

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

JOEVAL JONES,

Plaintiff,

v.

C.O. RUSSELL and
CAPTAIN O'DONOVAN,

Defendants.

OPINION AND ORDER

15-cv-056-bbc

Pro se plaintiff Joeval Jones has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that defendants C.O. Russell and Captain O'Donovan violated his constitutional rights by disciplining him for helping another prisoner prepare an affidavit for a legal matter. Plaintiff challenges the prison regulation under which he was disciplined as unconstitutionally vague and overbroad.

Because plaintiff is a prisoner, I must screen his proposed complaint under 28 U.S.C. § 1915A and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. In doing so, I am required to read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing the proposed complaint, I conclude that plaintiff may proceed on his claims that he was punished in violation of the First Amendment, but I am denying him leave to proceed on his

claim that the prison regulation at issue is unconstitutionally vague and overbroad.

Plaintiff makes the following allegations of fact in his complaint.

ALLEGATIONS OF FACT

Plaintiff Joeval Jones is a prisoner in the Waupan Correctional Institution. On or around April 27, 2014, plaintiff requested notarization for an affidavit drafted in support of another prisoner's legal matter. (It appears that he either drafted the affidavit or assisted another prisoner in drafting the affidavit.) On or around May 4, 2014, the notary came to plaintiff's cell and notarized the affidavit. On or around May 5, 2014, plaintiff attempted to mail the affidavit in a stamped envelope to the other prisoner. Defendant C.O. Russell stopped the affidavit from being mailed and wrote plaintiff a conduct report for violating "DOC 303.20 Group Resistance and Petitions." Plt.'s Cpt., dkt. #1, at 4 (emphasis in original). On or around June 3, 2014, a disciplinary hearing was held on plaintiff's conduct report and Captain O'Donovan "sentenced" plaintiff to 360 days of disciplinary separation in the segregation unit of the prison.

OPINION

A. Freedom of Expression

Prisoners have a First Amendment right to free expression or speech, but prisons may restrict that speech so long as the regulation is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 85 (1987); Russelly. Richards, 384 F.3d 444, 447

(7th Cir. 2004). To determine whether petitioner has engaged in speech protected by the First Amendment, this court must apply the four-part test set forth in Turner: (1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether alternative means exist for exercising the right in question that remain available to prisoners; (3) whether accommodation of the asserted constitutional right would have a negative impact on guards, other inmates and the allocation of prison resources; and (4) whether obvious, easy alternatives exist as evidence that the regulation is not reasonable. Tarpley v. Allen County, Indiana, 312 F.3d 895, 898 (7th Cir. 2002).

Plaintiff is silent about the contents of his affidavit (other than to say it related to the other prisoner's legal matter), so I am aware of no legitimate penological reason to prevent its mailing or to punish him for it. Thus, I may assume at screening that plaintiff's affidavit is protected speech. However, I note that plaintiff discusses a hypothetical in which he says that "if a prisoner is convicted . . . for . . . gang activity it would be wrong to punish the prisoner for having in his possession/cell the gang evidence" Plt.'s Cpt., dkt. #1, at 6. If plaintiff's affidavit contained gang-related evidence or information, defendants may have had legitimate penological reasons for their actions. Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987) ("[I]t is difficult to conceive of a single factor more detrimental to penological objectives than organized gang activity"). Nevertheless, because I do not know the contents of plaintiff's affidavit, I cannot conclude that defendants relied on such penological interests. Further, I am not aware of any easy alternatives that would allow plaintiff to assist other

prisoners in litigation without participating in preparing affidavits and other legal documents. Therefore, I cannot “readily discern the validity and rationality of the connection between [a] legitimate penological interest” and the restriction of plaintiff’s speech in this case, Munson v. Gaetz, 673 F.3d 630, 632-33 (7th Cir. 2012). Accordingly, plaintiff will be granted leave to proceed on this claim.

I note that plaintiff characterizes his claim as one for “retaliation.” Retaliation requires the same analysis under Turner in order to show that plaintiff’s speech was protected and plaintiff to show the following: (1) one or more retaliatory actions taken by defendants that would deter a person of “ordinary firmness” from engaging in the protected activity; and (2) sufficient facts to make it plausible to infer that plaintiff’s protected activity was one of the reasons defendants took the action they did against him. Bridges v. Gilbert, 557 F.3d 541, 552-53 (7th Cir. 2009). Typically, retaliation claims involve instances in which the defendants purport to carry out an adverse action for an unrelated reason but the real reason is the plaintiff’s protected activity. E.g., Greene v. Doruff, 660 F.3d 975, 977 (7th Cir. 2011) (Plaintiff “charges that he had been punished not for violating any prison rules but instead for having exercised his freedom of speech by filing a grievance. . . .”). In this case, plaintiff alleges that he was given a conduct report and punished with 360 days in segregation *for his speech*, not for some pretextual reason. Nevertheless, plaintiff is free to proceed under either the more straightforward freedom of expression theory or the retaliation theory for his First Amendment claim.

B. Vagueness and Overbreadth

Plaintiff also contends that the prison regulation under which he was punished is unconstitutionally vague and overbroad. As an initial matter, it is unclear which regulation he means. When discussing defendant Russell's conduct report, plaintiff says defendant Russell wrote that plaintiff's "affidavit violated DOC § 303.20 Group Resistance and Petitions." Plt.'s Cpt., dkt. #1, at 4 (emphasis in original). Wis. Admin. DOC § 303.20 is entitled "endangering safety," not "group petitions and resistance." Later, plaintiff cites "DOC 303.20(1)-(3)." Id. at 5-7. Section 303.20 has no subsections. It seems unlikely that plaintiff is referring to Wis. Admin. DOC §§ 303.21-23. Section 303.21 is entitled "inciting a disturbance"; § 303.22 is entitled "participating in a disturbance"; and § 303.23 is entitled "taking a hostage." Section 303.24 is entitled "group resistance and petitions," and it appears to match plaintiff's allegations most clearly. Among other things, this regulation prohibits "[j]oin[ing] in or solicit[ing] another to join in any group petition or statement," unless that statement is one that "[a]uthorized . . . by the warden"; a "group petition[] to the courts"; or a "[c]omplaint properly prepared under ch. DOC 310." Because it is not clear which regulation plaintiff wishes to challenge, he has not provided defendants fair notice of his claim.

Even if I assume that plaintiff meant DOC § 303.24, plaintiff's claim would not succeed. He does not explain why he believes the regulation is vague or how it might be applied too broadly. Rather, he argues that the notary "approved" the affidavit for which he was later disciplined by notarizing it, so he should not have been punished. However, the

notary's action has nothing to do with the clarity or scope of the regulation.

Distilled, plaintiff's claim seems to be that it was a mistake for defendants Russell and O'Donovan to discipline him under the regulation. In other words, plaintiff is arguing that defendants failed to properly apply state law in the form of a prison regulation. Such a claim is not cognizable in this court. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (holding that state sovereign immunity prohibits federal courts from ordering state officials to conform their conduct to state law). Accordingly, plaintiff will not be granted leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Plaintiff Joeval Jones is GRANTED leave to proceed on his claims that defendants C.O. Russell and Captain O'Donovan violated his rights to free expression under the First Amendment when they disciplined him for assisting another prisoner with an affidavit.

2. Plaintiff is DENIED leave to proceed on his claims that the regulation under which he was disciplined is unconstitutionally vague or overbroad.

3. For the time being, plaintiff must send defendants Russell and O'Donovan a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

Entered this 25th day of March, 2015.

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