

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

KENNETH JONES,

Plaintiff,

v.

K. ROSSI BURTON, CHRISTINE
HINES and RICK HILGEDORF,
in their individual/personal and
official capacities,

Defendants.

OPINION AND
ORDER
05-C-527-C

This is a proposed civil action for injunctive relief brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. Plaintiff Kenneth Jones, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, contends that defendants violated his constitutional rights under Fifth Amendment when they seized his watch.

Although plaintiff has paid the filing fee in full, the court must screen his complaint pursuant to 28 U.S.C. § 1915A. In screening, the court must examine the prisoner's claims, interpreting them broadly, and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a defendant

who is immune from such relief. 28 U.S.C. § 1915A.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is a prisoner incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. Defendants are employed at the Oxford Federal Correctional Institution. Defendant K. Rossi Burton is Assistant Warden. Defendant Christine Hines is Assistant Supervisor of "I.S.M." Defendant Rick Hilgedorf is an "I.S.O."

In 1998, while he was incarcerated at the United States Penitentiary in Leavenworth, Kansas, plaintiff received a Casio Data Bank 150 Model 1477 watch. The watch's features include a basic calculator. Plaintiff wore his watch on the prison compound during his time at Leavenworth. He brought the watch with him when he was transferred to Oxford, Wisconsin in 1999, and wore his watch every day without incident until May 2004.

In the spring of 2004, plaintiff was diagnosed with cancer. In May 2004, he was sent to the Federal Correctional Complex Medical Center in Butner, North Carolina, to receive necessary medical care. When he arrived in Butner, plaintiff was issued his watch and permitted to wear it on the prison compound.

In August 2004, plaintiff returned to the Oxford prison. At this time, defendant Rick Hilgedorf confiscated plaintiff's watch, telling plaintiff that defendant Christine Hines had ordered Hilgedorf to do so. Defendants informed plaintiff that the watch violated prison

Program Statement 5580.06 which provides:

Watches permitted to be retained by inmates must have a declared value of less than \$100 and cannot have stones or be electronically sophisticated (i.e. able to send signals).

Program Statement 5580.06 was in effect and remained unamended during the entire eight year period plaintiff possessed his watch.

When plaintiff was unable to regain his watch through informal channels within the prison, he filed a Bureau of Prisons Form 9 complaint, asking for the return of his watch and an explanation how his watch failed to meet the requirements of Program Statement 5580.06. On October 10, 2004, the warden denied plaintiff's complaint. He quoted Program Statement 5580.06 and gave plaintiff the following explanation:

A review of the technical specs reveals this watch has 150 pages of Telememo and Schedule memo with shared memory between the two. Therefore, the watch is classified as an electronically sophisticated device.

Plaintiff appealed the decision to the Bureau of Prisons Regional Director on October 22, 2004. Again his request was denied because his watch had "150 pages of telememo and a schedule memo with a shared memory" and was deemed "to be an electronically sophisticated device." On November 27, 2004, plaintiff appealed to the National Inmate Appeals Administrator who denied the appeal, stating that the watch's shared memory capability "renders [the watch] sufficiently electronically sophisticated to warrant prohibition."

In June 2005, plaintiff obtained a copy of an email message sent from Casio customer

support representative LaToya Albritton to an unidentified individual. In the message, Albritton responded to questions about the Casio E Databank 150, stating that the watch “does not have any kind of signal” and that it “cannot be used to alter or transmit any kind of radio signal.” Albritton wrote that “there is no known way that the watch or it’s [sic] functions can be altered to make it interact or communicate between a computer and or it’s [sic] user.”

OPINION

A. Due Process

Plaintiff contends that defendants’ decision to confiscate his watch deprived him of property without due process of law in violation of the Fifth Amendment. The Fifth Amendment protects individuals from being deprived of life, liberty or property without due process of law by the federal government. Caldwell v. Miller, 790 F.2d 589, 602 (7th Cir. 1986). However, before an individual is entitled to Fifth Amendment due process protections, he must have a protected liberty or property interest at stake. Dandan v. Ashcroft, 339 F.3d 567, 575 (7th Cir. 2003). Generally, a prisoner has a protected property interest in personal possessions. See, e.g., Nance v. Vierregge, 147 F.3d 589, 590 (7th Cir. 1998) (inmate had property interest in possessions he attempted to take with him while being transferred to another prison); Caldwell v. Miller, 790 F.2d 589, 608 (7th Cir. 1986) (“beyond dispute” that prisoner had property interest in hardbound books). Therefore, I will

assume that plaintiff has a protected interest in his watch.

Plaintiff suggests that the taking of his watch was an arbitrary application of prison Program Statement 5580.06. He emphasizes that the plain language of the statement forbids watches that are “electronically sophisticated (i.e. able to send signals).” The statement uses the phrase id est (i.e.), a Latin term equivalent to the English phrase “that is.” Id est stands in contrast to the phrase exempli gratia (e.g.), a Latin term that loosely translates to the English phrase “for example.” The precise language of the program statement equates electronic sophistication with the ability to send signals. Plaintiff alleges that his watch is incapable of sending signals. Therefore, he contends that his watch cannot violate the program statement and was taken from him arbitrarily. Although I agree with plaintiff’s linguistic analysis, his reliance on the program statement’s misuse of the abbreviation i.e. is itself misplaced.

As a general rule, when a protected property interest is at stake, the Fifth Amendment entitles individuals to receive notice and an opportunity to be heard before the Government deprives them of property. United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993). However, the due process rights of prisoners are not absolute and must be adapted to the legitimate security needs of a corrections institution. Caldwell, 70 F.2d at 608-09. To the extent that prison officials further their interest in security and order, property claims of inmates may be diminished by the needs and exigencies of the institutional environment. Id. at 609. In such instances, postdeprivation processes and

remedies will satisfy the Fifth Amendment, even in the absence of a pre-deprivation notice and hearing. So long as the federal government provides plaintiff with a post-deprivation remedy, due process is satisfied. Hudson v. Palmer, 468 U.S. 517 (1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post-deprivation remedy); Raditch v. United States, 929 F.2d 478, 481 (9th Cir. 1991) (“Although Hudson involved § 1983 and the Fourteenth Amendment, the same due process principles apply to the federal government through the Fifth Amendment.”).

Plaintiff contends that his watch was seized in arbitrary violation of the program statement. The federal government has provided him with an opportunity to raise his claim through the inmate complaint process. Plaintiff filed three complaint forms: BP-9, BP-10 and BP-11. Each of these forms was reviewed by officials from the Bureau of Prisons and each contained a well-reasoned response. At each level of plaintiff’s appeal, the Bureau of Prisons made it clear that the program statement is intended to prevent electronically sophisticated watches from being worn within the prison. The ability of a watch to “send signals” is only one example of a way in which a watch can be deemed electronically sophisticated. Although Program Statement 5580.06 would convey more clearly the bureau’s apparent intention if it exchanged the limiting term id est for the more comprehensive exempli gratia (or better yet, used the English equivalent “for example”), the error is forgivable. Plaintiff may not agree with the decision of prison officials; nevertheless

he has been provided the process due to him under the Fifth Amendment. I conclude therefore that he has failed to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED that

1. This action is DISMISSED pursuant to 28 U.S.C. § 1915A because plaintiff has failed to state a claim upon which relief may be granted.
2. The clerk of court is directed to enter judgment for defendants and close this case.
3. A strike will be recorded against plaintiff in accordance with 28 U.S.C. § 1915(g).

Entered this 26th day of September, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge