

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

GARRY A. BORZYCH,

Plaintiff,

v.

MATTHEW J. FRANK, Secretary of Wisconsin
Department of Corrections (DOC);
STEVE CASPERSON, Administrator of
Wisconsin's Department of Adult Institutions (DAI);
CINDY O'DONNELL, Office of the Secretary (OOS);
SANDRA HAUTAMAKI, Corrections Complaint Examiner;
DANIEL BERTRAND, Warden of Green Bay Corr. Inst.;
PETE ERICKSON, Security Director of G.B.C.I.;
LT. WAYNE NATZKE, Lieutenant at G.B.C.I.;
GLEN RIPLEY, Inmate Complaint Examiner (ICE); and
KATHLEEN BIERKE, Reviewer of Rejected Complaints,

Defendants.

ORDER

03-C-0575-C

Plaintiff Garry Borzych has filed two motions that are related. In one motion, he asks for the appointment of counsel. In the other, he asks for a protective order, but the “protective order” he wants is to be allowed to possess a copy of the texts titled “Temple of Woton” and “Creed of Iron,” which are central to the issues raised in this lawsuit.

Ordinarily, a party moving for a protective order wants an order that he need not

answer a discovery demand that the opposing party has served upon him. Fed. R. Civ. P. 26(c). Such orders are appropriate upon a finding by the court that justice requires that the party be protected from the “annoyance, embarrassment, oppression or undue burden or expense” that answering the discovery demand would cause. Id. This is not plaintiff’s situation. Plaintiff’s motion is more aptly construed as a renewed version of his earlier motion for a preliminary injunction, in which he sought an order enjoining defendants from preventing him from having in his possession copies of “Temple of Wotan” and “Creed of Iron.” The second motion will be denied for the same reasons I denied plaintiff’s first motion. However, I will venture these additional comments.

Plaintiff asserts that he is entitled to know which passages in the contraband texts warranted their confiscation on the ground that they posed a risk to the security of the Wisconsin Secure Program Facility. Plaintiff argues that if the court denies him the ability to view the texts personally, he should at the least be appointed counsel to assist him with this case.

Inmate Nathaniel Lindell made a similar argument in another case in this court, Lindell v. McCaughtry, 01-C-209-C. In that case, Lindell had been deprived of a publication on the ground that parts of the publication contained material that threatened the security of the institution. Magistrate Judge Stephen Crocker considered the matter in the context of a motion to compel discovery in an order dated June 20, 2004. He noted that “[i]f an

inmate can obtain withheld magazines simply by filing a federal lawsuit and demanding the magazines during discovery, then the institution's review system will be gutted. Federal litigation is not a mechanism by which a prisoner litigant may subvert valid institutional regulations." Lindell v. McCaughtry, slip op. p.3. June 20, 2003 (W.D. Wis.).

This court adheres to the same belief. I agree with the magistrate judge also that although it is difficult for any inmate to challenge the reasoning behind a prison's decision to withhold print material without seeing it during litigation, sometimes compromises have to be made to protect both sides' interests in cases involving sensitive information. Therefore, as in Lindell, I will not grant any motion plaintiff files that seeks an order allowing him to have the items at issue in this case so that he can defend any argument defendants might make that the material poses a danger to the security of the institution. Instead, assuming defendants will move for summary judgment on this issue, I will take the intermediate step the magistrate judge took in the Lindell case: defendants will have to submit the texts *in camera* and specify every passage in the texts that caused prison officials to withhold them from plaintiff. Rather than guess at what prison officials found to violate the state's policy, the court will require defendants to spell it out with precision.

I turn then to plaintiff's motion for appointment of counsel. In addition to arguing that he needs a lawyer to help him challenge defendants' likely stance with respect to the contraband texts, a matter that is not dispositive given the manner in which I intend to

proceed, plaintiff argues that he is unsophisticated in legal matters, has difficulty learning and that the issues raised in his lawsuit are complex. In addition, he makes the showing required by Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992), that he has made reasonable attempts to find representation on his own and has failed in his efforts.

Plaintiff's 18-page brief in support of his motion for appointment of counsel belies his claims of his inability to represent himself, even taking into consideration that he is receiving help from other inmates. He argues his positions well and cites numerous cases to support his arguments. He contends that one of the reasons he needs a lawyer is because he cannot Shepardize case law on the computer at the Wisconsin Secure Program Facility. Most pro se litigants don't even know what it means to Shepardize cases. In any event, the law governing plaintiff's claims was described in this court's order of January 5, 2004, granting plaintiff leave to proceed in forma pauperis. Plaintiff's need to conduct additional legal research is minimal. Instead, he should focus his attention on collecting the factual evidence he will need to succeed on his claims. He already has personal knowledge of his own religious beliefs and the circumstances surrounding the act he alleges was retaliatory. He appears capable of conducting discovery to obtain evidence in support of his retaliation claim, if such evidence exists, as well as to support his claims regarding religious freedom. Although the claims plaintiff raises in this lawsuit are moderately complex, I am not convinced that plaintiff is incapable of presenting his case without a lawyer.

ORDER

IT IS ORDERED that plaintiff's second motion for a preliminary injunction is DENIED.

Further, IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

Entered this 12th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge