

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 21 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRADLEY WILLIAM MONICAL,

Plaintiff-Appellant,

v.

JEREMY M. NOFZIGER; R. FOSS; CRAIG
PRINS; CHERYL LENEX; J.
ROCHESTER; JUDY GILMORE;
MICHEAL GOWER; TAYLOR; JOHN
DOE, 1-3,

Defendants-Appellees.

No. 21-35861

D.C. No. 6:18-cv-02214-YY

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Youlee Yim You, Magistrate Judge, Presiding**

Submitted March 14, 2023***

Before: SILVERMAN, SUNG, and SANCHEZ, Circuit Judges.

Oregon state prisoner Bradley William Monical appeals pro se from the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

district court's summary judgment and dismissal order in his 42 U.S.C. § 1983 action alleging equal protection, conditions-of-confinement, access-to-courts, First Amendment retaliation, and due process claims. We review de novo. *Gordon v. County of Orange*, 888 F.3d 1118, 1122 (9th Cir. 2018) (summary judgment); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We affirm in part, reverse in part, and remand.

The district court properly granted summary judgment on Monical's due process claims relating to the March 16, 2017 disciplinary hearing because Monical failed to raise a genuine dispute of material fact as to whether defendants failed to afford him all the process that he was due. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985) (requirements of due process are satisfied if "some evidence" supports disciplinary decision); *Wolff v. McDonnell*, 418 U.S. 539, 563-71 (1974) (setting forth due process requirements in prison disciplinary proceedings and explaining that prison authorities have discretion "to keep the hearing within reasonable limits," including refusing to call witnesses, "whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases").

The district court did not abuse its discretion by granting defendants' motion to stay discovery pending the outcome of the summary judgment motion because Monical did not demonstrate how his failure to obtain discovery resulted in "actual and substantial prejudice." *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)

(setting forth standard of review for district court's discovery rulings, and explaining that the district court's discretion to deny discovery "will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice" (citation and internal quotation marks omitted)).

We reject as unsupported by the record Monical's contention that his requests for admission were deemed admitted.

The district court properly dismissed Monical's access-to-courts and equal protection claims, and his due process claims regarding the January 2, 2017 disciplinary hearing and administrative segregation, because Monical failed to allege facts sufficient to state a plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (explaining that although pro se pleadings are construed liberally, a plaintiff must allege facts sufficient to state a plausible claim); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (equal protection "class of one" claim requires alleging that plaintiff "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"); *Superintendent*, 472 U.S. at 455 (requirements of due process are satisfied if "some evidence" supports the disciplinary decision); *Wolff*, 418 U.S. at 564-71 (prison disciplinary hearing due process requirements); *Frank v. Schultz*, 808 F.3d 762, 764 (9th Cir. 2015) (administrative reversal may cure due process violations); *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (a

failure to show that a non-frivolous legal claim has been frustrated is fatal to an access-to-courts claim); *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) (setting forth requirements for equal protection discrimination claim based on membership in a protected class); *Toussaint v. McCarthy*, 801 F.2d 1080, 1100-01 (9th Cir. 1986) (requirements for placement in administrative segregation), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

The district court dismissed Monical's conditions-of-confinement claim at the screening stage for failure to state a plausible claim. However, Monical alleged that, despite requests for appropriate footwear, he was provided only foam shower shoes two sizes too large, which limited his ability to exercise outdoors and caused injuries. Liberally construed, these allegations are "sufficient to warrant ordering [defendants] to file an answer." *Wilhelm v. Rotman*, 680 F.3d 1113, 1116 (9th Cir. 2016); *see also Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (explaining that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise").

The district court also dismissed Monical's First Amendment retaliation claim at the screening stage for failure to state a plausible claim. However, Monical alleged that, after he filed a grievance against defendant Rochester for

failing to provide enough paper for pleadings, Rochester instructed prison officials to toss his cell, and those officials read his legal papers, destroyed all of his case files, threw his folders into the hallway, and mixed his legal papers together, tearing some. After the search, those officials told him: “that will teach you about your rights to paper” Monical alleged that this incident was intended to dissuade prisoners from filing grievances about the denial of paper, and that it prevented him from filing future requests for paper out of fear of reprisals. Liberally construed, these allegations are also “sufficient to warrant ordering [defendants] to file an answer.” *Wilhelm*, 680 F.3d at 1116; *see also Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (setting forth elements of a First Amendment retaliation claim and noting that the relevant question is whether defendants’ actions would have chilled “a person of ordinary firmness from future First Amendment activities”).

In sum, we affirm summary judgment and the dismissal of Monical’s access-to-courts, equal protection, and due process claims, reverse the dismissal of Monical’s conditions-of-confinement and First Amendment retaliation claims, and remand for further proceedings.

Monical’s motion for appointment of counsel is denied.

The parties will bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MOLLY C. DWYER, CLERK
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BRADLEY WILLIAM MONICAL,

Plaintiff-Appellant,

v.

JEREMY M. NOFZIGER; et al.,

Defendants-Appellees.

No. 21-35861

D.C. No. 6:18-cv-02214-YY
District of Oregon,
Eugene

ORDER

Before: SILVERMAN, SUNG, and SANCHEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Monical's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 35) are denied.

No further filings will be entertained in this closed case.

Appendix B – Monical v. Nofziger

2021 WL 4491711

Only the Westlaw citation is currently available.
United States District Court, D. Oregon,
Eugene Division.

Bradley W. **MONICAL**, Plaintiff,

v.

Jeremy NOFZIGER and Craig Prins, Defendants.

Case No. **6:18-cv-02214-YY**
Signed 09/30/2021

Attorneys and Law Firms

Bradley W. **Monical**, Salem, OR, Pro Se.

Shannon M. Vincent, Oregon Department of Justice, Salem, OR, for Defendants.

OPINION AND ORDER

YOU, Magistrate Judge

I Pro se* plaintiff Bradley **Monical (“**Monical**”), an adult in custody (“AIC”) at the Oregon Department of Corrections (“ODOC”), brings this 42 U.S.C. § 1983 suit, alleging that defendants subjected him to a constitutionally deficient disciplinary process. Plaintiff originally commenced this action against various defendants; only defendants Jeremy Nofziger and Craig Prins (“defendants”) remain.¹

The parties have filed cross-motions for summary judgment (ECF 45, 65). As part of **Monical's** response to defendants' motion for summary judgment (ECF 63), he moves to strike portions of defendants' motion for summary judgment and the Declaration of Jeremy Nofziger (ECF 46).

For the reasons discussed below, defendants' motion for summary judgment (ECF 45) is GRANTED, **Monical's** motion for summary judgment (ECF 65) and motion to strike (ECF 63) are DENIED, and this case is dismissed with prejudice.

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the

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absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party does so, the nonmoving party must “go beyond the pleadings” and “designate ‘specific facts showing that there is a genuine issue for trial.’ ” *Id.* at 342 (citing FED. R. CIV. P. 56(e)).

In determining what facts are material, the court considers the underlying substantive law regarding the claims. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Otherwise stated, only disputes over facts that might affect the outcome of the suit preclude the entry of summary judgment. *Id.* A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49. A “scintilla of evidence” or “evidence that is merely colorable or not significantly probative” is insufficient to create a genuine issue of material fact. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The court “does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial.” *Balint v. Cason City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). “Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party.” *Addisu*, 198 F.3d at 1134.

II. Factual History

*2 On December 16, 2015, **Monical** was transferred from Eastern Oregon Correctional Institution to the Marion County Jail for court. Nofziger Decl. ¶ 4 & Ex. 2, ECF 46. On November 21, 2016, **Monical** and Brian Eller, a Marion County AIC, “attacked a deputy sheriff—choking her to the point that she began to black out and believed death was imminent.” *Id.* After **Monical** returned to ODOC custody, he received a misconduct report for a Rule 4.05 (Disturbance) violation. *Id.*

On March 16, 2017, defendant Nofziger, who is a hearings officer, conducted **Monical's** disciplinary hearing. *Id.* ¶ 7 & Ex. 2. After considering the evidence, Nofziger found that **Monical** had violated Rule 4.05 (Disturbance), a Level I rule violation. *Id.* ¶ 10 & Ex. 2. Nofziger recommended 120 days disciplinary segregation, “plus a 50% upward deviation—an additional 60 days—because the degree of harm attributed to the violation was significantly greater than typical for such a misconduct.” *Id.* ¶ 10 & Ex. 2. Nofziger additionally recommended a \$200 fine, which was suspended pending no major rule violations and

which **Monical** never paid. *Id.* **Monical** also received a loss of privileges for 28 days, which was suspended pending no major rule violations. *Id.*, Ex. 2, at 4.

On March 20, 2017, the Functional Unit manager approved Nofziger's recommendations. *Id.* ¶ 11 & Ex. 2. **Monical** requested administrative review, and on May 17, 2017, defendant Inspector General Prins determined (1) there was substantial compliance with Oregon Administrative Rules, Chapter 291, Division 105, (2) the hearings officer's finding was based upon a preponderance of the evidence, and (3) the sanction imposed was in accordance with the provisions set forth in the administrative rules. *Id.* ¶ 12 & Ex. 5.

III. Defendants' Motion For Summary Judgment

Monical alleges two due process claims.² In “Due Process Violation #3,” **Monical** alleges Nofziger “had no legal authority under the law” to “punish[] [him] for violations of ODOC rules while at [Marion C]ounty jail.” Am. Compl. 22, ECF 13. He also claims Nofziger violated his due process rights by denying his requests for witnesses, evidence, and an investigation, and by misleading him about the use of confidential informants. *Id.* at 21-22. **Monical** contends that Prins violated his due process rights when he “chose to ignore the law” on administrative review. *Id.* at 22.

In “Due Process Violation #4,” **Monical** alleges Prins' job was to ensure that subordinates followed the law and complied with due process requirements, but claims that Prins allowed Nofziger to hold an illegal hearing and violate his due process rights. *Id.* **Monical** alleges he was subjected to sanction as a result of Prins' actions, *id.*, and seeks \$87,750 in damages. *Id.* at 32-33. Defendants contend they are entitled to summary judgment because: (1) **Monical's** due process claims fail as a matter of law; (2) they provided **Monical** with all the process that was due; and (3) they are entitled to qualified immunity from damages. Def. Mot. 2, ECF 45.

A. Legal Authority To Discipline For Rule 4.05 Violation

*3 As a preliminary matter, **Monical** alleges that defendants improperly disciplined him for violating Rule 4.05 because a violation under that rule can only occur at an ODOC facility and he was in the physical custody of Marion County at the time of incident. Am. Compl. 8-9, 22, 23, ECF 13. **Monical** relies on O.R.S. 135.767, which provides for “[t]ransportation of an adult in custody,” and states that “the court wherein the adult in custody is charged with the commission of a crime *may* ... issue an order directing the Director of Department of Corrections ... to

surrender the adult in custody to the sheriff of the county where the adult in custody is to be tried.” (Emphasis added).

“May” is a permissive term. *See Associated Oregon Veterans v. Dep't of Veterans' Affairs*, 70 Or. App. 70, 74 (1984) (recognizing that “may” is a permissive term, while “shall” is construed as a mandatory term). Moreover, plaintiff does not allege, nor is there any evidence, to support that the Marion County Circuit Court issued such an order. *See Nofziger Decl.* ¶ 4 & Ex. 3, ECF 46 (“During this time, [**Monical**] remained a DOC AIC[.]”).

Furthermore, under O.A.R. 291-105-0015(4)(e), a Rule 4.05 violation occurs if an AIC “disrupts the orderly administration of or poses a direct threat to the security of a facility.” (Emphasis added). *Nofziger Decl.*, Ex. 1, ECF 46; **Monical Decl.**, Att. 8, ECF 64. Otherwise stated, Rule 4.05 does not require that the facility where the offense occurs is an ODOC facility. Thus, there was no legal error in disciplining **Monical** under Rule 4.05.

B. Due Process Analysis

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty or property without due process of law.” U.S. Const. amend XIV, § 1. “Due process ‘is a flexible concept that varies with the particular situation.’ ” *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015) (quoting *Zinerman v. Burch*, 494 U.S. 113, 127 (1990)).

Defendants move for summary judgment on the basis that **Monical's** due process claims fail as a matter of law because (1) his claims are not rooted in any protected liberty interest, and (2) he does not have a due process right to administrative review. Def. Mot. 6-10, ECF 45.

1. Protected Liberty Interest

Defendants argue that **Monical's** sanctions of 180 days in the disciplinary segregation unit (“DSU”) and loss of privileges for 28 days are not deprivations that amount to a “protected liberty interest”—a prerequisite for a due process claim. Def. Mot. 7-9, ECF 45.

AICs are entitled to certain due process protections when subject to disciplinary sanctions. *Wolff v. McDonnell*, 418 U.S. 539, 564-71 (1974). However, for the AIC's segregation to constitute a deprivation of due process, the AIC must establish the segregation “present[s] the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.” *Sandin v. Connor*, 515 U.S. 472, 486 (1995). Assignment to administrative segregation without other factors present does not implicate a protected liberty interest. *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003); *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir.

2000) (prisoner has no cognizable due process claim because he has no liberty interest in being free from disciplinary segregation).

The court considers three factors in determining whether a condition is atypical and significant:

(1) whether the challenged condition “mirrored those conditions imposed upon inmates in administrative segregation and protective custody,” and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will invariably affect the duration of the prisoner's sentence.

*4 *Sandin*, 515 U.S. at 486-87 (citation omitted).

As to the first and third factors, **Monical** does not allege that he experienced conditions different than other AICs who are housed in DSU or that his segregation extended the duration of his sentence. *Smith v. Powell*, No. 2:14-CV-01725-SB, 2016 WL 11384325, at *5 (D. Or. Jan. 25, 2016), *report and recommendation adopted*, 2016 WL 1183086 (D. Or. Mar. 28, 2016); *see also LaFleuer v. Nooth*, No. 2:12-cv-00637-SI, 2014 WL 1236138, at *4 (D. Or. March 25, 2014) (finding no issues of fact regarding conditions of segregation or length of sentence). Rather, **Monical's** due process claims are based on the second factor, *i.e.*, “whether the duration of his stay in the DSU and the degree of restraint imposed caused him a significant and atypical hardship compared to ordinary prison life.” *Smith v. Powell*, 2016 WL 11384325, at *5; *see* Am. Compl. 21-23, ECF 13.

Courts have recognized “there is no bright-line rule” as to the duration of segregation that amounts to a protected liberty interest. *Smith*, 2016 WL 11384325, at *5 (collecting cases); *see Brown*, 751 F.3d at 988 (holding indeterminate 27-month (810-day) stay in segregation without meaningful review implicated a liberty interest); *Williams v. Simon*, 2:13-cv-00950-AA, 2018 WL 1585785, at *6 (D. Or. Mar. 30, 2018) (holding 19-month fixed and irreducible stay in IMU may create liberty interest, but prison officials were entitled to qualified immunity); *Williams v. Foote*, No. CV08-2838-CJC (JTL), 2009 WL 1520029, at *10 (C.D. Cal. May 28, 2009) (holding 701-day duration of segregation, alone, did not give rise to a liberty interest, especially given plaintiff was placed in segregated housing pending investigation for attempted murder of a peace officer). In *White v. Taylor*, the court held that a 180-day stay in DSU and a 28-day loss of yard privileges did not implicate the AIC's liberty interests. No. 2:17-CV-00981-AC, 2020 WL 3964996, at *6 (D. Or. July 13, 2020) (citing *Smith*, 2016 WL

11384325, at *5 (finding 120 days in DSU did not implicate a protected liberty interest)); *see also Barboza v. Kelsey*, No. CV 03-3855 AHM AJW, 2011 WL 6091079, at *12 (C.D. Cal. Mar. 18, 2011), *report and recommendation adopted*, 2011 WL 6090154 (C.D. Cal. Dec. 5, 2011) (four months); *Rodgers v. Reynaga*, CV 1-06-1083-JAT, 2009 WL 62130, at *2 (E.D. Cal. January 8, 2009) (five months). Similarly, here, the 180-day duration of **Monical's** disciplinary segregation and loss of privileges for 28 days does not implicate a protected liberty interest.

Because **Monical** has failed to establish that his segregation “present[ed] the type of atypical, significant deprivation in which a State might conceivably create a liberty interest,” his due process rights were not violated. *Serrano*, 345 F.3d at 1078.

2. Administrative Review

As the court has already determined that **Monical's** sanction did not implicate a protected liberty interest, it is unnecessary to conduct any further analysis. *See Resnick*, 213 F.3d at 447, 449 (where there is no protected liberty interest, there is no due process claim). Nevertheless, “[t]he Due Process Clause does not guarantee a prisoner the right to an administrative appeal from a disciplinary decision[.]” *Reed v. Washington*, No. C09-5677BHS, 2010 WL 2330380, at *3 (W.D. Wash. May 10, 2010), *report and recommendation adopted*, 2010 WL 2342539 (W.D. Wash. June 7, 2010) (citing 16C C.J.S. *Constitutional Law* § 1776 (2021)).

*5 The OARs do not provide a right to an appeal of disciplinary proceedings. *See* OAR 291-105-005 through 291-105-0100. The OARs allow the inspector general to vacate any part of a disciplinary order or reopen the disciplinary hearing in the interest of justice. OAR 291-1050100. This, however, is not a right to which a prisoner is entitled. *See id.* (“The Inspector General ... *may*, in the interest of justice, vacate all or part of a final disciplinary order or withdraw the order and direct that a disciplinary hearing be reopened for consideration of new evidence.”) (emphasis added).

Woodroffe v. Oregon, No. 2:12-CV-00124-SI, 2015 WL 2125908, at *8 (D. Or. May 6, 2015), *aff'd sub nom. Woodroffe v. Kulongoski*, 745 F. App'x 728 (9th Cir. 2018) (emphasis in original).

Therefore, **Monical** suffered no due process violation on the basis that his administrative appeal was denied.

3. Defendants provided Monical with all Process that was due.

Even if **Monical** could show that his administrative segregation in the DSU implicated a protected liberty interest, his due process claims still fail because the evidence establishes that defendants provided **Monical** with all the process that was due.

a. Applicable Law

“Under the Fourteenth Amendment's Due Process Clause, a prisoner is entitled to certain due process protections when he is charged with a disciplinary violation.” *Serrano*, 345 F.3d at 1077 (citing *Wolff*, 418 U.S. at 564-71). But “[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen,” and though AICs retain constitutional protections of religious freedom, access to the court, equal protection, and substantive due process, “[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.” *Wolff*, 418 U.S. at 555-56.

In *Wolff*, the Supreme Court discussed the due process requirements of a prison disciplinary hearing. First, prison officials must provide the AIC with written notice at least twenty-four hours before the hearing. *Id.* at 564. This notice must include the charges against the AIC, a written description of the evidence on which the fact finder relies, and the reason for taking disciplinary action. *Id.* Second, prison officials should allow the AIC “to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.” *Id.* at 566. Third, if the AIC is illiterate, or if the complexity of the case makes comprehension unlikely, prison officials should allow the AIC to “seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff.” *Id.* at 570. Additionally, prison officials must have “some evidence” to support their ultimate disciplinary decision. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985).

b. Analysis**(1) Investigation**

Monical claims that defendants denied his right to an investigation. *See* Am. Compl. 22, ECF 13. The “Disciplinary Hearing Finding of Fact, Conclusion, and Order” states: “Inmate’s request for an investigation was granted in part and denied in part.” **Monical** Decl., Att. 4, ECF 64. Regardless, “pursuant to *Wolff*, procedural due process does not require an inmate to be provided with an independent investigation.” *Jones v. Taylor*, No. 2:17-CV-01031-BR, 2018 WL 4473578, at *8 (D. Or. Sept. 18, 2018); *see also Whitford v. Boglino*, 63 F.3d 527, 532 (7th Cir. 1995) (holding that “even if [the plaintiff] had a clear right to a fair hearing, he has no clearly identifiable constitutional right to an ‘adequate investigation’ of the insulting behavior charges”). Thus, **Monical’s** procedural due-process rights were not denied in this regard.

(2) Witnesses

*6 **Monical** alleges defendants violated his procedural due process rights by denying him witnesses. Am. Compl. 22, ECF 13.

As *Wolff* makes clear, the right of an AIC to call witnesses and present evidence is not unlimited. *See Wolff*, 418 U.S. at 566-67; *see Booth v. Stewart*, No. CIV.02-2440 MHM DKD, 2005 WL 2449956, at *6 (D. Ariz. Sept. 29, 2005) (holding that “[a] prison disciplinary hearing officer’s decision that an inmate’s request to call witnesses may properly be denied as irrelevant, unnecessary, unduly prolonging the hearing, or jeopardizing of prison safety, is entitled to deference”).

The Disciplinary Hearing Findings of Fact, Conclusions, and Order states that **Monical’s** request for witnesses was denied on the basis that the proposed testimony was not relevant to any viable defense:

Inmate **Monical** requested several Marion County Deputies and Marion County inmates be called as witnesses in this case. Inmate **Monical** provided a list of questions to be posed to the witnesses. This list of witnesses and questions to be posed were reviewed with

Inmate **Monical** on the record during his hearing. Inmate **Monical** failed to provide the Hearings Officer with sufficient evidence to conclude the results of the witness testimony would constitute a defense to the charges or substantially lessen the severity of the violation. This request was denied.

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Nofziger Decl., Ex. 2, ECF 46; *see also id.*, Ex. 4, ECF 46. Indeed, **Monical** request to call corrections officers as witnesses to ask questions such as whether their use of cell phones during work hours constituted theft of taxpayer money, how many AICs had died on their shifts, and whether they were in sexual relationships with AICs was not relevant. Thus, there is no due process violation.

(3) Evidence

Monical alleges defendants violated his procedural due process rights by denying him the opportunity to present evidence. *See* Am. Compl. 3, 22, ECF 13.

“While an inmate has the right to present evidence in his defense, the [Supreme] Court [in *Wolff*] found that an inmate does not have the right to confidential, irrelevant, or unnecessary information.” *Graves v. Knowles*, 231 F. App'x 670, 672 (9th Cir. 2007) (citing *Wolff*, 418 U.S. at 566)).

The Disciplinary Hearing Findings of Fact, Conclusions, and Order state that **Monical** was allowed to present photographs that were taken by prison staff, but photographs taken by the Marion County deputies were part of an active criminal investigation and ODOC did not have authority to subpoena those photos:

Inmate **Monical** requested pictures taken by DSU staff at OSP be provided as evidence. This request was granted. Inmate **Monical** arrived in DOC custody on November 23, 2016 and photographs were taken. These photographs show bruising to the left bicep and right forearm of Inmate **Monical**. Inmate **Monical** also requested the photographs taken by county deputies be provided. These photographs are the property of Marion County and are part of an active criminal investigation. The Department of Corrections does not have authority to subpoena these pictures. This request was denied as photographs from DOC were already provided.

*7 Nofziger Decl., Ex. 2, ECF 46. Where defendants were not in possession of the photographs **Monical** wished to present as evidence, there cannot be a due process violation on that basis.

(4) Confidential Information

Monical argues that Nofziger misled him about the contents of a confidential information packet. Pl. Resp. 10, ECF 63. A close reading of the evidence of record, however, does not indicate any evidence to support **Monical's** contention. Nofziger Decl., Ex. 4, at 14-17, ECF 46; *see also id.*, Ex. 3.

Regardless, failure to provide **Monical** with the confidential information used against him at his hearing does not implicate a due process interest. *See Cervantes v. Adams*, No. 1:11-CV-00387-BAM PC, 2012 WL 844750, at *7 (E.D. Cal. Mar. 12, 2012). Nor does due process require the disclosure of the identity of confidential informants to an AIC. *Wolff*, 418 U.S. at 568-69.

Thus, **Monical's** due process rights were not violated.

(5) The Decision

Monical argues that Nofziger improperly found him guilty of Rule 4.05 (Disturbance). Am. Compl. 22, ECF 13.

A disciplinary decision satisfies due process so long as it is supported by “some evidence” that has “some indicia of reliability.” *Hill*, 472 U.S. at 455; *Toussaint v. McCarthy*, 926 F.2d 800, 802-03 (9th Cir. 1990).

Rule 4.05 provides:

An inmate commits a Disturbance if he/she advocates, incites, creates, engages in, maintains or promotes a situation characterized by unruly, noisy, or violent conduct or unauthorized group activity, which disrupts the orderly administration of or poses a direct threat to the security of a facility, facility programs or the safety of DOC or OCE employees or other persons.

O.A.R. 291-105-0015(4)(e).

Nofziger relied on **Monical's** admission that he was out of his cell and on the tier at the time of the incident; documentation—including “believable” confidential information—that “show[ed] that [**Monical** and Eller] were in a concealed location as [the deputy who was assaulted] entered the section to conduct a head count of the inmates in the unit”; and that the additional staff who arrived to help the deputy “order[ed] ... **Monical** to the ground at Taser point.” *See* Nofziger Decl., ¶¶ 4, 8 & Ex. 2, 3, ECF 46. Thus, there is “some evidence” in the record supporting **Monical's** discipline.

In sum, **Monical** has not raised a cognizable due process claim arising from his time in DSU and loss of privileges, but even assuming that he had raised such a claim, he has been afforded all the process that was due. Accordingly, defendants are entitled to summary judgment on the merits.

C. **Monical's** Motion to Strike

Monical seeks to strike any references to his convictions. Resp. 5, ECF 63. The court did not consider **Monical's** convictions in resolving this motion, so that motion is moot. **Monical** also seeks to strike paragraph 4 of Nofziger's declaration based on lack of personal knowledge. There

is no suggestion that Nofziger claims these facts are based on personal knowledge. Rather, paragraph 4 summarizes Nofziger's findings of fact that formed the basis for concluding **Monical** violated Rule 4.05. *See* Knofziger Decl., Ex. 2, ECF 46.

Finally, **Monical** seeks to strike Exhibit 3, which confidential information that is attached to Nofziger's declaration and filed under seal. **Monical** complains that "the court cannot accept evidence in a summary judgment that is ... [in]accessible to the plaintiff and which should have been made available to plaintiff as evidence as his hearing[.]" *Id.* at 5-6 (citing Def. Mot. 2, 3, ECF 45; Nofziger Decl., ECF 46; *id.* ¶ 8 & Ex. 3). To the contrary, this confidential information was properly considered by Nofziger and is properly part of the record in this case. *See, supra*, Sect. III.B.3.b(4).

D. Qualified Immunity

*8 **Monical** has failed to raise a genuine issue of fact as to whether defendants violated his constitutional rights. Thus, the court need not address defendants' qualified immunity defense. *See* Monro v. Kelly, No. 6:17-CV-01650-SB, 2019 WL 7197605, at *5 (D. Or. Sept. 13, 2019), *report and recommendation adopted*, No. 6:17-CV-1650-SB, 2019 WL 7194566 (D. Or. Dec. 26, 2019) (concluding that because "Monro has failed to raise a genuine issue of fact as to whether Defendants violated his constitutional rights[,] ... the Court need not address Defendants' qualified immunity defense").

IV. Monical's Motion for Summary Judgment (ECF 65)

Monical's due process claims fail on the merits and defendants' motion disposes of all claims. Therefore, **Monical's** cross-motion for summary judgment (ECF 65) must be denied.

ORDER

Defendants' motion for summary judgment (ECF 45) is GRANTED, and **Monical's** cross-motion for summary judgment (ECF 65) is DENIED. **Monical's** motion to strike (ECF 63) is DENIED. Judgment shall be entered on behalf of defendants, and this case is DISMISSED with prejudice.

All Citations

Slip Copy, 2021 WL 4491711

Footnotes

Appendix B – Monical v. Nofziger

The remaining parties have consented to allow a magistrate judge to enter final orders and judgment in this case in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). ECF 21.

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Monical originally alleged four due process claims. However, the court held that “Plaintiff’s Amended Complaint does not state a cognizable due process claim related to the January 3, 2017, disciplinary hearing (“Due Process Violation #1”) or the March 6, 2017, placement in administrative segregation (“Due Process Violation #2”),” and those claims were dismissed. Order, ECF 15; *see also* Order, ECF 7 (describing how challenges to a disciplinary proceeding that was subsequently overturned and placement in administrative and disciplinary segregation did not amount to due process violations).