

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

JEFFREY STEVEN AKRIGHT,

Plaintiff,

v.

RANDALL HEPP, STEVEN FOSTER
and MICHAEL ISENSEE,

Defendants.¹

OPINION and ORDER

11-cv-357-bbc

At issue in this prisoner civil rights lawsuit is the application of a rule at Jackson Correctional Institution that limits the legal materials a prisoner may own: “Inmates who are assisting another inmate with legal matters will be allowed to have legal materials belonging to the inmate being assisted in their possession, as long as both inmates are housed in the same housing unit.” Defendants Michael Isensee, Steven Foster and Randall Hepp disciplined plaintiff Jeffrey Akright for violating this rule after affidavits prepared by other prisoners were discovered in plaintiff’s cell. Plaintiff contends that defendants violated his

¹ I have amended the caption to include defendants’ full names as reflected in their summary judgment materials.

right to free speech under the First Amendment because he was using those affidavits to support his own litigation. (Arguably, plaintiff's claim is covered by the constitutional right of access to the courts as well, but I need not consider that issue because the standard of review is the same for either claim.)

Plaintiff filed a motion for a preliminary injunction to stop defendants from enforcing the rule in the context of this case. Dkt. #13. In response, defendants filed a motion for summary judgment. Dkt. #19. Also before the court is plaintiff's motion to "strike" portions of an affidavit filed by defendant Foster. Dkt. #39. All of these motions are ripe for review.

I am denying plaintiff's motion for a preliminary injunction because he has not shown that denying the injunction will lead to irreparable harm. I am granting defendants' motion for summary judgment as it relates to plaintiff's request for damages because he has failed to show that any of the defendants knew when they disciplined him that the affidavits were for use in his own litigation. I am staying a decision on plaintiff's request for injunctive relief to give the parties an opportunity to discuss issues not addressed in their motions. Finally, I am denying plaintiff's motion to strike as unnecessary because I did not consider any of the disputed portions of Foster's affidavit in the context of this opinion.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Jeffrey S. Akright is a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin. Randall Hepp is the warden of that prison.

Prisoners at the Jackson prison are permitted to send or receive letters through the mail “with anyone in the free community as long as the correspondence does not violate state o[r] federal law.” Dfts.’ PFOF ¶ 6, dkt. #21. In addition, prisoners may correspond with other prisoners so long as the Department of Corrections identification numbers of both prisoners are visible on the envelope. There is no predetermined limit on the number of letters a prisoner may send or receive.

The Jackson prison’s Institution Handbook includes the following rule:

Legal materials must fit into a box no larger than 20” x 20” x 20”. Inmates who are assisting another inmate with legal matters will be allowed to have legal materials belonging to the inmate being assisted in their possession, as long as both inmates are housed in the same housing unit. JCI staff will not be responsible for the return of legal materials that are given to other inmates.

This rule is not included in the regulations or policies of the Wisconsin Department of Corrections.

On June 15, 2010, defendant Michael Isensee, a correctional officer, conducted a search of plaintiff’s cell. Isensee confiscated a number of items during the search, including affidavits plaintiff had obtained from other prisoners for use in his own litigation. The

affidavits did not include a case caption. Dkt. #16-4.

The following day, a captain interviewed plaintiff about the seized documents. After concluding that the documents were not contraband, he returned them to plaintiff.

On June 17, 2010, plaintiff received the following conduct report from defendant Isensee:

On the above date and time, I CO2 Isensee, on the Oxbow Unit, performed a room search on Cell B-35. In Inmate Akright, Jeffery #353807 legal work I found a legal file folder that contained other legal work of Inmate Medina, Christopher #366291 and in another folder, the legal work of Inmates Hipp, Adrian #311110, Leiser, Loven #366291 and Maday, Norbert #278632. Note: Inmate Medina was in segregation and did not reside on the Unit and per policy and procedures page 51, "Inmates who are assisting another inmate with legal matters will be allowed to have legal materials belonging the the inmate be [sic] assisted in their possession, as long as both inmates are housed in the same housing unit." Inmate ip, Leiser and Maday are not here at JCI. Also in and/or on Mr. Akright's cabinet was : 1-Sagean Radio, 1-2006 Federal Criminal Code and Rules book, 1-600 piece puzzle [unintelligible], 1-1000 piece Suns Out puzzle, 1-Oraline dental floss containing contraband, 3-altered Nakoto correctable tape, 1-home made binded Appellate Practice and Procedure in WI book, 1-Harry Potter book, 1-cribbage board and 1-pair of weight lifting gloves. Note: I noticed that the radio's face plate had a hole drilled into it. The Federal Criminal Code book has someone else's name marked out on it. The two puzzles could not be proved that they were his. The dental floss contained broken pieces off of his typewriter. The three typewriter tape containers had been opened. The Appellate Practice book had a home made binding. The cribbage board had no name on it and could not be proved that it was his. And the weight lifting gloves could not be proved that they were his. Sgt. Dunabay and Captain Jensen notified. Contraband and copy of page 51 of policy and procedure accompany this report.

On June 23, 2010, a hearing was held on the conduct report before defendant Steven

Foster, a captain. Both in a written statement and at the hearing, plaintiff informed Foster that the affidavits had been returned to him and he was not guilty of wrongfully possessing another prisoner's legal materials. However, he did not tell Foster that the affidavits were for use in his own litigation.

Foster found plaintiff guilty of Wis. Admin. Code §§ DOC 303.35(2) (damaging or altering property), 303.47(2)(possessing contraband) and 303.63 (violating prison's rules). Although Foster acknowledged in his written decision that another captain had returned the affidavits to plaintiff, Foster included the affidavits in the list of contraband that provided the basis for the finding of guilt. As punishment, plaintiff received 20 days' room confinement with loss of electronics.

Plaintiff appealed the decision to defendant Hepp, but only as to the affidavits. Hepp affirmed, writing: "Elements of the violation met. Sanction is appropriate. Return of items seems to have been in error."

OPINION

There are two important threshold questions that may resolve many issues: (1) what is the scope of the policy at issue in this case? and (2) what is the scope of plaintiff's claim? The parties talk past each other in their briefs regarding both of these questions.

With respect to the first question, defendants' position is that the policy, properly

construed, does not prohibit a prisoner from collecting affidavits of other prisoners to support his own lawsuit. Dfts.' PFOF ¶ 56 dkt. #21 ("[I]t is not a violation of the [prison] handbook for inmates to ask and receive statements from other inmates to submit to court in their own cases, regardless of where the inmate resides."). Rather, they say that the rule is meant to prohibit jailhouse lawyers from possessing the legal materials of other prisoners who do not live in the same housing unit. All of the justifications defendants advance for the rule relate to that interpretation.

Defendants' position has two important implications for the case. First, it seems to moot plaintiff's request for a preliminary injunction. In his motion, plaintiff asks for an order to stop defendants from "restricting [him] from obtaining affidavits to support litigation *in this action*." Plt.'s Br., dkt. #14, at 8 (emphasis added). Defendants say that they have no intent on stopping plaintiff from collecting affidavits in the context of this case. Further, plaintiff does not point to any affidavits that he *has* collected for this case and identifies no reason that he would need to do so to support his claim. Accordingly, plaintiff cannot show that denying the preliminary injunction would cause him irreparable harm, which is one of the requirements for obtaining relief. River of Life Kingdom Ministries v. Village of Hazel Crest, 585 F.3d 364, 375 (7th Cir. 2009).

Second, defendants' argument is self-defeating with respect to their motion for summary judgment because it is not responsive to plaintiff's claim. Plaintiff is not

challenging a rule that limits his or another prisoner's ability to act as a jailhouse lawyer. It is undisputed that the affidavits that defendant Isensee confiscated from plaintiff were related to his own cases. He makes it clear in his summary judgment materials that he believes the policy is "unreasonable" because it "prohibits Akright from gathering affidavits to support litigation." Plt.'s Br., dkt. #35, at 10. Even if plaintiff wanted to challenge a rule about jailhouse lawyers, he would not have standing to do so because he does not allege in his complaint or his proposed findings of fact that he has any intention of acting as a jailhouse lawyer or receiving assistance from one at any time in the foreseeable future. Summers v. Earth Island Institute, 129 S. Ct. 1142, 1150-51 (2009) (no standing to obtain injunction unless plaintiff alleges likelihood of harm from challenged conduct). Thus, I have no reason to consider the constitutionality of the rule as interpreted by defendants.

Where does this leave plaintiff's claim? Because defendants advance no justification for a rule that would prohibit prisoners from obtaining affidavits from other prisoners, I must assume for the purpose of defendants' motion that such a rule would not withstand scrutiny under the Constitution. Does this mean that defendants are conceding liability? No, it does not. Although defendants do not attempt to justify the substance of the disciplinary decision, they argue that they cannot be held liable for violating plaintiff's First Amendment rights because they did not realize at the time that the documents were related to plaintiff's own case. "[O]nly intentional conduct violates the Constitution," United

States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010), so defendants cannot be held liable for a mistake.

I agree with defendants that plaintiff has failed to point to evidence from which a reasonable jury could find that defendants knew when they disciplined him that the affidavits were for his own case. It is undisputed that the affidavits at issue did not include a case caption and plaintiff does not identify anything else about them that would have made it immediately apparent that they belonged to him. Defendant Isensee's conduct report refers repeatedly to the affidavits as "the legal work of" the other prisoners. In addition, plaintiff admits that he did not tell defendant Foster at the hearing that the affidavits were for use in his own case. Foster avers in his affidavit that he "did not believe that these inmate legal materials were part of any litigation brought by Akright." Dkt. #22, ¶ 43. Although plaintiff attempts to dispute that testimony, he does not cite any contrary evidence.

It is true that plaintiff told defendant Foster at the hearing that another captain had returned the documents to him the day after they were confiscated. Foster does not explain why plaintiff's statement did not prompt him to check with the other captain regarding the reasons the documents were returned or at least ask plaintiff some follow up questions. However, there is no cause of action under the Constitution for "failing to investigate" or negligence. Loubser v. Thacker, 440 F.3d 439, 442 (7th Cir. 2006) ("Section 1983 claims

cannot be founded on negligence.”). Thus, even if I agree with plaintiff that Foster “should have” done more to confirm the factual basis for the conduct report, that is not enough to justify a damages award under 42 U.S.C. § 1983. (Plaintiff does not identify any reason that defendant Hepp would have known that the legal materials were for plaintiff’s own case, so I do not consider that question.)

An injunction is a different matter. In his complaint, plaintiff asks for an injunction ordering defendants to remove from his disciplinary record the finding of guilt related to affidavits of the other prisoners. Defendants now know that plaintiff did not violate the rule regarding other prisoners’ legal materials, yet they have not adjusted his disciplinary record accordingly. Although plaintiff already has served his punishment, it remains a blot on his record, so the issue is not moot. Chapman v. Pickett, 586 F.2d 22, 27 (7th Cir.1978) (“[W]e have before us no indication of any kind that the record of Chapman’s punishment will not be used against him in the future. Thus, the issue of an injunction against such future use is not moot.”). In their brief, defendants suggest that plaintiff’s improper discipline is a state law issue unless the discipline he received was an “atypical, significant deprivation” under the due process clause. Dfts.’ Br., dkt. #23, at 11. I disagree. If plaintiff had a right under the First Amendment to possess the affidavits, then continuing to punish him for doing so may also be violation of the First Amendment, not state law, regardless whether the punishment was severe enough to implicate plaintiff’s rights under the due

process clause. E.g., Greybuffalo v. Kingston, 581 F. Supp. 2d 1034, 1051 (W.D. Wis. 2007) (ordering defendants to “expunge from their records their finding that plaintiff violated prison rules by possessing the A.I.M. document” after court concluded that document was protected by First Amendment). Thus, defendants have two options: (1) reconsider the disciplinary decision without relying on the affidavits of the other prisoners; or (2) show that continuing to punish plaintiff for possessing those affidavits is reasonably related to a legitimate penological interest under Turner v. Safley, 482 U.S. 78 (1987). I will give defendants an opportunity to inform the court which option they will choose.

In addition, plaintiff asks for an order to stop defendants from enforcing the rule as it applies to affidavits of other prisoners for use in his own litigation. Although plaintiff has failed to show that he needs an injunction to stop defendants from interfering with *this* case, I am not prepared to say that the issue is moot altogether because the parties have not addressed that question. Accordingly, I will give the parties an opportunity to do that as well. In particular, defendants should identify any steps they have taken to insure that the policy will not be applied in the future to a prisoner’s own litigation materials.

ORDER

IT IS ORDERED that

1. Plaintiff Jeffrey Akright’s motion for a preliminary injunction, dkt. #13, is

DENIED.

2. The motion for summary judgment filed by defendants Randall Hepp, Steven Foster and Michael Isensee, dkt. #19, is GRANTED with respect to plaintiff Jeffrey Akright's claim for damages. A decision on the motion is STAYED as to plaintiff's request for injunctive relief.

3. Plaintiff's motion to strike portions of the affidavit of defendant Foster, dkt. #39, is DENIED as unnecessary.

4. Defendants may have until February 16, 2012, to: (1) submit supplemental materials justifying the decision to discipline plaintiff for possessing other prisoners' affidavits, using the standard articulated in Turner v. Safley, 482 U.S. 78 (1987); or (2) inform the court that they have reconsidered the disciplinary decision without relying on plaintiff's possession of those affidavits. Regardless whether defendants choose option (1) or (2), defendants should submit supplemental materials addressing the question whether plaintiff's request for injunctive relief is moot as it relates to enforcement of the prison rule at issue as applied to legal materials plaintiff is using for his own litigation in addition to any other issues defendants believe are relevant to deciding whether the court should issue an injunction. Plaintiff may have until March 8, 2012, to file a response. There shall be no reply. The parties may submit a supplemental brief as well as evidentiary materials, but they

need not submit additional proposed findings of fact.

Entered this 26th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge