

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

KEEYON N. BARKER,
Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-161-S

LEBBEUS BROWN and
JEFF REWEY,

Defendants.

Plaintiff Keeyon N. Barker was allowed to proceed on his First Amendment claim against defendants Lebbeus Brown and Jeff Rewey. In his complaint plaintiff alleges that defendants Brown and Rewey did not send a letter that he wrote to his uncle.

On September 9, 2005 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following facts.

Plaintiff Keeyon Barker is an inmate at the Wisconsin Secure Program Facility, Boscobel, Wisconsin (WSPF). Defendant Lebbeus Brown is a supervising officer 2 at WSPF. Defendant Jeff Rewey is a correctional officer II at WSPF.

WSPF inmates are allowed to correspond through the mail with anyone subject to restrictions provided in Wis. Admin. Code § DOC

309.04(4)(c). Outgoing mail which concerns activity that would violate the law of Wisconsin or administrative rules is not delivered. § DOC 309.04(4)(c).

Wisconsin Administrative Rule § DOC 303.20 prohibits participation in gang activity including possession of gang literature, creed symbols or symbolism. Institution security is threatened by the presence of gangs because of the direct threat of gang violence and because gangs undermine prison authority. Affiliation with gangs in the correctional setting is not in the best interest of the inmate and his rehabilitation. Suppressing gang activity in correctional institutions including WSPF is imperative to maintaining a safe and secure environment for staff, inmates and visitors.

On October 10, 2003 defendant Rewey was examining outgoing non-legal inmate mail. He examined a piece of mail from plaintiff to Gary Barker who was not an inmate. The first line of the letter stated, "I greet ya with the five highest principles of mankind Love, Peace, Truth, Freedom & Justice." Based on his training and experience defendant Rewey recognized these terms as corresponding to the five points of the star symbol associated with the Vice Lords gang. According to plaintiff's institution face card he was a gang member.

Defendant Rewey did not mail the letter but gave it to defendant Brown who was the institution's Disruptive Groups

Coordinator. Defendant Brown confirmed defendant Rewey's conclusions about the letter and instructed him to write plaintiff a conduct report based on the letter. Defendant Brown issued a Notice of Non-Delivery of Mail to plaintiff indicating that his letter would not be delivered because it concerned an activity which if completed would violate administrative rule §DOC 303.20(3) which prohibited participation in gang activity including possession of gang symbols.

Defendant Rewey issued plaintiff Adult Conduct Report No. 1501044 charging him with Group Resistance and Petitions. Plaintiff was found guilty of a violation of § DOC 303.20 on October 24, 2003. He filed a petition for certiorari in the Dane County Circuit Court to review the disciplinary committee's finding of guilt.

On a record review the state court concluded that the disciplinary committee's decision was incorrect and vacated the decision. The Court stated that there was nothing in the record before it to indicate that censorship of plaintiff's letter furthered the government's interest of security, order or rehabilitation. The state court, however, did not find that plaintiff's First Amendment rights were violated when it found that the disciplinary committee's decision should be vacated.

MEMORANDUM

Plaintiff claims that the defendants violated his First Amendment rights by not sending his outgoing mail to his uncle. Initially, plaintiff argues that this court must find that his First Amendment rights were violated because the State Court so found. The state court did not find that plaintiff's First Amendment rights were violated but rather that on the record the disciplinary committee's decision finding of guilt should be vacated. The state court decision does not preclude the defendants from litigating the issue of whether they are individually liable in this § 1983 action for a violation of plaintiff's First Amendment rights when they did not deliver his mail. See Michelle T. v. Crozier, 173 Wis. 2d 681, 684 n.1, 495 N.W. 327 (1993).

An inmate's First Amendment right to correspond with people not in jail may be restricted by regulations which are reasonably related to legitimate penological objectives. Turner v. Safely, 482 U.S. 78 (1987). In Procunier v. Martinez, 416 U.S. 396 (1974) the United States Supreme Court set a specific standard governing outgoing inmate mail. The Court held that the regulation must further an important or substantial government interest unrelated to the suppression of expression and that the regulation be no greater than necessary for the protection of that interest. See Nasir v. Morgan, 350 F. 3d 366 (3rd Cir. 2003).

In this case the Wisconsin Administrative Code provides that outgoing inmate mail may not be delivered if it concerns an activity which if completed would violate a law or a DOC administrative rule. Enforcing this regulation furthers the substantial government interests of security and rehabilitation. The regulation is not broader than necessary for the protection of these interests. The regulation does not violate the First Amendment.

Defendants applied this regulation on October 10, 2003 to plaintiff's letter to his uncle because they believed that the letter violated Wisconsin Administrative rule § DOC 303.20 which prohibited gang activity. This application of the regulation furthers the substantial government interests of security and rehabilitation and was not broader than necessary for the protection of those interests. The fact that the conduct report was ultimately expunged does not make the application of the regulation to plaintiff's letter unreasonable. Plaintiff's First Amendment rights were not violated by the non delivery of his letter to his uncle on October 10, 2003. Accordingly, defendants' motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

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ORDER

IT IS ORDERED that the defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff DISMISSING his complaint and all claims contained therein with prejudice.

Entered this 12th day of October, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge