

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

ROBERT E. TALIAFERRO, JR.,

Plaintiff,

v.

RANDALL HEPP, OFFICER HALE
and CAPTAIN FOSTER,

Defendants.

ORDER

12-cv-921-bbc

Plaintiff Robert E. Taliaferro, Jr., an inmate at the Jackson Correctional Institution, brings this amended complaint pursuant to 42 U.S.C. § 1983 against defendants Randall Hepp, Officer Hale and Captain Foster. In an order entered March 11, 2013, I dismissed all but one of plaintiff's claims with prejudice. Taliaferro v. Hepp, No. 12-cv-921-bbc, 2013 WL 936609 (W.D. Wis. Mar. 11, 2013). I dismissed his claim that prison officials threatened to punish him if he displayed his artwork online under Fed. R. Civ. P. 8 and advised plaintiff that if he filed an amended complaint, he must allege who made the implied threat, when the person or persons made the threat and whether the threat concerned punishment for selling artwork online or only for displaying it online.

Plaintiff has now filed a supplement to his complaint, dkt. #4, that clarifies the threat made by defendants Hale and Foster. Because plaintiff is a prisoner, under the 1996 Prison Litigation Reform Act, I must screen the supplement and deny plaintiff leave to proceed if

it is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). Because plaintiff is a pro se litigant, I must construe the allegations of the amended complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the amended complaint, I conclude that plaintiff's allegations fail to state a claim that defendants violated plaintiff's First Amendment rights because their implied threat did not implicate plaintiff's protected speech. None of the supplemental allegations affect the previous decision on plaintiff's other causes of action. Although Hepp is included as a defendant in the caption, the amended complaint includes no new allegations regarding Hepp, and he will be dismissed from the case.

In his amended complaint, plaintiff has alleged the following relevant facts.

ALLEGATIONS OF FACT

Plaintiff Robert Taliaferro, Jr., is an inmate at the Jackson Correctional Institution, where defendant Randall Hepp is the warden, defendant Hale is a correctional officer and defendant Foster is a security supervisor. Plaintiff is a visual artist and regularly displayed and sold his artwork on Artspan.com, a social media website. The "website was created and managed by a member of the community." Suppl., dkt. #5, ¶ 8.

On April 19, 2012, plaintiff received a conduct report alleging that he had violated DOC Policy 303.32, which prohibits an inmate from engaging in a "business or enterprise." Plaintiff asked for a staff advocate and defendant Hale was assigned to plaintiff. On April

27, 2012, plaintiff met with Hale about the upcoming disciplinary hearing. Hale listened to plaintiff's comments and then said that plaintiff "would probably be found guilty and could get up to 180 days of segregation, the maximum sanction for the disciplinary infraction." Amended Cpt., dkt. # 5, ¶ 12c. Hale stated that the website was a violation of the rules and asked plaintiff about "the status of the website." Id. at ¶ 12d. Plaintiff replied that "he had requested that the site be taken down as it seemed to be an issue behind the conduct report being written, even though it was not the exact reason for the report." Id. Hale stated that taking down the artwork "was probably for the best" and then asked whether plaintiff would rather have segregation time or loss of recreation, if he were offered a choice. Id. at ¶ 12e. Plaintiff said that he would prefer a loss of recreation.

On May 4, 2012, a disciplinary hearing was held on the conduct report and defendant Foster served as the hearing officer. Foster found plaintiff guilty of violating DOC Policy 303.32 and imposed a penalty of sixty days' loss of recreation. In the disciplinary hearing report, defendant Foster refers to the fact that plaintiff voluntarily removed the artwork after learning that his posting of it on a website violated the rules.

OPINION

Plaintiff's only remaining claim is that defendants Hale and Foster implied that he would receive additional punishment if he did not take down the Artspan.com website. A public official may not use an implied threat of punishment as "informal censorship" to suppress protected speech, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963), and the

First Amendment protects “purely artistic expression.” Piarowski v. Illinois Community College District, 759 F.2d 625, 628 (7th Cir. 1985). As I explained in the previous order, the Jackson Correctional Institution has a legitimate penological interest in prohibiting the sale of artwork by prisoners, Turner v. Safley, 482 U.S. 78, 89 (1987), but those same penological interests would not justify prohibiting a prisoner from merely exhibiting his artwork online. Taliaferro, 2013 WL 936609 at *3-4.

In the previous opinion, I noted that the complaint was ambiguous about who made the threat and whether the threat was “to punish plaintiff if he continued to display his work online or only if he continued to display *and sell* it online.” Dkt. #4, at 9. Plaintiff’s supplement makes it clear that Hale and Foster made the statements and I agree with plaintiff that one might reasonably interpret their statements as threatening additional punishment if plaintiff continued to show his artwork on Artspan.com. However, plaintiff has admitted that he sold his artwork online through the website. Cpt., dkt. #3-3, ¶ 31-32. Despite my invitation to clarify his allegation, plaintiff has not alleged that defendants restricted his right to display his artwork online. Instead, defendant has only reemphasized that the website was managed by “a community member.” Regardless who managed the website, the state has legitimate reasons for preventing prisoners from selling things online. Accordingly, defendants were not prohibited from using the threat of additional punishment to persuade plaintiff to take down the website selling his paintings or from showing leniency when plaintiff took down the website on his own initiative. Therefore, I will deny plaintiff leave to proceed on this claim.

ORDER

It is ORDERED that plaintiff Robert E. Taliaferro, Jr., is DENIED leave to proceed on his claim that defendants Hale and Foster violated his rights under the First Amendment, and the complaint is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of May, 2013.

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