

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SYLVESTER JACKSON,

Plaintiff,

v.

GARY H. HAMBLIN, WILLIAM GROSSHANS,
and RANDALL R. HEPP,

Defendants.

OPINION and ORDER

11-cv-136-slc¹

In this proposed civil action, plaintiff Sylvester Jackson, an inmate at Jackson Correctional Institution, contends that defendants are violating his constitutional rights by prohibiting him from receiving legal assistance from prisoners not located in his housing unit. Plaintiff has paid his filing fee in full, but because he is a prisoner, his complaint must be screened under 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may

¹While this court has a judicial vacancy, it is assigning one-third of its caseload automatically to Magistrate Judge Stephen Crocker. For the purpose of issuing this order only, I am assuming jurisdiction over this case.

be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e).

Plaintiff frames his claim as one for a denial of his right of access to the courts. He cannot proceed on that claim because he does not explain how the policy he is challenging has affected any particular case he is litigating. However, I conclude that plaintiff may proceed on a claim that his First Amendment right to free speech was unconstitutionally restricted.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff is a prisoner who has been incarcerated at several different institutions at times pertinent to this case. After he was convicted, he sought out “prisoner after prisoner” who was knowledgeable in the law to assist him with bringing legal challenges to his conviction. (From my reading of plaintiff’s complaint, I understand that he is alleging these facts as background information to this lawsuit, not as a challenge to his conviction.)

While incarcerated at Stanley Correctional Institution, plaintiff met prisoner Vincent L. Ammons, an inmate who plaintiff believed was knowledgeable in the law. Ammons agreed to assist plaintiff with his criminal and civil cases, but shortly after speaking with Ammons, plaintiff was transferred to Jackson Correctional Institution.

While at the Jackson prison, plaintiff again sought out prisoners who could provide him legal assistance, but was unable to find help because of a policy at the Jackson prison that

prohibits inter-housing unit legal assistance. In November 2010, plaintiff was reunited with Ammons at the Jackson prison. Once again, plaintiff asked Ammons for his assistance, but this time Ammons refused because he and plaintiff were located in different housing units and inter-housing unit legal assistance was prohibited. Ammons told plaintiff that he would attempt to sort out this issue through the prisoner grievance procedures.

On December 7, 2010, Ammons filed an informal group grievance on behalf of himself and numerous other prisoners, alleging that the Jackson prison's policy denying prisoners inter-unit legal assistance was unconstitutional. On December 8, 2010, the inmate complaint examiner denied Ammons' grievance, stating, "[i]nmates who are assisting another inmate with legal matters will be allowed to have legal materials belonging to the inmate being assisted in their possession, as long as both inmates are housed in the same housing unit." Plt.'s Cpt., dkt. #1 at 2. Ammons then filed grievance JCI-2010-25539, asserting that the Jackson prison's policy of not allowing prisoners in different housing units to assist each other in legal matters is unconstitutional. Defendant Hepp, the warden of the Jackson prison, dismissed this complaint and Ammons appealed the dismissal to the correction complaint examiner on December 14, 2010. Defendant Raemisch affirmed the dismissal on December 21, 2010. As a result of the dismissal, plaintiff was informed by Ammons that he could not work on his legal matters because he had been banned from doing so by "prison officials enforcing" Wis. Admin. Code § DOC 309.155(5).

OPINION

A. Proposed Class Action

As an initial matter, plaintiff asserts that his lawsuit involves a class of approximately 1,000 other prisoners who are similarly situated. I construe plaintiff's assertions as a request for certification of this lawsuit as a class action. Before the court may certify a class action, four prerequisites must be met:

(1) The class [must be] so numerous that joinder of all members is impracticable; (2) there [must be] questions of law or fact common to the class; (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of that class; and (4) the representative parties [must] fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Although plaintiff may be able to satisfy some of these requirements, he cannot proceed on a class action because he is not represented by a lawyer and therefore, is not in a position to protect the interests of the class. Because absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Fed. R. Civ. P. 23(g) (requiring class counsel in class action cases; setting standard for appointing such counsel). Therefore, plaintiff's request for class certification will be denied.

B. Department of Corrections Regulation

Plaintiff challenges Wis. Admin. Code § DOC 308.155(5), the regulation on which

defendants relied in refusing to allow inter-housing unit legal assistance, saying that it is unconstitutionally vague and overbroad. The regulation provides that

Inmates may provide legal services to other inmates except that institutions may regulate the time and place of such legal services. Compensation of any kind for the provisions of such inmate to inmate legal services is prohibited. The department is not responsible for legal materials not provided by the department that are given to other prisoners.

Plaintiff argues that the regulation fails to provide fair warning regarding what conduct violates the code, subjecting plaintiff to severe discipline for its infraction, and it fails to provide those charged with enforcing the code an “explicit and ascertainable standard to prevent its enforcement in an arbitrary manner.” Plaintiff argues that his vagueness claim should be analyzed as a due process claim. Due process requires that laws and regulations be written with enough specificity so that individuals can distinguish lawful from unlawful conduct and conform their conduct accordingly. Grayned v. City of Rockford, 408 U.S. 104, 108 (1971).

Plaintiff’s facial challenge to the regulation is without merit. Wis. Admin. Code § DOC 309.155(5) cannot be unconstitutional on its face because it does not prohibit anything; it simply delegates power to the institutions to make policies consistent with the regulation. I construe plaintiff’s complaint as a challenge to the Jackson prison’s policy that prohibits inter-housing unit legal assistance.

C. Access to Courts

Plaintiff contends that defendants violated his right of access to the courts by prohibiting

him from receiving legal assistance from prisoner Ammons. To state a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn that the denial of access caused him an “actual injury.” Lewis v. Casey, 518 U.S. 343, 351 (1996). At a minimum, a plaintiff alleging a denial of access to the courts must identify an “arguable” and “non-frivolous” underlying cause of action, Christopher v. Harbury, 536 U.S. 403, 415 (2002), and describe how that cause of action has been prejudiced by the actions of prison officials. Lewis, 518 U.S. at 351; see also Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998) (“[I]f the denial [of access to courts] has had no effect on the legal relief sought by the plaintiff, no right has been violated.”). Plaintiff fails to explain how his inability to speak with prisoners in other housing units has hindered his ability to litigate any particular case. Therefore, he fails to state a claim for denial of access to courts.

D. First Amendment Right to Communicate with Other Prisoners

The right of access to the courts is the only legal theory that plaintiff identifies in his complaint, but as I have explained, it is not one on which he can proceed. It does not follow however that his case cannot proceed. “[T]he complaint need not identify a legal theory, and specifying an incorrect theory is not fatal.” Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992). In screening a prisoner’s complaint under § 1915, the court must determine whether the plaintiff states a claim under *any* legal theory. I conclude that plaintiff’s complaint can be read as stating a potential claim that defendants violated his First Amendment

right of inmate-to-inmate legal correspondence. Shaw v. Murphy, 532 U.S. 223, 228 (2001) (inmate-to-inmate correspondence that relates to legal matters receives same First Amendment protections as any other inmate-to-inmate communication).

Although prisoners retain First Amendment rights while incarcerated, limitations on the exercise of these rights “arise from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security.” O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The Supreme Court has held that courts are required to give considerable deference to prison officials’ adoption of policies that serve these interests. Pell v. Procunier, 417 U.S. 817, 827 (1974). In accord with this deference, analysis of plaintiff’s facial challenges to the constitutionality of Section DOC 309.155(5) is governed by the Court’s holding in Turner v. Safely, 482 U.S. 78, 89 (1987) ,that prison regulations that allegedly impinge on the constitutional rights of inmates are valid if “reasonably related to legitimate penological interests.” Waterman v. Farmer, 183 F. 3d 208, 213 (3d Cir. 1999) (substantial overlap between Turner standard and First Amendment doctrines of vagueness and overbreadth "suggests that the Supreme Court did not intend for those doctrines to apply with independent force in the prison litigation context."); Aiello v. Litscher, 104 F. Supp. 2d 1068, 1074-75 (W.D. Wis. 2000) (applying Turner analysis to facial challenge to prison regulation prohibiting access to sexually explicit material).

In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a “valid, rational connection” between the restriction and

a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right.” Turner, 482 U.S. at 89. Because an assessment under Turner requires an evaluation of the prison officials’ reason for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and legitimate penological interest. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same).

Under this standard, plaintiff has stated a claim upon which relief may be granted against defendants. Accordingly, I will allow plaintiff to proceed on this claim.

E. Personal Involvement

The question remains whether plaintiff has alleged that each of the defendants was personally involved in the alleged constitutional violation. Morfin v. City of East Chicago, 349 F.3d 989, 1001 (7th Cir. 2003) (no liability under § 1983 unless defendant was personally involved in constitutional violation). In his complaint, plaintiff alleges that defendant Hepp dismissed Ammons’s appealed grievance. He alleges also that Secretary Rick Raemisch affirmed the dismissal, although he never named Raemisch as a defendant. I believe that it is fair to

construe the complaint to include Raemisch as a defendant and I will add him to the caption.

Plaintiff's allegations do not suggest that defendants Hamblin and Grosshans were personally involved in the denial of Ammons's legal assistance to plaintiff. In fact, plaintiff says nothing about defendants Hamblin and Grosshans in his complaint, except to list their job titles and responsibilities. Because neither defendant is an official at the Jackson prison, it is not reasonable to infer that these defendants are responsible for the policies at the Jackson prison. I will allow plaintiff to proceed on his claim only against defendants Hepp and Raemisch.

ORDER

IT IS ORDERED that

1. Plaintiff Sylvester Jackson is GRANTED leave to proceed on his claim that defendants Randall R. Hepp and Rick Raemisch violated his First Amendment right to inmate-to-inmate legal correspondence.

2. Plaintiff is DENIED leave to proceed on his claim that defendants Gary H. Hamblin and William Grosshans violated his constitutional right to inmate-to-inmate legal correspondence.

3. Plaintiff is DENIED leave to proceed on his claim that defendants Gary H. Hamblin, William Grosshans, Randall R. Hepp and Rick Raemisch violated his right of access to the courts by prohibiting him from receiving legal counsel from other prisoners not in his housing unit. The complaint is DISMISSED as to that claim for plaintiff's failure to state a claim upon which relief

may be granted.

4. The complaint is DISMISSED as to defendants Gary H. Hamblin and William Grosshans.

5. Plaintiff must send defendants 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.

6. 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 documents.

7. 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 the defendants. 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.

8. Plaintiff is obligated to pay the unpaid balance of his filing fee 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 account until the

filing fee has been paid in full.

Entered this 6th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge