

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

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MAURICE A. SMITH,

Plaintiff,

v.

PAMELA WALLACE, WAYNE COWAN,  
TURNER WALLACE, ROBERT HOFKES  
and DEPUTY WARDEN NELSON,

Defendants.

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OPINION and ORDER

11-cv-646-bbc

Pro se plaintiff Maurice Smith is proceeding on claims that defendants Pamela Wallace, Wayne Cowan, Turner Wallace, Robert Hofkes and Timothy Nelson (1) violated plaintiff's right of access to the courts by confiscating computer disks containing his legal materials and (2) violated his rights under the First Amendment by retaliating against him for filing an inmate grievance about the disks. On October 10, 2012, I denied plaintiff's motion for partial summary judgment on liability. Dkt. #48. Defendants have filed a motion for summary judgment, dkt. #49, which is ready for decision.

Because plaintiff did not file a response brief or respond to defendants' proposed findings of fact, I must treat defendants' proposed findings of fact as undisputed and determine whether summary judgment is proper on the basis of those facts. Wienco, Inc. v. Katahn Associates, Inc., 965 F.2d 565, 568 (7th Cir. 1992); Procedure to Be Followed on Motions for Summary Judgment, dkt. #20, at II.C ("Unless the responding party puts into

dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed.”). From the undisputed facts, I conclude that defendants are entitled to summary judgment because plaintiff has not established that he lost a meritorious legal claim challenging his conviction or that defendants filed a conduct report against him in retaliation for filing his inmate grievance.

From defendants’ proposed findings of fact and the record, I find the following undisputed facts.

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Maurice Smith was an inmate at the Chippewa Valley Correctional Treatment Facility from June 9, 2011 until August 25, 2011. Defendants are employees of the Wisconsin Department of Corrections at the Chippewa Valley Correctional Treatment Facility. Defendant Robert Hofkes is a correctional sergeant and, among other duties, serves as the property sergeant who inventories inmates property upon their arrival. Defendant Wayne Cowan is a captain and defendant Turner Wallace an administrative captain. Cowan is Hofkes’s supervisor. Cowan and Turner Wallace assist in the coordination of all security operations, monitor inmate movements outside of the housing units, provide backup for security supervisors and participate in the development and implementation of overall institution goals, policies and procedures. Turner Wallace also serves in a “quasi-security director capacity” because the facility does not have an official security director.

Defendant Pamela Wallace has been warden of Chippewa Valley Correctional Treatment Facility since September 2005. As warden, Pamela Wallace has general supervisory authority over the administration and operation of the institution. She is responsible for implementing all Department of Corrections policies and directives and legislative and judicial mandates in the Chippewa Valley Correctional Treatment Facility. Defendant Timothy Nelson is the deputy warden. He assists in development, implementation and administration of the security, treatment and support services. He is responsible for the overall administration and operation in the warden's absence. Nelson and Pamela Wallace do not supervise the day-to-day operations of individual Department of Corrections employees.

#### B. Prison Policies and Procedures

The Division of Adult Institutions has adopted policies to insure there is a complete inventory of all personal property in the inmate's possession upon intake and transfer. DAI Policy 309.20.03, dkt. #56-1, at § IV-V (Effective Aug. 31, 2010). After a transfer, "unauthorized property will be recorded and marked as contraband," and "inmates will designate a method for disposal for unauthorized property." Id. at § V(D), (E).

Inmates are allowed to retain legal materials that are "necessary for active legal actions," but they are limited to "a box no larger than . . . 8000 cubic inches." Id. at § I(F). In addition, the Division of Adult institution provides computers for legal research and word processing. DAI Policy 309.15.01, dkt. #56-2, at § I(C)(2). Inmates may have a personal

account to save their legal work on computers in their own personal folders. Id. at § I(C)(5). An inmate “found with inappropriate documents in his computer file will be told to delete them” and, “[i]f he refuses or continues creating and saving this type of document, he may have his computer account locked and his computer privileges revoked.” Id. at § I(C)(5).

Inmates are also required “to develop and maintain a portfolio (also known as re-entry materials) on one portable storage media device/disk that will contain data and information to assist the inmates during their incarceration and re-entry into the community.” DAI Policy 300.00.15, dkt. #56-2. Inmate portfolios contains things such as completion information for GED/High School Diploma, resumes, cover letters, sample job applications and reference lists. The prison retains the computer disk containing the reentry materials and gives it back to the prisoner upon release.

### C. Confiscation of Plaintiff’s Computer Disks

On June 9, 2011, the day plaintiff arrived at the Chippewa Valley Correctional Treatment Facility, defendant Hofkes performed an inventory of plaintiff’s property. Among plaintiff’s property, Hofkes found twelve computer disks that were consistent with the types of disks purchased by the Department of Corrections for use by staff and inmates in the re-entry program. Hofkes seized the computer disks because, according to Department of Corrections rules, inmates are allowed only one disk—the one containing re-entry materials—and that is to be kept by staff. In addition, it appeared that plaintiff may have stolen the items from institutions in which he was previously incarcerated. Hofkes

completed a “property receipt/disposition” form, which shows the unauthorized property items inventoried, together with plaintiff’s disposal directives. As evidenced by the form, the disks were to be held.

Before his transfer, plaintiff was incarcerated at both Felmers O. Chaney Correctional Center and Gordon Correctional Center. Hofkes contacted the superintendents of those facilities to ask whether they knew how plaintiff had acquired so many disks. Both superintendents indicated that plaintiff had been the inmate clerk at both centers and would have had access to those types of disks. Hofkes reported his findings to Nelson.

When an inmate transfers into the Chippewa Valley Correctional Treatment Facility with property that is deemed contraband, the matter falls under Nelson’s jurisdiction and he is required to make sure that proper procedures are followed. According to Nelson, it is necessary to visually verify the content of computer disks in an inmate’s possession to determine whether they are being used in any type of illegal activity. Nelson directed Hofkes to review the contents of the disks for the sole purpose of determining their contents. Six of the disks were not labeled or had a label that did not identify them as containing legal information. Hofkes found legal materials on some of the disks and he skimmed the legal material to the extent necessary to confirm that they were indeed legal in nature. Hofkes later wrote that one of the disks contained “legal documents” and another included “legal documents and notes.” Hofkes Aff., Ex. 5, Conduct Report, dkt. #56-5, at 2.

On or about June 15, 2011, Cowan received an Interview/Information Request from plaintiff, in which he said that Hofkes was in the process of inquiring whether he could

maintain possession of his disks containing legal materials. He asked for the disks back in order to pursue a legal appeal. Cowan responded to plaintiff in writing, saying that inmates are not allowed to possess computer disks because it is necessary to be able to visually verify the content of the files. Cowan told plaintiff that once the inquiry was completed, plaintiff would be told how he could dispose of the disks.

#### D. Conduct Report

On June 18, 2011, Hofkes prepared and signed Conduct Report 1784398 charging plaintiff with theft/, Wis. Admin. Code § DOC 303.34, misuse of state or federal property, Wis. Admin. Code § DOC 303.36, counterfeit and forgery, Wis. Admin. Code § DOC 303.41, and inadequate work or study performance, Wis. Admin. Code § DOC 303.62. On June 22, 2011, Turner Wallace reviewed and signed the conduct report.

Sometime after the conduct report was written, Cowan spoke with plaintiff about the disks. Cowan asked plaintiff to produce receipts for all twelve disks, but he was unable to do so. Inmates are responsible for retaining receipts to prove ownership of questionable items; failure to prove ownership can mean that the items are considered contraband.

On July 10, 2011, a hearing was held on plaintiff's conduct report before hearing officer Captain Alan Chada. Relying on the statement in the conduct report and plaintiff's testimony, Chada found that plaintiff was guilty of misuse of state or federal property and inadequate work or study performance but he dismissed the charges of theft and counterfeit and forgery. He found that plaintiff had used his job as clerk for personal gain, but may not

have been aware that he was violating prison rules. The disposition required plaintiff to perform twenty hours of extra duty.

On July 12, 2011, plaintiff appealed the hearing officer's decision. In the appeal, he indicated that he wanted his legal documents returned. On July 25, 2011, Pamela Wallace affirmed the decision because the "[f]inding of guilt and disposition [are] appropriate." Pamela Wallace Aff., Dkt. #53-1. She wrote that, "as for the 12 discs—the content is scattered and no one disc has a particular theme including the topics of legal material and re-entry. Regardless—you are not allowed to have any discs in your possession for any reason until such time of your release." Id. At no time during their involvement with the conduct report were Hofkes, Cowan, Turner Wallace, Nelson or Pamela Wallace aware that plaintiff had filed any inmate complaint related to this matter.

#### E. Plaintiff's Inmate Complaints

On June 22, 2011, four days after he received the conduct report but several weeks before his hearing, plaintiff filed Inmate Complaint CVTF-2011-11960, in which he complained that he was being denied access to computers in the library and computer lab. During her investigation, the institution complaint examiner discovered that plaintiff had received a conduct report because he was in possession of multiple computer disks with contraband on them. As a result of this discovery, his computer account was disabled pending an investigation. Several files were found on his computer account that were not permitted under prison regulations. After a few days, his account was restored and he was

directed to remove the files. On July 12, 2011, the institution complaint examiner recommended dismissal of plaintiff's complaint. She believed that plaintiff had not been denied access to the courts because his account had been disabled for a good reason. In addition, while his account was disabled, he still had access to Lexis-Nexis, library print materials and a typewriter. She also noted that, "[a]s for the computer disks, these are being addressed through the conduct report and are not reviewable through ICRS."

On July 18, 2011, plaintiff filed Inmate Complaint CVTF-2011-13600, in which he requested the return of his legal materials and asserted that he needed the materials for his motion for reconsideration with the court of appeals and his petition to the supreme court. That same day, the institution complaint examiner rejected plaintiff's complaint because the issues raised in it had been addressed in his previous complaint. Plaintiff appealed the rejection of his second inmate complaint on July 25, 2011.

On August 2, 2011, Nelson reviewed the recommendation of the institution complaint examiner with respect to Complaint 11960 and dismissed the complaint. Plaintiff appealed this decision to the corrections complaint examiner on August 8, 2011. The corrections complaint examiner found that plaintiff's computer account access had been suspended during an investigation into whether he violated rules regarding use of the computer system, which the examiner found to be a reasonable and appropriate action. On December 18, 2011, he recommended that the appeal be dismissed, and his recommendation was adopted by the Office of the Secretary on December 19, 2011.

On August 4, 2011, Pamela Wallace reviewed the recommendation of the institution



complaint examiner with respect to Complaint 13600 and found that it was appropriately rejected. On August 10, 2011, plaintiff attempted to appeal this decision to the corrections complaint examiner. On August 16, 2011, the corrections complaint examiner's office advised plaintiff that under Wis. Admin. Code § DOC 310.13, the corrections complaint examiner is not to review a rejected complaint.

## OPINION

### A. Access to the Courts

Plaintiff's first claim is that defendants interfered with his right of access to the courts by confiscating legal materials he needed for his criminal appeal or his petition to the Supreme Court. Prisoners have a constitutional right to "meaningful access to the courts" to pursue post conviction remedies and to challenge the conditions of their confinement. Bounds v. Smith, 430 U.S. 817, 821-22 (1977); Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). To succeed on his claim for denial of the right of access to the courts, plaintiff must prove that defendants caused him to lose a meritorious claim, a chance to sue on a meritorious claim or a chance to seek some particular order of relief. Lewis v. Casey, 518 U.S. 343, 346-348 (1996); Christopher v. Harbury, 536 U.S. 403, 414 (2002); Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006). Accordingly, plaintiff must (1) identify the non-frivolous argument he wanted to pursue in his appeal or petition and (2) explain how his ability to file or litigate that claim was lost or impeded. Christopher, 536 U.S. at 415-16.

Defendants argue that plaintiff's claim should be dismissed for three reasons: (1) even if his disks were confiscated and his account locked, plaintiff still had "meaningful access" to the courts because he had access to the library, Lexis-Nexis, printed materials, the typewriter and the mailroom; (2) the confiscation of computer disks was done in conformity with prison regulations reasonably related to legitimate penological interests and a simple delay resulting from such reasonable regulations cannot support a claim for denial of access to the courts as a matter of law; and (3) plaintiff has not shown that he would have won his underlying cases but for the confiscation of his disks.

The undisputed facts do not support defendants' first two arguments. Defendants admit that they confiscated plaintiff's disks that contained, among other things, "legal materials." Hofkes found that some of the disks contained something he described as "legal documents and notes." Defendants failed to described the content of those disks in any greater detail. If the disks contained plaintiff's legal notes or drafts relevant to his appeal and defendants refused to return those notes or drafts, then the fact that plaintiff could start over with his legal research is not enough to warrant a finding that he had meaningful access to the courts. For similar reasons, even if the Chippewa Valley Correctional Treatment Facility has legitimate reasons to prohibit inmates from keeping computer disks, that does not justify refusing to return legitimate files on the disks. Defendants could have copied the legal documents easily to plaintiff's personal account.

Nevertheless, I agree with defendants that plaintiff has not met the actual injury requirement in Lewis, 518 U.S. at 346-48, because he has failed to identify the legal

argument he was unable to raise on appeal. In both the initial screening order denying plaintiff leave to proceed initially, dkt. #8, at 7-8, and the screening order granting him leave to proceed, dkt. #13, at 7-8, I warned plaintiff that on summary judgment he would be required to identify a meritorious argument that he was unable to assert on appeal. I denied plaintiff's motion for summary judgment because, among other things, he failed to explain what non-frivolous legal argument he intended to raise in the state court of appeals or supreme court. Dkt. #48, at 10. Because plaintiff failed to respond to defendants' motion and show that he had a nonfrivolous claim on appeal, I will grant summary judgment for defendants on plaintiff's claim that they violated his right of access to the courts.

#### B. First Amendment Retaliation

Plaintiff is also proceeding on a claim that defendants filed and affirmed the conduct report in retaliation for plaintiff's inmate grievance he filed asking defendants to return his computer disks. As an initial matter, it is not clear what complaint plaintiff believes defendants were retaliating against him for filing. In the first round of summary judgment, plaintiff filed an exhibit that he asserted was an inmate complaint he signed on June 21, 2011. "Offender Complaint," dkt. #43, at 2. In this complaint, plaintiff asked the prison to return the confiscated computer disks and asserted that he purchased the disks legally from his previous institutions. The conduct report was reviewed and signed by Turner Wallace one day later (Hofkes signed it on June 18, 2012). Although the June 21 complaint is not stamped as received by the institution and does not appear to have been assigned a

complaint number, defendants did not dispute its veracity during plaintiff's motion for summary judgment. In their present motion for summary judgment, defendants ignore the June 21 complaint entirely. Therefore, for purposes of this motion, I will treat it as undisputed that plaintiff filed a June 21 complaint asking for his disks back and a June 22 complaint about being locked out of his computer account at the library.

To succeed on his retaliation claim, plaintiff must prove that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) a causal connection between the two." Watkins v. Kasper, 599 F.3d 791, 794 (7th Cir. 2010) (internal quotations omitted). Plaintiff has the initial burden to produce evidence that his offender complaint was "at least a motivating factor," and then defendants may rebut this proof with evidence that they would have disciplined plaintiff even if he had not filed the complaint. Kidwell v. Eisenhower, 679 F.3d 957, 965 (7th Cir. 2012). Plaintiff may rely on "[c]ircumstantial proof, such as the timing of events . . . to establish the defendant's retaliatory motive," Massey v. Johnson, 457 F.3d 711, 716-17 (7th Cir. 2006), but suspicious timing is almost never sufficient to establish a retaliatory motive in and of itself. Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002).

As I explained in the opinion denying plaintiff's motion for summary judgment, plaintiff has no direct evidence of defendants' retaliatory motive. He based his motion on two pieces of circumstantial evidence: (1) he received the conduct report one day after filing his inmate complaint and (2) the charges were not supported by meaningful evidence.

However, each of the defendants has now filed an affidavit denying that he or she knew that plaintiff had filed an inmate complaint and plaintiff has filed nothing to put their averments into dispute. Because defendants were unaware of plaintiff's inmate complaints, the timing of the conduct report is not suspicious. Kidwell v. Eisenhower, 679 F.3d 957, 966 (7th Cir. 2012) (suspicious timing is circumstantial evidence of retaliation only if "the person who decided to impose the adverse action knew of the protected conduct"). Moreover, Hofkes completed and signed the conduct report before plaintiff filed either of his inmate complaints, so Hofkes's actions could not possibly have been retaliatory.

In addition, defendants had good reason to believe plaintiff's possession of the disks violated institutional rules: Hofkes spoke with superintendents from plaintiff's two previous institutions. In plaintiff's previous motion for summary judgment, he argued that these individuals were unfamiliar with plaintiff's work assignments. However, to establish that the defendants' reasons were pretextual, plaintiff would need evidence that defendants knew the superintendents were lying or mistaken. The record contains no such evidence. Accordingly, I will grant defendants' motion for summary judgment on plaintiff's retaliation claim.

#### ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Wayne Cowan, Robert Hofkes, Timothy Nelson, Pamela Wallace and Turner Wallace, dkt. #49,

is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 19th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge