

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

CINDY O'DONNELL, SANDRA
HAUTAMAKI, JOHN RAY,
PETER HUIBREGTSE, GERALD BERGE,
SGT. S. GRONDIN, C.O. D. ESSER,
KELLY TRUMM, C.O. JOHNSON,

Defendants.

ORDER

05-C-04-C

In an order dated October 21, 2005, I granted defendants' motion for summary judgment on all of plaintiff's claims except his claim that

1) His First Amendment rights are violated by the decision of defendants Berge, Johnson, Trumm, Huibregtse, John Ray and O'Donnell to enforce prison policies prohibiting prisoners from possessing magazines with torn covers;

2) His First Amendment rights are violated by the decision of defendants Sandra Grondin, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell to enforce prison policies prohibiting prisoners from possessing copies of material from inmates' personal websites; and

3) His Eighth Amendment rights were violated when defendant Esser used excessive force against him.

Now, defendants have filed a motion for clarification of the October 21, 2005 order, contending that the order misstated the names of the defendants who should remain on the claim relating to torn magazine covers and misstated the facts concerning the reason plaintiff's mail was confiscated on August 22, 2005 (the act that forms the basis of plaintiff's second claim). Defendants are correct on both counts.

In the October 21 order, I found as fact that when plaintiff's magazine was confiscated on August 22, 2005, defendant Haines refused to return it, defendant Berge denied plaintiff's appeal of the non-delivery decision, defendant Trumm recommended the dismissal of plaintiff's inmate complaint regarding the confiscation of his magazine and defendants Huibregtse, Hautamaki and O'Donnell affirmed defendant Trumm's decision on appeal. I made no finding that defendants Johnson and John Ray had participated in this act. Nevertheless, in the order portion of the October 21 order, at page 78, I inadvertently included the names of Johnson and John Ray and omitted the name of defendant Haines. This was a typographical error that will be corrected. Therefore, the defendants to claim I should be Haines, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell.

Next, defendant contends that the court misstated the facts relating to the reason plaintiff's internet copies were confiscated on August 22, 2003. A review of the undisputed

facts reveals that on August 22, internet copies were confiscated because the material was sent to plaintiff by friends or family, not because it contained material from plaintiff's personal website, as stated in the October 21 order. In West v. Frank, Case No. 04-C-173-C, Order dated March 25, 2005 at 14, this court held for the first time that defendants' practice of prohibiting inmates from receiving internet materials from family and friends was unconstitutional. West, an inmate at the Wisconsin Secure Program Facility, challenged the confiscation of internet materials mailed to him in August, September and November 2003. Id. at 5-7. I concluded that the practice violated the First Amendment but that the defendants were entitled to qualified immunity, because at the time they confiscated West's mail, they were not on notice that a ban on internet materials sent by friends and family was unconstitutional. Id. at 17-18.

In this case, defendants acknowledge that plaintiff's internet copies were confiscated on August 22, 2003 because they were mailed to him by a friend or family member. Therefore, the decision to confiscate plaintiff's mail on August 22, 2003, violated his First Amendment rights. However, because defendants' action took place prior to the decision in West v. Frank, they are entitled to qualified immunity for their actions. Therefore, I will grant defendants' motion for summary judgment with respect to plaintiff's claim that his First Amendment rights were violated when defendants confiscated his mail on August 22, 2003.

Two claims remain for trial in this matter:

1) Whether plaintiff's First Amendment rights are violated by the decision of defendants Haines, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell to enforce prison policies prohibiting prisoners from possessing magazines with torn covers; and

2) Whether plaintiff's Eighth Amendment rights were violated when defendant Esser used excessive force against him.

Unfortunately, the trial calendar has become too congested to allow the trial in this case to go forward on November 28. This means that the parties may choose between two options. They may keep the November 28 date and consent to have Magistrate Judge Crocker preside over the jury trial or they can postpone the trial until February 27, 2006. If the parties cannot reach an agreement, trial will be postponed to February 27. The parties should notify the court of their decision on or before November 8, 2005.

ORDER

IT IS ORDERED that

Defendant's motion for clarification is GRANTED. The opinion and order entered herein on October 21, 2005, is AMENDED as follows:

On page 78, the paragraph numbered 13 is DELETED and the following paragraph is inserted in its place:

13) His First Amendment rights are violated by the decision of defendants Haines, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell to enforce prison policies prohibiting prisoners from possessing magazines with torn covers.

Further, IT IS ORDERED that the facts relating to plaintiff's claim that he was denied Internet copies on August 22, 2003, are AMENDED to reflect that plaintiff's August 22, 2003 Internet copies were confiscated because they were mailed to him by a friend. Defendants' motion for summary judgment is GRANTED with respect to this claim.

Finally, IT IS ORDERED that the parties are to advise the court on or before November 8, 2005, of their preference for a trial date and presiding judge.

Entered this 31st day of October, 2005.

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