

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

MAURICE A. SMITH,

Plaintiff,

v.

PAMELA WALLACE, WAYNE COWAN,
TURNER WALLACE, ROBERT HOFKES
and DEPUTY WARDEN NELSON,

Defendants.

OPINION and ORDER

11-cv-646-bbc

Pro se plaintiff Maurice Smith is proceeding on two claims against defendants Pamela Wallace, Wayne Cowan, Turner Wallace, Robert Hofkes and Deputy Warden Nelson: that they (1) violated his right of access to the courts by confiscating his computer disks and (2) violated his rights under the First Amendment by retaliating against him for filing an inmate grievance about the disks. The case is before the court on plaintiff's motion for partial summary judgment on the issue of liability. Dkt. #36. In their two-page response, defendants argue that the motion must be denied because (1) plaintiff's proposed findings of fact did not comply with the court's Procedure to be Followed on Motions for Summary Judgment, dkt. #20, and (2) plaintiff failed to show that he had a meritorious argument for his appeal or for his petition to the Wisconsin Supreme Court.

I conclude that, even taking plaintiff's proposed findings of fact as true, plaintiff is not entitled to summary judgment because he has failed to establish that he lost a

meritorious claim challenging to his conviction or sentence or that defendants punished him for filing his inmate grievance.

Plaintiff has also filed a motion for appointment of counsel. Dkt. #25. In deciding whether to appoint counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, plaintiff must give the court the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Because plaintiff has not yet complied with this preliminary requirement, his motion will be denied without prejudice at this time.

PROCEDURAL ISSUES

Before turning to the merits of plaintiff's summary judgment motion, I will address defendants' argument that I should not consider any of plaintiff's proposed findings of fact because he did not support them with citations to the record. Plaintiff filed a brief and a separate "Statement of Undisputed Facts." The latter document sets out plaintiff's version of the facts in short, numbered paragraphs, but the paragraphs are not followed by citations to evidence in the record. Plaintiff also signed this statement of facts as if it were a declaration, swearing "under penalty of perjury that the foregoing is true and correct."

Plaintiff's proposed findings of fact do not comply with the court's Procedure to be Followed on Motions for Summary Judgment sent to plaintiff with the preliminary pretrial

conference order. Dkt. #20. Section I.B. of those procedures states that "[e]ach factual proposition must be followed by a reference to evidence supporting the proposed fact. The citation must make it clear where in the record the evidence is located." Plaintiff was required to support each proposed finding of fact with a citation to one of the types of evidence listed in Section I.C. of the procedures.

It appears that plaintiff intended his "Statement of Undisputed Fact" to serve as both his proposed findings of fact and as the affidavit in support of those facts. A party may support proposed findings of fact with his own sworn affidavit or declaration, if he has first-hand knowledge of those proposed facts. The sworn declaration and the proposed findings of fact should be separate documents, but I will not disregard plaintiff's filing simply because he combined both his statement and his declaration in one document. If he had filed a declaration separate from the proposed findings of fact and provided a citation after each proposed findings to the declaration, I would have considered those proposed findings of fact that were within his personal knowledge. Because plaintiff is proceeding without an attorney, I will be lenient regarding this technical legal mistake.

However, plaintiff should be aware that I am unlikely to extend him similar leniency again. Before responding to future summary judgment motions in this or other cases, plaintiff should reread the court's procedures and follow them precisely. In particular, he should take care to set out all necessary facts in a separate proposed finding with citations to evidence in the record. Plaintiff should not assume that his reader knows any facts about his case.

Because defendants chose not to file a response to plaintiff's proposed findings of fact, I will treat as undisputed all of plaintiff's proposed facts that were within his personal knowledge. I find the following facts to be undisputed.

UNDISPUTED FACTS

At all relevant times, plaintiff Maurice Smith was an inmate at the Chippewa Valley Correctional Treatment Facility. On June 21, 2011, he filed an offender complaint asking defendants to return several computer disks confiscated from him on June 9, 2011. Plaintiff wrote that he had purchased the disks at his previous institutions and they contained legal materials relating to his criminal appeal. Offender Complaint, dkt. #43, at 2.

On June 22, 2011, defendant Robert Hofkes filled out a conduct report charging plaintiff with theft, counterfeit and forgery, misuse of state and federal property and inadequate work performance for stealing and misusing the computer disks. Adult Conduct Rep., dkt. #43, at 4. Hofkes reported that in plaintiff's work assignments at his previous institutions, he had been permitted him to use computer disks only for job related duties. Id.

On July 10, 2011, plaintiff received a disciplinary hearing on the conduct report. Defendant Turner Wallace served as the hearing officer. The evidence at the hearing consisted of plaintiff's testimony and Hofkes's written report, in which Hofkes had concluded that the disks contained personal materials of a legal and non-legal nature. Id. at 5-6. Wallace said that Superintendent Olson from the Gordon Correctional Center and

Captain McPike and Social Worker Reynolds from the Felmers O. Chaney Correctional Center had been contacted and had said that plaintiff did not have permission to use the computers or other office resources for personal use.

However, Olson had begun his tenure as superintendent of the Gordon Correctional Center only a short time before plaintiff's hearing. In his brief time as superintendent, he did not or could not have witnessed plaintiff's use of office equipment or the adequacy of his work performance. In addition, McPike and Reynolds from the Felmers O. Chaney Correctional Center were not plaintiff's immediate supervisors for his assigned duties and did not know about all of his various daily activities.

After the hearing, plaintiff received a written disposition. He was found guilty of inadequate work performance and misuse of state or federal property, but the charges of theft and counterfeit and forgery were dismissed. Hearing officer Wallace also found that plaintiff may have been unaware that he was violating any rules or policies.

Plaintiff filed an administrative appeal with the warden, defendant Pamela Wallace. Pamela Wallace is the wife of Turner Wallace, who served as plaintiff's hearing officer. Plaintiff argued on appeal that no witnesses were called and there was no evidence to support the charges. Pamela Wallace denied his appeal.

OPINION

Even if all of plaintiff's proposed findings of fact are taken as true, plaintiff cannot succeed on the merits of his claims for denial of access to the courts or for First Amendment

retaliation. A moving party such as plaintiff is entitled to summary judgment when he “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is not appropriate “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In this case, plaintiff has not shown that he is entitled to judgment as a matter of law.

A. Access to the Courts

Plaintiff’s first claim is that defendants interfered with his right of access to the courts by confiscating legal materials he needed for his criminal appeal or his petition to the Supreme Court. Prisoners have a constitutional right to “meaningful access to the courts” to pursue post conviction remedies and to challenge the conditions of their confinement. Bounds v. Smith, 430 U.S. 817, 821-22 (1977); Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). To succeed on a claim for denial of the right of access to the courts, a prisoner must prove that the defendants’ conduct caused him to lose a meritorious claim, a chance to sue on a meritorious claim or a chance to seek some particular order of relief. Christopher v. Harbury, 536 U.S. 403, 414 (2002); Marshall v. Knight, 445 F.3d 965, 968 (7th Cir. 2006). Accordingly, a plaintiff must (1) describe the non-frivolous argument he wanted to pursue in his appeal or petition and (2) explain how his ability to file or litigate that claim was lost or impeded. Christopher v. Harbury, 536 U.S. at 415-16. 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.").

I agree with defendants that plaintiff's proposed findings of fact fail to show that he lost a non-frivolous claim on appeal relating to his conviction or sentence. Plaintiff did not propose any facts about the arguments he wanted to assert in his appeal and petition or about the acts by defendants that prevented him from pursuing those arguments on appeal.

In his brief, plaintiff argues that he needed the "gestalt or whole of the combination of legal materials" in order to complete his appeal and petition, but this argument fails for several reasons. First, plaintiff did not propose any findings of fact describing the contents of the confiscated computer disks. As explained in the procedures for summary judgment, "the court will not consider facts contained only in a brief." Procedure to be Followed on Motions for Summary Judgment, dkt. #20, Section I.B. Second, plaintiff's vague statement in his brief that the disk contained the "gestalt of legal theories, case law, anecdotes, public writings, forms and literature" does not identify the materials on the disks with enough specificity to show that the disks were necessary for him to pursue his appeal. Finally, plaintiff still has not explained what argument he intended to raise with the state court of appeals or the Wisconsin Supreme Court. Accordingly, I cannot find that plaintiff is entitled to judgment as a matter of law on his denial of access to the courts claim.

B. First Amendment Retaliation

Plaintiff is also proceeding on a claim that defendants filed the conduct report and found him guilty of inadequate work performance and misuse of state or federal property

in retaliation for an inmate grievance he filed seeking the return of the computer disks. Defendants raised no arguments in response to this claim.

However, plaintiff is not entitled to summary judgment on his First Amendment retaliation claim. To succeed on that claim, plaintiff must prove that “(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) a causal connection between the two.” Watkins v. Kasper, 599 F.3d 791, 794 (7th Cir. 2010) (quoting Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009)). Plaintiff is entitled to summary judgment only if he shows that any reasonable jury would conclude that defendants filed the conduct report and found him guilty in retaliation for his having filed an offender complaint. Greene v. Doruff, 660 F.3d 975, 979 (7th Cir. 2011). Plaintiff has the initial burden to produce evidence that his offender complaint was “at least a motivating factor,” and then defendants may rebut this proof with evidence that they would have disciplined plaintiff even if he had not filed the complaint. Kidwell v. Eisenhower, 679 F.3d 957, 965 (7th Cir. 2012). Plaintiff may rely on “[c]ircumstantial proof, such as the timing of events . . . to establish the defendant's retaliatory motive,” Massey v. Johnson, 457 F.3d 711, 716-17 (7th Cir. 2006), but suspicions timing is almost never sufficient to establish a retaliatory motive in and of itself. Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002).

Plaintiff has no direct evidence (such as statements by defendants) that Hokfes issued the conduct report or Turner Wallace found him guilty because of the offender complaint. Plaintiff's motion rests on two pieces of circumstantial evidence of retaliatory motive: (1)

the timing of the conduct report and (2) the lack of evidence to support the charges against him. Plaintiff received the conduct report only one day after filing the complaint and eleven days after the disks were confiscated. This timing might be suspicious, or it might be that Hofkes needed time to talk with officials at plaintiff's previous institution to determine whether plaintiff was permitted to purchase computer disks for his personal use. Ultimately, Hofkes relied on statements by three officials at plaintiff's two previous institutions, who plaintiff contends did not actually know the rules governing his work activities. However, plaintiff has no evidence that Hofkes or Wallace had any reason to suspect these officials did not know the rules at their institutions. At most, plaintiff's evidence suggests that Hofkes was mistaken. (In his brief, plaintiff also argues that Wallace ignored plaintiff's evidence that he was entitled to keep the disks, but again plaintiff proposed no findings of fact about that evidence.)

Plaintiff's circumstantial evidence is not sufficient to establish as a matter of law that his inmate grievance caused defendant Hofkes to issue the conduct report or defendant Turner Wallace to find him guilty. A reasonable jury might conclude that defendants waited to file the conduct report until Hofkes had completed his investigation into plaintiff's alleged conduct and that Hofkes and Wallace reasonably relied on officers at the other institutions.

Furthermore, plaintiff has offered no reason why Deputy Warden Nelson or Pamela Wallace should have questioned Hofkes or Wallace Turner's motives. In fact, he has offered no evidence to show that these defendants even knew about his inmate grievance. Accordingly, plaintiff has not established beyond genuine dispute that his inmate complaint

caused defendants to file a conduct report, find him guilty or uphold that decision on appeal.

The denial of plaintiff's motion does not end this case. Plaintiff filed his summary judgment motion six months before the dispositive motion deadline, which is not until November 16, 2012. Defendants have not yet filed a motion for summary judgment on the merits. If they do, plaintiff will be required at that time to respond with sufficient evidence to sustain his claims.

ORDER

IT IS ORDERED that Plaintiff Maurice Smith's motion for partial summary judgment is DENIED.

Entered this 10th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge