

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

GLENN T. TURNER,

Plaintiff,

OPINION and ORDER

v.

11-cv-708-bbc

WILLIAM POLLARD, PETER ERICKSEN,
WILLIAM SWIEKATOWSKI, TOM CAMPBELL,
RICK RAEMISCH and MICHAEL DELVAUX,

Defendants.

Pro se plaintiff Glenn Turner is proceeding on the following claims in this prisoner civil rights case:

- (a) defendants William Swiekatowski, Michael Delvaux, Peter Ericksen, Tom Campbell, Rick Raemisch and William Pollard disciplined plaintiff for writing an essay titled "Failure to Comply with Allah's Rules and Regulations," possessing "The Willie Lynch Letter" and the "Willie Lynch Letter Update," taking part in a "group exercise" during recreation time and possessing four "personal photos of friends and family," in violation of the First Amendment; and
- (b) in the context of investigating this conduct report, defendant Swiekatowski tried to incite other prisoners to attack plaintiff by telling them that plaintiff had put "hits" on them, in violation of the Eighth Amendment.

Now before the court are two motions filed by plaintiff in which he seeks an order under Fed. R. Civ. P. 37 requiring defendants to answer interrogatories and produce documents

he has requested. Dkt. ##46 and 47. For the reasons explained below, I am granting the motion in part and denying it in part.

One potential problem is that plaintiff fails to explain in the context of his motions why he believes he is entitled to any of the discovery that defendants did not provide. Instead, he simply lists by number the various requests to which he says defendants refused to provide adequate responses. Ordinarily, that would be enough to deny plaintiff's motions without further discussion. However, plaintiff also cites a document he sent earlier to defendants and the court in which he was trying to persuade defendants to provide the discovery before he filed his motions. Dkt. #35. In that document, he makes an argument for each discovery request for which he was still seeking additional documents or information. In this one instance, I will refer to the other document to help determine whether plaintiff is entitled to relief. However, in the future, the court may disregard any motion he files if he does not provided the necessary argument in the context of the motion itself. DeSilva v. DiLeonardi, 181 F.3d 865, 867 (7th Cir. 1999) ("[A] brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.").

Most of plaintiff's requests fall within one of several categories:

- requests regarding the basis for defendants' determination in the disciplinary proceedings that the essay, letters, photos and group activity were related to the Gangster Disciples or the Nation of Islam or otherwise undermined security at the prison; these include information about the confidential prisoner informants defendants relied on (Discovery Requests Nos. 1, 5, 21, 24, Campbell Interrogatories Nos. 13 and 20), the photos defendants confiscated from plaintiff (Discovery Request No. 8, 10), letters used as evidence (Discovery Request No. 9), prisoner statements used as evidence (Discovery Request No. 23), any prisoner statements about gang

activity plaintiff engaged in (Swiekatowski Interrogatory No. 10, Delvaux Interrogatory No. 24, Campbell Interrogatories Nos. 10-11), names of prisoners interviewed (Discovery Request No. 33), the “security justification” for prohibiting each of the items and activities that were the subject of the conduct report (Ericksen Interrogatories Nos. 18, 19 and 20, Swiekatowski Interrogatory No. 8), Swiekatowski’s statement about the items at a May 10 hearing (Swiekatowski Interrogatory No. 9), evidence supporting a finding that the subjects of the confiscated photos were gang members (Campbell Interrogatory No. 12) and evidence that plaintiff admitted he was a gang member (Campbell Interrogatories Nos. 19 and 25);

- requests for rules related to plaintiff’s conduct report; these include the rules defendants relied on to find him guilty (Discovery Requests Nos. 11 and 13, Pollard Interrogatory No. 6), any rules that prohibit materials discussing a security threat group (Ericksen Interrogatory No. 17), any rules that prohibit references to the Nation of Islam (Raemisch Interrogatory No. 9, Campbell Interrogatory No. 14), security threat groups (Delvaux Interrogatory No. 10), the Willie Lynch Letter or the Willie Lynch Letter Update (Campbell Interrogatory No. 15) or “inflammatory” documents (Delvaux Interrogatory No. 15);
- requests for information about the discipline of other prisoners; these include requests for documents showing any other prisoners who have been disciplined for possessing the same materials (Discovery Request No. 14), other conduct reports that rely on confidential informants (Discovery Request No. 31) and other conduct reports issued “for taking part in group exercise” (Discovery Request No. 40);
- requests about plaintiff’s claim that defendant Swiekatowski tried to incite other prisoners to attack him; these include names of the other prisoners Swiekatowski spoke to about plaintiff (Discovery Request No. 34), the complete file on the grievance plaintiff filed on this issue (Discovery Request No. 36), other defendants’ awareness and opinions on this issue (Ericksen Interrogatories Nos. 13 and 14, Raemisch Interrogatory No. 6);
- requests seeking more information about the defendants; these include any complaints or investigations against defendants for dishonest conduct (Discovery Request No. 30), defendant Raemisch’s job duties (Raemisch Interrogatory No. 1), Swiekatowski’s legal obligations (Swiekatowski Interrogatory No. 3).

In addition, plaintiff is seeking a complete list of items in the prison library that discuss the Nation of Islam (Discovery Request No. 19) and a copy of the DVD “The Great

Debaters” (Discovery Request No. 20). With respect to his interrogatories, he wants to know whether Pollard received a “unilateral appeal” of plaintiff’s conduct report (Pollard Interrogatory No. 12), whether the Nation of Islam is classified as a security threat group (Delvaux Interrogatory No. 9), whether plaintiff was ever accused of possessing the Turner Diaries (Campbell Interrogatory No. 17) and whether defendant Ericksen was the security director “responsible for placement of security personnel at inside recreational gymnasium at GBCI on Feb. 28, 2009” (Campbell Interrogatory No. 5). I will consider each of the requests in turn.

A. Grounds for Discipline

With respect to the requests seeking more information on the basis for defendants’ disciplinary decision, it is important for plaintiff to know that the question in this case is not whether defendants were correct in determining that he is a gang member or that the confiscated items were gang-related. Rather, the question is whether defendants violated his rights under the First Amendment and the standard of review is whether defendants’ actions were reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78 (1987). Under that standard, the court must give deference to prison officials’ judgment that a particular act is gang-related or otherwise undermines prison security. E.g., Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff’s assessment regarding gang symbols). Thus, plaintiff will not be able to prevail on his claim simply by showing that there were weaknesses in defendants’ case against him.

That being said, evidence about the basis for defendants' disciplinary decision may be relevant to the determination whether the decision was reasonably related to a legitimate penological interest. As I have stated in previous cases, "courts are required to defer to the reasoned judgment of prison officials on gang-related matters, [but] prison officials cannot avoid scrutiny for restricting prisoners' constitutional rights simply by incanting the word 'gang.'" Greybuffalo v. Kingston, 581 F. Supp. 2d 1034, 1042 (W.D. Wis. 2007).

Some of the information plaintiff seeks is so far removed from an assessment of the reasonableness of the decision that I cannot say that it would be likely to lead to the discovery of any relevant information. This includes plaintiff's requests for the disciplinary history of the confidential informants (Discovery Request No. 5), the "complete history of reliability and credibility findings" for the informants (Discovery Request No. 21) and the names of the confidential informants and any other prisoners who gave statements (Discovery Request No. 33).

With respect to many of the other requests, plaintiff received an answer but he was not satisfied with it. For example, he challenges a number of interrogatories in which the particular defendant answered that he did not know or did not remember a particular subject or he gave an answer that plaintiff believes is untruthful. (Delvaux Interrogatory No. 24, Campbell Interrogatories Nos. 10-12, 13, 19-20 and 25, Swiekatowski Interrogatories Nos. 8, 10, Ericksen Interrogatory No. 20.) However, I cannot compel defendants to provide a different answer simply because plaintiff does not like the answer he received. Of course, if defendants try to change their story at summary judgment, plaintiff is free to point out the

inconsistency. Even if they provide the same answer, plaintiff is free to cite any evidence he has that contradicts it.

Defendants refused to answer some of the requests on the ground that plaintiff was seeking confidential information that could undermine security if released to plaintiff. These include the prisoner statements used against plaintiff (Discovery Requests Nos. 23 and 24), letters used as evidence (Discovery Request No. 9) and the photos defendants confiscated from plaintiff (Discovery Requests Nos. 8 and 10). I will not require defendants to give plaintiff those documents, but because they could be relevant to assessing the reasonableness of their decision under Turner, I will require them to submit the documents to the court in camera, that is, under seal to be reviewed only by the court and not shown to plaintiff.

In Erickson Interrogatories Nos. 18 and 19, plaintiff seeks an explanation for the decision to censor his essay “Failure to Comply with Allah’s Rules and Regulation,” the Willie Lynch Letter and the Willie Lynch Letter Update. Defendant Ericksen has since provided a supplemental response to Interrogatory No. 19, dkt. #51, so plaintiff’s motion is moot as to that request. However, defendants continue to object to Interrogatory No. 18 on the ground that plaintiff has failed to identify “what policy he was referring to.” Dkt. #50 at 3. This response makes no sense. Plaintiff is asking *defendants* to explain the grounds for their decision, so defendants’ response suggests that they expect plaintiff to answer his own interrogatory. I am requiring defendant Ericksen to answer Interrogatory No. 18.

B. Rules

With respect to some of these requests, defendants answered them, but plaintiff disagreed with the answer (Discovery Requests Nos. 11 and 13, Pollard's Interrogatory No. 6, Campbell Interrogatories Nos. 14 and 15, Delvaux Interrogatories Nos. 10 and 15). Again, I cannot compel defendants to give plaintiff the answer he wants. Other requests sought irrelevant information that cannot help plaintiff prove his claim. For example, it does not matter whether particular defendants were "aware" of a particular policy (Raemisch Interrogatory No. 9) because the test under Turner is objective. Hammer v. Ashcroft, 570 F.3d 798, 803 (7th Cir. 2009).

Defendants object on vagueness grounds to Ericksen Interrogatory No. 17: "Does the DOC DAI policies prohibit any material, Books, Newspapers or other documents which makes mention of any Security Threat Groups?" In particular, defendants say that plaintiff failed to "clarify what policy he was referring to." Dkt. #50 at 2-3. Although plaintiff could have drafted his interrogatory more carefully, it is clear enough that plaintiff is asking defendants whether *any* policy prohibits prisoners from possessing written materials mentioning a security threat group. Accordingly, I am directing defendant Ericksen to answer this interrogatory.

C. Discipline of Other Prisoners

Plaintiff asks for a list of all the prisoners who have been disciplined for possessing the Willie Lynch Letter or the Willie Lynch Letter Update, but defendants say that no such

list exists. Under Fed. R. Civ. P. 34, parties are not required to create new documents. E.g., Alexander v. Federal Bureau of Investigation, 194 F.R.D. 305, 310 (D.D.C.2000) (“Rule 34 . . . only requires a party to produce documents that are already in existence ”; party “is not required to prepare, or cause to be prepared, new documents solely for their production”); Rockwell International Corp. v. H. Wolfe Iron & Metal Co., 576 F. Supp. 511, 513 (W.D. Pa. 1983) (“Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require production of things in existence.”). Even if I treated this request as an interrogatory rather than a request for a production of documents, I agree with defendants that it would be extraordinarily burdensome to require defendants to search all of their records for similar disciplinary proceedings. Particularly because plaintiff fails to explain how this information could help him prove his claim, I decline to impose that burden on defendants. Plaintiff similarly fails to explain how other conduct reports that rely on confidential informants (Discovery Request No. 31) or other conduct reports involving prisoner group exercises (Discovery Request No. 40) could be relevant to his claim.

D. Eighth Amendment Claim

Defendants provided three names in response to plaintiff’s request for the names of prisoners whom defendant Swiekatowski “told that plaintiff had put hits out on them, had a problem with, intended in any way, form or fashion to cause them harm” (Discovery Request No. 34). Again, if plaintiff believes there were additional prisoners, he is free to

present that evidence at summary judgment. With respect to the interrogatories about whether other defendants knew about Swiekatowski's conduct (Erickson Interrogatories Nos. 13 and 14, Raemisch Interrogatory No. 6), that information is irrelevant because Swiekatowski is the only defendant named on this claim.

However, documents created by defendants as a result of the grievance plaintiff filed on this issue (Discovery Request No. 36) could be relevant to this claim. Defendants do not object to this request on relevance grounds, but they say that "other inmates' [grievances] are confidential." Dkt. #49, at 9. This objection is confusing because plaintiff is not asking for documents related to the grievances of *other* prisoners, but to his own. Accordingly, I conclude that defendants must comply with this request. If defendants believe that any responsive documents are confidential for a reason they have not yet identified, they may submit the documents to the court in camera, along with a short brief explaining their objection.

E. Information about Defendants

All of plaintiff's discovery requests about defendants seek irrelevant information. Plaintiff wants documents about possible past dishonest conduct by defendants to prove that they fabricated evidence to support his conduct report (Discovery Request No. 30), but, as noted above, the test under the First Amendment is an objective one, so defendants' motives are not part of the analysis.

It is not clear why plaintiff is seeking discovery about Raemisch's job duties

(Raemisch Interrogatory No. 1) or Swiekatowski's legal duties (Swiekatowski Interrogatory No. 3). In any event, defendants provided a response to the first interrogatory and the second interrogatory is improper because it is seeking a legal conclusion.

F. Other Discovery Requests

I am denying plaintiff's remaining discovery requests. Defendants object to providing a list of all the publications in the Green Bay prison library "on, by or about the Nation of Islam" (Discovery Request No. 19) on the ground that no such list exists and it would be unduly burdensome to create one. Again, Rule 34 does not require defendants to create new documents. In any event, the Court of Appeals for the Seventh Circuit has emphasized recently that the presence of a particular book in the prison library does not support a prisoner's right to possess passages that might appear in the book, both because "prison librarians cannot be required to read every word of every book to which inmates might have access to make sure the book contains no incendiary material" and because a book might be fine when viewed as a whole even though parts of it would be unacceptable in isolation. Toston v. Thurmer, 689 F.3d 828, 829-30 (7th Cir. 2012). For example, a book in the prison library on World War II might include a picture of a swastika, but that would not mean that prisoners would be permitted to display Nazi symbols in their cells or on their persons.

Plaintiff says he wants a copy of a video called the "Great Debaters" (Discovery Request No. 20) because it "deals with the history and meaning of the Willie Lynch letter,"

but even if that is true, I could not consider the video because it is hearsay. Fed. R. Evid. 801 and 802. Defendants objected on vagueness grounds to plaintiff's interrogatory asking defendant Erickson whether he was the security director "responsible for placement of security personnel at inside recreational gymnasium at GBCI on Feb. 28, 2009"(Campbell Amended Interrogatory No. 5). Regardless whether defendants should have been able to figure out what plaintiff was asking, this interrogatory has no apparent relevance to any of plaintiff's claims. Finally, defendants answered all of plaintiff's remaining interrogatories (Pollard Interrogatory No. 12, Delvaux Interrogatory No. 9 and Campbell Interrogatory No. 17).

ORDER

IT IS ORDERED that plaintiff Glenn Turner's motions to compel discovery, dkt. ##45 and 46, are GRANTED IN PART. Defendant Peter Ericksen may have until October 19, 2012, to answer Interrogatories Nos. 17 and 18. Defendants may have until October 19 to comply with Discovery Request No. 36; if defendants believe the documents responsive to that request are confidential for reasons they have not yet identified, they may submit the response to the court in camera, along with a short brief. Defendants may have until October 19 to submit in camera responses to Discovery Requests Nos. 8, 9, 10, 23, 24.

Plaintiff's motions are DENIED in all other respects.

Entered this 9th day of October, 2012.

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