practice, it does not conform to the Wisconsin statute, which requires affidavits, depositions, or answers to interrogatories. *See* WIS. STAT. § 802.08(2) & (3). The circuit court had discretion to set discovery deadlines under WIS. STAT. § 802.10(3)(d) in order to control the pace of the litigation, and Heimermann has not persuaded us that the circuit court's deadlines were unreasonable or that any additional discovery would have altered the outcome of the summary judgment motion.

¶16 On the merits, Heimermann argues that the circuit court improperly focused on the deliberate indifference requirement—involving the prison officials' reaction to Heimermann's fears for his safety—instead of on the affirmative acts

prison officials took in using him as a confidential informant that placed him at risk. This argument fails to recognize that the creation-of-danger theory acts to create an affirmative duty to protect in a *non-custodial* context. ***Reed***, 986 F.2d at 1126. Here, prison officials already had a duty to protect Heimermann because he was in their custody, regardless whether they also helped create additional danger for him or not. Therefore, the circuit court properly analyzed Heimermann's Eighth Amendment claims under the standard of deliberate indifference to a substantial risk of serious harm.

¶17 Heimermann also complains that the circuit court viewed the fact that prison officials treated him for mental health problems as evidence that they were not deliberately indifferent to his risk of psychological harm, instead of evidence that he was in fact suffering psychological harm. However, we agree with the circuit court that Heimermann's subjective fears for his safety were insufficient to establish an objective reason to believe that he would actually be at substantial risk of serious harm from other inmates by being placed in a double cell in the general population several years after his involvement in the investigation of the prison guard. There is nothing in the summary judgment materials to suggest that any of the inmates with whom the prison officials would have placed Heimermann in a double cell had any propensity toward violence or specific animosity toward him or had made any actual threats.

Patent and Business Interference Claims

¶18 Heimermann claims that prison officials violated his First and Fourteenth Amendment rights by "interfering" with his ability to process a patent application and engage in a business based upon development of that patent. The "interference" Heimermann refers to was a series of three conduct reports finding

him guilty of violating a prison rule against "enterprises and fraud." However, we have already dealt with variations of these same constitutional claims on prior appeals dealing with the same conduct reports. *See* ***State ex rel. Heimermann v. Thurmer***, Nos. 2008AP2682-2684, unpublished slip op. (WI App June 24, 2010); ***State ex rel. Heimermann v. Thurmer***, No. 2008AP2903, unpublished slip op. (WI App Nov. 10, 2009). Suffice it to say that nothing has altered our opinion that prison officials were restricting Heimermann's attempts to start a business based upon a patent, not his ability to obtain a patent, and that it is constitutionally permissible to restrict a prisoner's business activity.

Amendment of the Complaint

¶19 Finally, Heimermann contends that the circuit court erred in refusing to allow him to amend his complaint. However, we are satisfied that the denial was appropriate, considering that the action had already been pending for three years and the additional claims Heimermann sought to add were substantially similar to claims the circuit court had already dismissed.

CONCLUSION

¶20 The orders of the circuit court are affirmed. We remand with directions that the final judgment be modified to explicitly state that the complaint is dismissed with prejudice only with respect to the non-***Heck*** claims.

By the Court.—Orders affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.