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

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MAURICE A. SMITH,

OPINION AND ORDER

Plaintiff,

11-cv-646-bbc

v.

PAMELA WALLACE, CAPTAIN COWAN,
CAPTAIN T. WALLACE, and SERGEANT HOFKES,

Defendants.

- -

Pro se plaintiff Maurice Smith is proceeding on claims that defendants Sergeant Hofkes, Captain Cowan, Captain T. Wallace and Pamela Wallace violated his right of access to the courts by confiscating his computer disks and retaliated against him for filing an inmate grievance about the disks.

Now before the court is defendants' motion for partial summary judgment, dkt. #22, in which they argue that plaintiff did not exhaust his administrative remedies with respect to the retaliation claim. Also before the court are various motions filed by plaintiff, including: (1) a motion to supplement the complaint to add as defendants Deputy Warden Nelson, Ms. Parr and Ms. Peterson, dkt. #34, (2) a motion to compel discovery, dkt. #29, and (3) a motion for preliminary injunction against Nicole Williams, dkt. #31.

I will deny defendants' motion for summary judgment because defendants have failed to support the motion with admissible evidence. I will grant plaintiff's motion to amend the

complaint and grant him leave to proceed against defendant Nelson, but deny him leave to proceed against defendants Parr and Peterson. I will also deny plaintiff's motion to compel discovery and his motion for preliminary injunction.

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

In their two-page brief in support of their motion for summary judgment, defendants assert that plaintiff failed to exhaust his administrative remedies with respect to his retaliation claim because he never alerted prison officials to his belief the conduct report was retaliatory during his hearing or his appeal. Defendants filed no supporting affidavits or declarations. The only citation to the record in their brief is to the conduct report that plaintiff filed along with his complaint. They did not file a reply brief. Dfts.' Letter Stating No Reply, dkt. #42.

The procedures for summary judgment are set out clearly in Federal Rule of Civil Procedure 56, but it appears they merit repeating. A party seeking summary judgment must "show there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must support its assertion that material facts cannot be disputed either by "citing to particular parts of material in the record" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "[T]he court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(4).

As explained in the pretrial conference order, the court has relaxed its procedures for

filing summary judgment motions based on failure to exhaust in prisoner lawsuits. Instead of following the court's standard summary judgment procedures,

> the moving defendant may submit a motion, supporting affidavits, relevant exhibits, and a supporting brief. The defendant need not submit a separate document containing proposed findings of fact, so long as the material facts can be found in the supporting affidavits and exhibits.

Pretrial Conference Order, dkt. #20, at 4. As this instruction makes clear, defendants were required to support their motion with admissible facts, consistent with Rule 56.

Defendants have cited no evidence to show that plaintiff did not raise objections to the conduct report on the grounds that it was retaliatory. They merely assert in their brief that he never raised this issue in his hearing or appeal; they do not support this assertion with record citations. Their only citation is to the conduct report itself. Because defendants' motion for partial summary judgment was not supported adequately, I will deny it.

PLAINTIFF'S MOTION TO SUPPLEMENT THE COMPLAINT

Plaintiff was granted leave to proceed on January 26, 2012. The amended complaint, dkt. #10, was served on January 31, 2012, and defendants filed their answer on March 6, 2012. Plaintiff filed a motion to supplement his complaint, dkt. #24, on June 22, 2012, which he subsequently amended. Dkt. #34. His motion to supplement seeks to add three new defendants: Deputy Warden Nelsen, Ms. Parr and Ms. Peterson.

Under Federal Rule Civil Procedure 15(a)(2), the district court has discretion whether to grant a party leave to amend its pleadings, but should "freely give leave when justice so

requires." Fed. R. Civ. P. 15(a)(2); Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998). However, a request to amend may be denied on several grounds, including undue delay, undue prejudice to the party opposing the motion or futility of the amendment. Sound of Music v. Minnesota Mining and Manufacturing Co., 477 F.3d 910, 922-23 (7th Cir. 2007). Because the lawsuit is in its early stages and defendants have not objected to plaintiff's motion, I will grant the motion to amend.

However, the Prison Litigation Reform Act requires the court to screen plaintiff's supplemental allegations and to dismiss any claim that is frivolous, malicious or fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915A(a), (b). Although it appears that plaintiff has been released to a halfway house in Milwaukee, Wisconsin, his status as a prisoner for purposes of the PLRA is determined by the time he brings a suit and, in any case, a halfway house comes within the definition of a "any jail, prison, or other correctional facility" for purposes of the PLRA. Witzke v. Femal, 376 F.3d 744, 750, 753 (2004).

I will assume familiarity with the facts as alleged in the amended complaint. Plaintiff has alleged the following additional facts in his proposed supplement.

Defendants Nelson, Parr and Peterson are employed at the Chippewa Valley Correctional Treatment Facility. Nelson is the deputy warden and was the supervisor of the other defendants who seized and read plaintiff's computer disks. In addition, plaintiff attached a copy of the conduct report filed by defendant Wallace. Conduct Rep., dkt. #34-1, at 1. Plaintiff highlighted a line in which defendant Wallace states, "under the direction of Deputy Warden Nelson the contents of each disk were reviewed." Id.

Parr is a social service professional and AODA facilitator and was plaintiff's social worker. Plaintiff told Parr about his conflict with the other defendants regarding the seizure of his computer disks. Sometime after learning about the conflict, Parr reported "erroneous information" about plaintiff that led to his termination from the AODA program and, ultimately, his transfer to a more restrictive facility. In addition, Parr attempted to obtain information through unauthorized means from the Veterans Administration about plaintiff's military service and mental health records. Plaintiff does not state whether Parr was successful in this attempt, but he attached a document entitled "AODA Discharge Summary" that was signed by Parr and Peterson. AODA Discharge Summary, dkt. #34-1, at 6. The document states that "staff at the Veterans Administration [were] contacted" to verify what Parr regarded as plaintiff's implausible claims about his 16 years of military service; in response, the Veteran's Administration staff indicated plaintiff had served only 14 months in the army. Id. at 7.

Peterson is the AODA program supervisor. Plaintiff alleges that Peterson "participated in contacting the Veterans Administration" and that she learned about his conflict over the computer disks "as part of the structural hierarchy" in the prison. Plaintiff's proposed supplement to his complaint includes many other assertions about Nelson, Parr and Peterson. However, these assertions are not factual allegations but vague conclusions about their legal responsibilities.

The supplemental complaint contains no relevant facts about defendant Parr's conduct that were not included in plaintiff's two previous complaints. As I explained in both

previous orders, these facts are insufficient to state a claim for retaliation against Parr, because plaintiff has alleged no facts to connect her negative evaluation to his grievance. And, for reasons explained in the order dated January 26, 2012, plaintiff's allegations that Parr obtained confidential information are not properly part of this lawsuit because they do not arise out of the same transactions or occurrences as his access to the courts claim. Fed. R. Civ. P. 20. Plaintiff's allegations against Peterson are deficient for the same reasons. Accordingly, I will deny plaintiff leave to proceed on his claims against defendants Parr and Peterson, and they will be dismissed from the case.

However, the supplemental complaint does state claims against defendant Nelson for denial of access to the court and for retaliation. At least at this early screening stage, plaintiff's allegation that Nelson directed Wallace to review the disks is sufficient to infer that Nelson was "personally involved" in the allegedly unconstitutional actions. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982).

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff has filed a "motion to cease and desist obstructions to court access of Nicole Williams, Parole Agent," which I interpret as a motion for preliminary injunction. Plaintiff contends that Williams and Genesis Behavioral, Inc. have imposed conditions of his parole that interfere with his right to access the courts.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."

Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (citation omitted). To obtain preliminary injunctive relief, plaintiff must show some likelihood of success on the merits, that he has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and that an injunction is in the public interest. Ezell v. City of Chicago, 651 F.3d 684, 694 (7th Cir. 2011).

I will deny this motion for several reasons. First, plaintiff failed to comply with this court's procedures, which require parties seeking injunctive relief to submit proposed findings of fact. I have included a copy of those procedures with this order. Second, plaintiff's request is outside the scope of this case and he is trying to obtain an injunction against two entities who are not parties to this lawsuit. Plaintiff is proceeding on claims that defendants Wallace, Cowan, T. Wallace, Hofkes and Nelson violated his right of access to the courts and retaliated against him *for events that occurred in the past, when he was incarcerated*. He is not proceeding against Nicole Williams or Genesis Behavioral, Inc in this lawsuit. Moreover, plaintiff has adduced no evidence about the parole conditions that he finds objectionable or how those conditions interfere with his access to the courts. Like the proposed supplement to his complaint, plaintiff's brief in support of his motion for preliminary injunction contains few specific facts and is primarily a series of vague legal conclusions.

PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Plaintiff has filed a "motion for supplementation and the disclosure of electronically stored information," dkt. #29, which I construe as a motion to compel discovery under Fed. R. Civ. P. 37(a)(1). Plaintiff asks the court to order defendants to disclose all of the documents stored in his EDNET account, which he claims "form a foundation as evidence of the intended behavior . . . and conduct by the defendants." Plaintiff does not describe the contents of these documents.

In response to plaintiff's motion, defendants notified the court of their intention to mail plaintiff a CD containing all of the contents of plaintiff's EDNET account, dkt. #33., and filed a copy of their letter sending the CD. Dkt. #35. Accordingly, the motion to compel is now moot.

However, for future reference, the court notes that a party may move to compel discovery only *after* the other party fails to respond to a discovery request or provides an evasive or incomplete response. Fed. R. Civ. P. 37(a)(1), (4). The motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Moreover, the party seeking to compel discovery must prove that the information sought is relevant to the subject matter of the action. See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U.A., 657 F.2d 890, 903 (7th Cir. 1981).

Plaintiff did not allege in his motion that he had asked defendants to produce the requested documents and did not explain why the documents were relevant (such as by

describing the contents of the documents and explaining how the documents would help prove facts about defendants' intent or conduct). In future filings, plaintiff should explain the *specific facts* surrounding his motion, instead of dwelling on vague claims that defendants are oppressing him or interfering with his rights.

ORDER

IT IS ORDERED that

1. The motion for summary judgment, dkt. #22, filed by defendants Pamela Wallace, Captain Cowan, Captain T. Wallace and Sergeant Hofkes is DENIED;

2. Plaintiff Maurice Smith's motion to file a supplement to his complaint, dkt. #34, is GRANTED;

3. Plaintiff is DENIED leave to proceed on his claims against defendants Ms. Parr and Ms. Peterson, who are DISMISSED from the case;

4. Plaintiff is GRANTED leave to proceed on his claim that defendant Deputy Warden Nelson violated his right to access the courts and retaliated for his inmate complaint;

5. Plaintiff's "motion to cease and desist obstructions to court access of Nicole Williams, Parole Agent", dkt. #31, is DENIED;

6. Plaintiff's "motion for supplementation and the disclosure of electronically stored

information," dkt. #29, is DENIED as moot.

Entered this 2d day of August, 2012.

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