UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 19 2023

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

ENRIQUE ZACARIAS DIAZ,

Plaintiff - Appellant,

v.

OREGON DEPARTMENT OF CORRECTIONS, et al.,

Defendants - Appellees.

No. 23-1938

D.C. No.
2:22-cv-00796-YY
District of Oregon, Pendleton

ORDER

Before: RAWLINSON, BYBEE, and HURWITZ, Circuit Judges.

A review of the record and appellant's response to this court's August 29, 2023 order to show cause demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, served on August 14, 2023 and filed on August 16, 2023, was not filed or delivered to prison officials within 30 days after the district court's judgment entered on July 7, 2023. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED.

Appendix A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ENRIQUE ZACARIAS DIAZ, Plaintiff, v. **S. WASHBURN and H. NEVIL,** Defendants.	Case No. 2:22-cv-00796-YY **JUDGMENT**

IMMERGUT, District Judge.

Based on this Court's Order, ECF 41, IT IS ADJUDGED that Defendants' Motion for Summary Judgment, ECF 25, is GRANTED. This case is DISMISSED with prejudice

DATED this 7th day of July, 2023.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

HSS Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ENRIQUE ZACARIAS DIAZ, Plaintiff, v. **S. WASHBURN and H. NEVIL,** Defendants.	Case No. 2:22-cv-00796-YY **ORDER ADOPTING F&R**

Enrique Zacarias Diaz, Oregon State Correctional Institution, 3405 Deer Park Drive SE Salem, OR 97310. Pro se.

Dylan J. Hallman, Oregon Department of Justice, 1162 Court Street NE, Salem, OR 97301. Attorney for Defendants.

IMMERGUT, District Judge.

On May 30, 2023, Magistrate Youlee Yim You issued her Findings and Recommendation ("F&R"), ECF 32, recommending that Defendants S. Washburn and H. Nevil's (collectively, "Defendants") Motion for Summary Judgment, ECF 25, be granted. Plaintiff filed objections on June 9, 2023, ECF 36,[1] to which Defendants timely responded, ECF 40. This Court has reviewed

[1] Plaintiff also filed objections to Defendants' Reply to Motion for Summary Judgment on June 9, 2023. ECF 37; *see also* ECF 29. As Plaintiff's filing is untimely, *see* ECF 30, this Court does not consider these objections in ruling on Judge You's F&R.

de novo the portions of the F&R to which Plaintiff objected. This Court accepts Judge You's conclusions and ADOPTS Judge You's F&R in full.

STANDARDS

Under the Federal Magistrates Act ("Act"), as amended, the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). If a party objects to a magistrate judge's F&R, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* But the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149–50 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Nevertheless, the Act "does not preclude further review by the district judge, sua sponte" whether de novo or under another standard. *Thomas*, 474 U.S. at 154.

CONCLUSION

This Court has carefully reviewed de novo the portions of Judge You's F&R to which Plaintiff objected. Judge You's F&R, ECF 32, is adopted in full. This Court GRANTS Defendants' Motion for Summary Judgment, ECF 25. This case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 7th day of July, 2023.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

ENRIQUE DIAZ,

Plaintiff,

v.

S. WASHBURN and H. NEVIL,

Defendants.

Case No. 2:22-CV-0796-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge.

FINDINGS

Pro se plaintiff Enrique Diaz, an adult in the custody of Oregon Department of Corrections ("ODOC"), brings this civil rights action under 42 U.S.C. § 1983 against two ODOC employees, S. Washburn and H. Nevil. Plaintiff alleges that defendants deprived him of his property without due process of law in violation of his Fourteenth Amendment rights.

Defendants have filed a motion for summary judgment (ECF 25) in which they contend they provided plaintiff with all of the process that he is due. For the reasons discussed below, defendants' motion for summary judgment (ECF 25) should be GRANTED and this case should be dismissed with prejudice.

I. Legal Standards

A. Summary Judgment

Under Federal Rule of Civil Procedure 56(a), "[t]he 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 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 324 (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. Carson 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 (citation omitted).

B. Pro Se Pleadings

Federal courts hold a pro se litigant's pleadings to "less stringent standards than formal pleadings drafted by lawyers." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987). "Although . . . pro se litigant[s] . . . may be entitled to great leeway when the court construes [their] pleadings, those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995). Moreover, on a motion for summary judgment, a pro se party involved in civil litigation "should not be treated more favorably than parties with attorneys of record." *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986). "It is not the district court's job to sift through the record to find admissible evidence in support of a non-moving party's case." *Claar v. Burlington N.R.R.*, 29 F.3d 499, 504 (9th Cir. 1994) (quoting *Celotex*, 477 U.S. at 324). Simply put, in areas "where [a] plaintiff does not identify specific evidence in the record to support his assertions, the Court is not required to search for it." *Woodroffe v. Oregon*, No. 2:12-CV-00124-SI, 2015 WL 2125908, at *2 (D. Or. May 6, 2015), *aff'd sub nom. Woodroffe v. Kulongoski*, 745 F. App'x 728 (9th Cir. 2018).

II. Background

Plaintiff's due process claim arises from his previous incarceration as an adult in custody ("AIC") at Eastern Oregon Correctional Institution ("EOCI").[1] Washburn is the former superintendent of EOCI, and Nevil is a hearings officer at EOCI. Am. Compl. 2, ECF 8; Mot. 1, ECF 25 (noting each defendant's employment status). The following facts are not in dispute:

On December 14, 2021, EOCI issued plaintiff a misconduct report for assaulting another AIC, Victor Almazan. *See* Nevil Decl., Ex. 1 at 4, ECF 26. The misconduct report stated that

[1] Plaintiff is currently incarcerated at Oregon State Correctional Institution.

"[the] assault resulted in an outside medical trip, with the costs to be determined." *Id.* On December 21, 2021, Nevil presided over plaintiff's disciplinary hearing regarding the assault of AIC Almazan. *Id.* at ¶ 5. Nevil explains, and the record shows, that plaintiff attended the hearing and "confirmed that he had received a copy of the misconduct report, notice of hearing, notice of rights in a hearing, and rules of prohibited conduct." *Id.* at ¶ 6; *Id.*, Ex. 1 at 1. Plaintiff entered a plea of "admit" regarding three charges against him: Assault I, Disrespect I, and Disobedience of an Order I. *Id.*, Ex. 1, at 1. During the disciplinary hearing, Nevil informed plaintiff that he would be responsible for paying restitution "to cover the cost of AIC Almazan's treatment at an outside care facility due to injuries he sustained as a result of the assault." *Id.* at ¶ 8. On December 23, 2021, Nevil issued a "Finding of Fact, Conclusion, and Order" that stated:

> AIC Almazan suffered a serious physical injury when he was assaulted by [plaintiff] which warranted transport to an outside health care facility for treatment. Photographic evidence shows blood all over the area of the fight and AIC Almazan's person due to [plaintiff's] assaultive behavior.

Nevil Decl., Ex. 1 at 1, ECF 26. Plaintiff's sanctions included restitution for "100% cost of care for [AIC] Almazan . . . to be determined." *Id.* at 2.

On February 18, 2022, Corrections Officer K. Hickey served plaintiff with a notice of restitution hearing. *See* Nevil Decl., Ex. 2 at 1, ECF 26. The notice informed plaintiff of the date and time of the hearing and stated, "[t]he restitution amount being considered is $3,769 for cost of outside medical care for AIC Almazan[.]" *Id.* On February 25, 2022, Corrections Officer Alexenko asked plaintiff if he wanted to attend the restitution hearing, and plaintiff declined stating, "No. I'm good." *See* Nevil Decl., Ex. 3 at 1, ECF 26. Plaintiff's response was documented on an "Inmate Refusal to Attend Disciplinary Hearing" form that was witnessed and signed by Corrections Officer Alexenko. *See id.*

On February 25, 2022, Nevil presided over plaintiff's restitution hearing without plaintiff in attendance. Nevil Decl. ¶ 14, ECF 26. Nevil "made a recording stating that [he] had considered evidence regarding the restitution—i.e., the medical bills associated with AIC Almazan's care[.]" *Id.* On the same day, Nevil issued his restitution recommendation in an addendum to his earlier Findings of Fact, Conclusions, and Order. *See* Nevil Decl., Ex. 4 at 1, ECF 26 (Addendum to Findings of Fact, Conclusions, and Order—hereinafter, "restitution order"). Nevil explained:

> [Plaintiff's] case was heard on December 21, 2021, evidence was presented, considered, and a Findings of Fact was made at that time. However, while most of the sanctions were recommended during this hearing, there wasn't information available regarding cost of outside medical care for AIC Almazan[.]
>
> The hearing was reconvened on February 25, 2022, to consider . . . the aforementioned medical costs.

Id. Nevil recommended that "[plaintiff] be assessed costs of restitution for $3,769.55," and Washburn approved the recommendation. *Id.*

On March 1, 2022, plaintiff filed a petition for administrative review challenging the restitution order. *See* Pl.'s Exs., ECF 11 at 14. In his petition, plaintiff asserted that AIC Almazan "was not hurt bad enough for an outside transport to a medical agency." *Id.* Plaintiff alleged "[t]he hearings officer said information wasn't available regarding the cost of outside medical care for [AIC] Almazan," and "[t]hey don't even know if he went on the outside medical trip or just up to regular medical." *Id.* at 15. Assistant Inspector General Jeremy Nofziger denied plaintiff's petition by letter, stating: "The review indicates . . . the finding was based upon a preponderance of the evidence[.]" *Id.* at 16.

On April 1, 2022, ODOC's Central Trust[2] received notice that plaintiff owed $3,769.55 in restitution for AIC Almazan's medical care and assessed plaintiff's trust account for the full amount of the restitution. Culp Decl. ¶ 6, ECF 27. The manager of the Central Trust, B. Culp, explains that plaintiff's trust account carried a balance of only $532.37. *Id.* at ¶ 8. The Central Trust therefore withdrew $532.37 from plaintiff's account and charged his account for "the remaining obligation." *Id.*

Plaintiff brings this action under 42 U.S.C. § 1983 alleging that he was "deprived of [his] property on 4/1/2022 at [EOCI] in which $532.77 was unlawfully taken . . . from [his] inmate prison trust account." Am. Compl. 5, ECF 8. Plaintiff claims that, by issuing the restitution order, defendants denied him due process because "there was no evidence of an outside medical trip as there wasn't any information available regarding the cost of care[.]" *Id.*

III. Discussion

Defendants argue they are entitled to summary judgment because they "provided plaintiff with all the process he was due before requiring him to pay restitution and assessing the funds in his AIC trust account," Mot. 7, ECF 25, and "Nevil set plaintiff's restitution for the amount that ODOC paid for [AIC Almazan's] treatment" at "an outside health care facility." *Id.* at 6.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court defined the contours of an AIC's due process rights at a disciplinary hearing. Pursuant to *Wolff*, an AIC must have (1) "an opportunity to appear before the decision making body," (2) "staff representation if he wishes," (3) "written notice of the charge against him in advance of the hearing," (4)

[2] *See* O.A.R. 291-158-0010(2) (identifying the Central Trust as "[a] unit within the Department of Corrections that is responsible for administering and managing inmate trust accounts; including making authorized transactions consistent with state or federal law in inmate trust accounts and administrative trust accounts").

"conditional opportunity to present witnesses and documentary evidence," and (5) "a written statement of the evidence relied upon and the reasons for the sanction taken." *Brown v. Williams*, No. CIV. 041064CO, 2005 WL 1109690, at *4 (D. Or. May 6, 2005), *report and recommendation adopted* (D. Or. June 9, 2005) (citing *Wolff*, 418 U.S. at 563-73). "Judicial review of a prison disciplinary action is limited to whether the requirements set forth in *Wolff v. McDonnell* were met and whether there is 'some' evidence to support the finding." *Id.* (citing *Superintendent v. Hill*, 472 U.S. 445, 455 (1985)).

The Supreme Court has since clarified that "the requirements of due process are satisfied if some evidence supports the decision of the prison disciplinary board[.]" *Hill*, 472 U.S. at 455. "This standard is met if 'there was some evidence from which the conclusion of the administrative tribunal could be deduced . . . [.]'" *Id.* (citation omitted).

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Id. (citations omitted).

Here, there is no dispute that ODOC officials provided plaintiff with notice of the charges against him, an opportunity to attend his disciplinary hearing and present evidence, and a written statement of Nevil's findings and conclusions. Indeed, the evidence demonstrates that plaintiff attended his disciplinary hearing on December 21, 2021, and "confirmed that he had received a copy of the misconduct report, notice of hearing, notice of rights in a hearing, and rules of prohibited conduct." Nevil Decl. ¶ 6, ECF 26. There is also no dispute that ODOC notified plaintiff regarding the date and time of his restitution hearing and informed him that "the amount being considered is $3,769.55 for cost of outside medical care for AIC Almazan[.]" *Id.*, Ex. 2 at 1. Despite being informed of the hearing and the amount being considered for restitution,

plaintiff declined to attend the restitution hearing on February 25, 2022. *See Id.*, Ex. 3. Thus, there is no issue of material fact that ODOC met the minimal procedural requirements of *Wolff*.

The next question is "'whether there is any evidence in the record that could support the conclusion reached'" by Nevil and Washburn in the restitution order. *Hill*, 472 U.S. at 455-56. Plaintiff challenges the sufficiency of the evidence regarding the restitution amount of $3,769.55 based on a misreading of Nevil's restitution order. Plaintiff argues here—as he did in his petition for administrative review, *see* Pl.'s Exs., ECF 11 at 15—that he "was still charged for the med trip" despite Nevil stating in the restitution order that "there wasn't information available regarding the cost of outside medical care[.]" Diaz Decl. 1, ECF 15.[3] Plaintiff takes Nevil's statement out of context and fails to acknowledge that Nevil made that statement in reference to the lack of information regarding AIC Almazan's medical costs at the disciplinary hearing that took place on December 23, 2021. When Nevil issued the restitution order on February 25, 2022, he referred to the lack of information in December 2021 regarding AIC Almazan's medical costs to explain why plaintiff's disciplinary hearing was "reconvened" in February 2022—i.e., to determine the amount of the restitution based on "the medical bills associated with AIC Almazan's medical care." *See* Nevil Decl. ¶ 14, ECF 26.

Further, there is no question that there is "some evidence from which the conclusion of the administrative tribunal could be deduced[.]" *Hill*, 472 U.S. at 455. First, Corrections Officer S. Hale, who responded to plaintiff's assault of AIC Almazan, reported that "[the] assault resulted in an outside medical trip[.]" Nevil Decl., Ex. 1 at 4, ECF 26. Further, despite plaintiff's impression that AIC Almazan "was not hurt bad enough for an outside transport to a medical

[3] Plaintiff filed no formal response to the motion for summary judgment, *see* n. 4, *infra*, but filed four declarations as well as exhibits in this case before the motion for summary judgment was filed.

agency[,]" Pl.'s Exs., ECF 11 at 14, the Findings of Fact from his December 23, 2021, disciplinary hearing determined that "AIC Almazan suffered a serious physical injury when he was assaulted by [plaintiff] which warranted transport to an outside health care facility for treatment" and referenced photographic evidence showing "blood all over the areas of the fight." Nevil Decl., Ex. 1 at 1, ECF 26. Moreover, Nevil submitted a declaration in which he explains that he "considered . . . the medical bills associated with AIC Almazan's medical care" at the restitution hearing on February 25, 2022. *Id.* at ¶ 14. Therefore, the record clearly demonstrates that "some evidence" supported the restitution order against plaintiff. *See Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987) (emphasizing that "[t]he standard is 'minimally stringent' only requiring '*any* evidence in the record that *could* support the conclusion reached by the disciplinary board'") (citing *Hill*, 472 U.S. at 454-55 (emphasis added in *Cato*)); *see also White v. Taylor*, No. 2:17-CV-00981-AC, 2020 WL 3964996, at *7 and *9 (D. Or. July 13, 2020) (denying the plaintiff's due process challenge to an EOCI disciplinary hearing, emphasizing that "[a] court must defer to prison officials' judgments and cannot substitute its view of the facts presented in a prison disciplinary hearing"—citing *Hill*, 472 U.S. at 455, and finding that "the record readily supports the 'some evidence' standard in this case").

In sum, plaintiff's due process claim fails because there is no genuine issue of material fact that defendants assessed plaintiff $3,769.55 in restitution for AIC Almazan's medical costs based on "some evidence" and that the Central Trust properly deducted $532.37 from plaintiff's trust account to pay for a portion of the restitution due. Defendants are therefore entitled to summary judgment. *See Weakley v. Shartle*, 2017 WL 4124910, at *9 (D. Ariz. September 18,

2017) (granting the defendants summary judgment on the plaintiff's due process claim because the prison officials' findings and order "were supported by 'some evidence'").[4]

RECOMMENDATIONS

Defendants' motion for summary judgment (ECF 25) should be GRANTED and plaintiff's claims should be dismissed with prejudice.

[4] As previously noted, plaintiff filed no formal response to defendants' motion for summary judgment. After defendants filed their motion for summary judgment on March 3, 2023, the court issued a Summary Advice Notice on March 6, 2023, and indicated that plaintiff's response was due by April 5, 2023. ECF 28. On March 27, 2023, plaintiff filed two declarations in response to the motion for summary judgment—but mistakenly filed those declarations in another case, *Diaz v. Oregon Department of Corrections*, 2:22-cv-01048-YY. On April 12, 2023, defendants filed a reply (ECF 29) in which they noted plaintiff's apparent error. In light of the circumstances, the court issued an order on April 13, 2023, noting that plaintiff's response had been due on April 5, 2023, extending plaintiff's deadline to file a response to April 27, 2023, and advising plaintiff that "if he fails to file a response by 4/27/2023, the court will take Defendants' motion under advisement on the record before the court." ECF 30. Plaintiff did not correct his erroneous filings and did not file a response.

Nevertheless, even if this court considers the declarations that plaintiff filed in Case No. 2:22-cv-1048-YY (*see* ECF 36 and 37), they do not change the analysis because they merely repeat plaintiff's allegations and offer no counter evidence. Plaintiff attests that "the information I was provided in the notice on February 18, 2022 about the seeking of restitution was not accurate." Case No. 2:22-cv-1048, Diaz Decl., ECF 36. But the notice was clearly marked "NOTICE OF RESTITUTION HEARING," and indicated that "[t]he restitution amount being considered is $3,769.55 for cost of outside medical care for AIC Almazan, Victor (#17141998) due to misconduct that occurred on December 5, 2021." *Id.* Plaintiff also claims that he "felt it unnecessary to attend the hearing in which I was not afforded proper due process" because the "restitution is unfair," *id.*, and "the outside medical trip seemed fraudulent." *Id.*, Diaz Decl., ECF 37. But plaintiff's unsupported belief that the restitution was unfair or fraudulent is not the determining factor, as there was "some evidence" that AIC suffered "serious" injury and "warranted transport to an outside health care facility for treatment Almazan," which was documented by medical bills and photographic evidence showing "blood all over the area of the fight." Nevil Decl. ¶ 14, ECF 26; *Id.*, Ex. 1 at 1. Therefore, plaintiff's due process rights were not violated.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Tuesday, June 20, 2023. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED May 30, 2023.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge