

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

MATTHEW J. FRANK, Secretary of the Wisconsin Department of Corrections, JON E. LITSCHER, former Secretary of the Wisconsin Department of Corrections; CINDY O'DONNELL, Deputy Secretary to Litscher; JOHN RAY, Corrections Complaint Examiner ("C.C.E."); GERALD BERGE, Warden at Supermax Correctional Institution; PETER HUIBREGTSE, Deputy Warden of Supermax; LIEUTENANT JULIE BIGGAR, a Lt. at Supermax; ELLEN RAY, I.C.E.; SGT. JANTZEN; C.O. WETTER; C.O. S. GRONDIN; C.O. MUELLER; C.O. CLARK, all guards at Supermax; JOHN SHARPE, Manager Foxtrot Unit at Supermax; SGT. BOYELSON,

Defendants.

In Lindell v. Frank, Nos. 03-2651 & 03-2765 (7th Cir. July 19, 2004), the Court of Appeals for the Seventh Circuit directed this court to 1) reopen this case as to plaintiff Lindell's claim against defendants Ellen Ray, Peter Huibregtse, John Ray, Cindy O'Donnell,

C.O. Mueller and Sgt. Boyelson for arbitrarily confiscating picture postcards from his cell in violation of the First Amendment; and 2) modify the injunction ordered by this court concerning photocopies of clippings by narrowing its scope. (The original order enjoined defendants “from enforcing the publisher’s only rule to the extent that it prohibits inmates from receiving any newspaper and magazine clippings and photocopies in the mail from any source other than the publisher or a recognized commercial source.” Lindell v. Frank, 02-C-21-C (W.D. Wis. May 5, 2003)).

In an order dated August 23, 2004, I reopened the case, granted plaintiff leave to proceed on his First Amendment postcard claim and modified the previously entered injunction as follows:

Defendants are ENJOINED from enforcing their publisher’s only rule to the extent that it prohibits plaintiff Lindell from receiving a reasonable number of photocopies of clippings that are from published sources and in a reasonable format.

Subsequently, on September 1, 2004, plaintiff moved to amend the injunction and schedule briefing on the issue. In addition, plaintiff advised this court that he had filed a petition for a rehearing en banc with the Court of Appeals for the Seventh Circuit. Ordinarily, the filing a petition for a rehearing stays the mandate issued by the court of appeals. Therefore, in an order entered on September 16, 2004, I denied plaintiff’s motion to amend the injunction

as premature.

Meanwhile, on September 13, 2004, defendants moved to dismiss plaintiff's First Amendment postcard claim on the ground that plaintiff had failed to exhaust his administrative remedies as to that claim. On October 28, 2004, I granted defendants' motion. A judgment of dismissal was entered that same date.

Now before the court is plaintiff's renewed motion for modification of the August 23, 2004 injunction (Dkt. #164), which is supported by a statement from plaintiff (Dkt. #165) advising this court that the court of appeals declined to docket his motion for rehearing (presumably because it was not timely). Also before this court is plaintiff's notice of appeal from the judgment entered on October 28, 2004.

Because the court of appeals has refused to entertain plaintiff's motion for rehearing, I am free to consider his renewed motion for modification of the August 23, 2004 injunction. That motion will be denied.

Plaintiff argues in his motion that the injunction should be modified to allow him to receive photocopies of material from the internet as well as "unlimited quantities" of photocopies of "legal materials," personal correspondence and photocopies or actual clippings from publications "relating to his litigation." According to plaintiff, any injunction limiting the amount, format or type of photocopies or clippings he can receive serves no legitimate penological purpose and threatens to violate his First Amendment rights.

Plaintiff's argument that the injunction should be modified to allow him unlimited quantities of photocopies of legal materials, personal correspondence or materials relating to his litigation, or clippings in addition to photocopies of clippings suggests that he has not read carefully this court's August 23 order or the decision of the court of appeals. Both rulings addressed the questions whether prison officials may legitimately restrict the overall volume of photocopies that may be sent to plaintiff and whether prison officials may require clippings to be photocopied for easier handling. The court of appeals agreed with this court that plaintiff's constitutional rights would not be infringed by a rule limiting the volume of photocopies he received or by a rule requiring clippings to be photocopied. Lindell v. Frank, 377 F.3d 655, 660 (7th Cir. 2004).

As to plaintiff's desire to amend the injunction to include language making it clear that he is allowed to receive photocopied material from the Internet, I do not believe such a modification is required. It is implicit in this court's August 23, 2004 order that the Internet constitutes a "published source." Therefore, the injunction as presently written precludes defendants from denying plaintiff a reasonable number of reasonably formatted photocopies of clippings from that source.

Turning to plaintiff's notice of appeal, plaintiff states that he is appealing from the August 23 order modifying the injunction and from the judgment entered in this action on October 28, 2004, dismissing his postcard claim for failure to exhaust his administrative

remedies. I express no opinion whether plaintiff's appeal from the August 23 order is timely. Only the court of appeals can address that issue.

With respect to plaintiff's appeal from the October 28 judgment, I construe his notice of appeal to include a request for leave to proceed on appeal in forma pauperis. This request is governed by the 1996 Prison Litigation Reform Act. It must be denied if plaintiff has three strikes against him under 28 U.S.C. § 1915(g) or if I certify that the appeal is not taken in good faith. Plaintiff does not have three strikes against him, and I do not intend to certify that his appeal is not taken in good faith.

The only other hurdle to plaintiff's proceeding with his appeal in forma pauperis is the requirement that he make an initial partial payment of the filing fee that has been calculated from a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Plaintiff has not submitted the necessary trust fund account statement.

ORDER

IT IS ORDERED that

1. Plaintiff Nathaniel Allen Lindell's motion to amend the modified injunction entered in this case on August 23, 2004 is DENIED.
2. Plaintiff may have until December 27, 2004, in which to submit a certified copy

of his trust fund account statement for the six-month period beginning approximately June 1, 2004 to approximately December 1, 2004. If, by December 27, 2004, plaintiff fails to submit the required statement or show cause for his failure to do so, then I will deny his request for leave to proceed in forma pauperis on the ground that he has failed to show that he is entitled to indigent status on appeal.

Entered this 7th day of December, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge