IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEONARD COLLINS,

Plaintiff,

v.

GARY McCAUGHTRY
and MOLLY OLSON,

Defendants.

OPINION AND ORDER

04-C-147-C

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In this civil action brought under 42 U.S.C. § 1983, plaintiff Leonard Collins alleges three violations of his First Amendment rights. In an opinion and order dated February 28, 2005, I granted defendants' motion for summary judgment as to one of plaintiff's claims because he had failed to exhaust administrative remedies with respect to it. I stayed a decision whether plaintiff had exhausted his administrative remedies with respect to the other two claims and asked defendants to provide supplementary evidentiary information related to plaintiff's inmate complaints Nos. KMCI-1998-1823 and KMCI-2001-13011. I requested this additional information because the record evidence suggested that plaintiff might have satisfied the exhaustion provision of the 1996 Prison Litigation Reform Act, 42

U.S.C. § 1997e(a), with respect to his claims that (1) defendant Gary McCaughtry denied him a hardbound English book; and (2) defendant Molly Olson retaliated against him for filing an appeal by placing him in segregation.

Defendants have now submitted authenticated copies of plaintiff's complaints Nos. KMCI-1998-1823 and KMCI-2001-13011. As noted in the February 28 order, defendants' evidence indicated that plaintiff had properly appealed these two complaints. After reviewing the text of these grievances, I conclude that plaintiff failed to exhaust his claim against defendant Olson, but that he did exhaust his claim about being denied a book. Nevertheless, plaintiff has failed to show that he has standing to litigate his claim against defendant McCaughtry. Accordingly, this court lacks subject matter jurisdiction to decide the constitutionality of the ban on hardbound books and I will grant defendants' motion and dismiss both remaining claims without prejudice.

OPINION

A. Exhaustion

1. KMCI-1998-1823

The parties debate whether plaintiff put defendants on notice of his claim that defendant Molly Olson retaliated against him for filing an appeal by placing him in segregation. Plaintiff suggests that he raised this claim in KMCI-1998-1823, which

defendants had summarily described as a complaint "about being unjustly placed in [temporary lock up]." As I noted in the February 28 order, it was not clear from this description whether plaintiff had mentioned defendant Olson and if so, whether plaintiff had alleged that she acted in retaliation for his filing an appeal. Upon reviewing plaintiff's inmate complaint, I find that plaintiff did not mention defendant Olson or allege retaliation. Instead, plaintiff complained that he had been placed in temporary lock-up while prison officials investigated his possible involvement in a conspiracy to escape or cause a prison riot. Because plaintiff's grievance does not mention defendant Olson or alert prison officials to his belief that she had retaliated against him for filing an appeal, I must grant defendants' motion and dismiss plaintiff's claim against defendant Olson for his failure to exhaust his administrative remedies.

2. KMCI-2001-13011

The parties also debate whether plaintiff raised his claim that defendant McCaughtry denied him a hardbound English book in his grievance no. KMCI-2001-13011. As I noted in the February 24 order, defendants described plaintiff's complaint no. KMCI-2001-13011 as a complaint about not "being provided with [] programs in segregation as specified in DOC 303.70." This summary description makes no mention of the alleged denial of a hardbound English book. Upon reviewing the copy of complaint no. KMCI-2001-13011,

I conclude that plaintiff did adequately put defendants on notice of his claim about being denied a book. In his grievance, plaintiff stated that he "was denied [an] education book" in segregation. Although plaintiff does not specify that he was denied an English book or the reason for the denial, this complaint was sufficient to put defendants on notice that he was challenging a restriction on his ability to receive reading materials. Thus, I conclude that plaintiff satisfied the Prison Litigation Reform Act's exhaustion requirement with respect to his claim that he was denied an English book in violation of the First Amendment.

B. First Amendment Violation

Now that I have resolved defendants' failure to exhaust affirmative defense, it is appropriate to turn to their argument that they are entitled to summary judgment on the merits of plaintiff's book denial claim. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999) (district court lacks discretion to resolve claims on merits unless exhaustion requirement satisfied). From the parties' proposed findings of fact, I find the following facts to be undisputed.

1. Undisputed facts

Plaintiff Leonard Collins is an inmate at the Waupun Correctional Institution in Waupun, Wisconsin. Defendant Gary McCaughtry was the warden of the Waupun facility

from December 4, 1988 until he retired on November 1, 2004.

On June 15, 2000, plaintiff requested an English text book from the Waupun facility's education director, Mark Melcher. Melcher responded that the prison school did not have extra books to lend and that study materials could be obtained from the prison library. Subsequently, plaintiff was informed that hard cover books were not allowed in segregation. After legal materials became available on CD-ROM in 2001, inmates housed in the Waupun facility's segregation unit have not been permitted to have any hardbound books. Prior to that time, they were allowed hard covered legal and religious materials.

Hardbound books were banned because inmates could use them as weapons, body armor or to conceal contraband. In the past, inmates had thrown hardbound books at staff; these books proved especially dangerous because of their sharp edges. In addition, inmates tied open hardcover books together to fashion body armor for themselves for use in resisting cell entry teams. To conceal contraband, inmates would split a book's cover and slide thin items, such as matches, tobacco, notes, and razor blades into the crevice. Soft covered books are not as effective as weapons, body armor or for smuggling contraband.

2. Discussion

As a prisoner, plaintiff retains the right to have access to reading materials free from

arbitrary restriction, Antonelli v. Sheahan, 81 F.3d 1422, 1433 (7th Cir. 1996), but that right may be infringed by prison regulations reasonably related to legitimate penological interests. Thornburgh v. Abbott, 490 U.S. 401, 414 (1989); Turner v. Safley, 482 U.S. 78, 89 (1987). However, there is a fundamental problem with plaintiff's claim: he has not shown that he was actually denied the book he sought pursuant to the ban on hard cover books. The only proposed fact on point indicates that plaintiff was denied an English book because the education department did not have the book to lend at the time. In their answer to plaintiff's complaint, defendants denied that plaintiff had been refused a book pursuant to the ban on hardbound books. This raises the question whether plaintiff has standing to challenge a general policy banning hardbound books in segregation that did not become effective until at least six months after plaintiff asked for and was denied an English book.

Although neither party addressed the issue of standing expressly, federal courts have an independent obligation to insure that they have subject matter jurisdiction over an issue. Fed. R. Civ. P. 12(h)(3). Because the standing issue goes to the court's jurisdiction, it can be raised sua sponte at any time. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990) ("Although neither side raises the issue [of standing] here, we are required to address the issue even if the courts below have not passed on it"). In order to have standing to raise a claim, a party must demonstrate that he has suffered an "injury in fact," that there is a causal connection between the injury and the conduct complained of and that a favorable decision

will likely redress the injury. O'Sullivan v. City of Chicago, 396 F.3d 843, 854 (7th Cir. 2005) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id.

In his complaint, plaintiff alleged that he had been denied an English text book pursuant to the rule prohibiting inmates housed in the segregation unit from having hard cover books. However, the facts do not bear this out. The fact show only that plaintiff was denied the book he requested because it was not available at the time he wanted it from the source where he requested it.

The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case [and thus,] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561. Of course, the Supreme Court has recognized that parties might have standing to challenge a barrier if they demonstrate that they intend to apply for a particular benefit if the barrier is removed. E.g., Gratz v. Bollinger, 539 U.S. 244, 261 (2003) (plaintiff had standing to challenge university's use of race as a factor in admissions based on his testimony that he intended to apply to transfer if race was removed as an admission preference) (citing similar cases). However, for this rule to apply in this case, plaintiff would

have to adduce evidence that he (1) remains in segregated confinement; and (2) intends to request a hard cover book if the ban is lifted. None of the proposed findings of fact suggests either situation.

Although some aspects of standing are prudential, injury, causation and redressability are "irreducible constitutional minimum[s]." Failure to prove them is fatal to a claim. Lujan, 504 U.S. at 560. It might be argued that plaintiff would not have brought a challenge to the ban unless he had been denied a hardbound book or intends to request one. However, "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." FW/PBS, 493 U.S. at 231 (internal citations and quotations omitted). Because the facts reveal that plaintiff lacks standing to challenge the ban on hardbound books, this court lacks jurisdiction to rule on the constitutionality of defendant's ban on hardbound books and the claim must be dismissed.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Gary McCaughtry and Molly Olson is GRANTED with respect to plaintiff Leonard Collins's First Amendment retaliation claim against defendant Olson and his First Amendment challenge to defendant McCaughtry's policy of banning hardbound books in the segregation housing

unit. Both of these claims are DISMISSED without prejudice. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 14th day of March, 2005.

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