UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TED MARCUM,

Plaintiff,

v. Case No. C-1-06-822

RICHARD JONES, et al.,

Defendants.

ORDER

This matter is before the Court upon the Supplemental Motion for Summary Judgment of Defendants (doc. 91), Plaintiff's Memorandum in Opposition (doc. 96), and Defendants' Reply Memorandum (doc. 100). Also pending before the court are Plaintiff's Motion for Telephone Conference (doc. 88) and Plaintiff's Motion for an Extension of Time (doc. 101).

I. Background

Plaintiff originally brought a civil rights action against the Butler County Sheriff and various Butler County officials seeking monetary damages, declaratory relief, and injunctive relief. That suit listed a number of civil rights violations over fourteen periods of incarceration at two Butler County Jails- the Resolutions Jail ("Resolutions") and the Hanover Jail ("Hanover"). In his Complaint, Plaintiff condensed these violations into two claims. His first claim was that the jails' "no publications policy" violated his First and Fourteenth Amendment rights by denying him access to publications, magazines, tabloids, and newspapers. His second claim was that certain conditions at the jail amounted to "cruel and unusual punishment" such that they violated his Eighth and Fourteenth Amendment rights. The Defendants filed for summary judgment in December of 2007. The Magistrate Judge issued a Report and

Recommendation in which he recommended that summary judgment be granted for Defendants. This Court granted summary judgment for the Defendants on the Eighth Amendment Claim. The Court denied summary judgment on the First Amendment claim related to the "no publications policy" based on the lack of evidence presented by the Defendants justifying their enforcement of the policy. Defendants subsequently filed their Supplemental Motion for Summary Judgment in which they present evidence in support of their policy.

II. Motions for an Extension of Time/Telephone Conference

Plaintiff moves for an extension of time to respond to Defendants' reply in support of their Supplemental Motion for Summary Judgment, an extension of time to file a motion to strike, an extension of time to request an evidentiary hearing, and an extension of time to file sanctions against Defendants. Plaintiff also moves for a telephone conference for purposes of discussing settlement negotiations or trial settings.

Plaintiff's requests are not well-taken. The legal and factual issues presented by the Defendants' motion are not complex and they have been fully briefed by the parties. Plaintiff has had an opportunity to present fully his positions on the issues raised by Defendants' Supplemental Motion for Summary Judgment. Pursuant to Rule 7.1 of the Local Rules of the United States District Court for the Southern District of Ohio, the Court therefore finds that oral argument is not necessary and Plaintiff's request for same is denied. This matter is ripe for decision, and Plaintiff's remaining requests for extensions of time are therefore denied. In addition, because the Court finds that Defendants' Supplemental Motion for Summary Judgment is well-taken, Plaintiff's request for a telephone conference is denied.

III. Opinion

Plaintiff claims that the Court's consideration of the substantive issues raised by the supplementary motion for summary judgment is barred by the doctrine of collateral estoppel. He argues that the current motion for summary judgment is barred by the doctrine of collateral estoppel because "defendants have had a full and fair opportunity to litigate their Summary Judgment [c]laims . . . in their initial motion for summary judgment." (doc. 96) In the Sixth Circuit, collateral estoppel applies if the following criteria are met:

> 1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; 2) determination of the issue must have been necessary to the outcome of the prior proceeding; 3) the prior proceeding must have resulted in a final judgment on the merits; and 4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace and Agric. Implement Workers, UAW, 97 F.3d 155, 161 (6th Cir. 1996).

The current motion for summary judgment is not barred by collateral estoppel because the prior proceeding did not result in a final judgment on the merits. In partially denying the Defendants' first motion for summary judgment, the Court expressly refused to decide the Plaintiff's First Amendment claims on the merits. Because there has been no final judgment on the claim, the prior summary judgment ruling does not preclude the Court from deciding Defendants' current motion for summary judgment.

As to the substantive issues raised by the Defendants' motion for summary judgment, the "no publications policy" of the Hanover and Resolutions jails is constitutional if it is "reasonably related to legitimate penological interests." ***Turner v. Safley***, 482 U.S. 78, 89 (1987). According to ***Turner***, four factors should be considered when determining whether the regulation at issue is reasonably related to penological interests. Those factors are: (1) whether there is a valid, rational connection between the regulation and the governmental interest put forth to justify it, (2) whether alternative means of exercising the right abridged by the regulation remain open to inmates, (3) the impact accommodating the asserted right would have on inmates, guards, and prison resources, and (4) the absence of ready alternative regulations. ***Id***. at 89-90. In evaluating these factors, great deference must be given to prison officials. According to the Supreme Court, "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." ***Bell v. Wolfish***, 441 U.S. 520, 547 (1979). Furthermore, "in the absence of substantial evidence in the record to indicate that the [prison] officials have exaggerated their response . . . courts should ordinarily defer to their expert judgment in such matters." ***Id***.

In support of their Supplemental Motion for Summary Judgment, the Defendants have submitted four additional affidavits as evidence that the "no publications policy" is reasonably related to the government's interest in maintaining a safe prison. By their affidavits, Defendants have demonstrated a valid, rational connection between the "no publications" regulation and the government's interest in maintaining a safe facility. The affidavits go beyond broad, conclusory allegations and are competent evidence that allowing publications would make the prison less safe by increasing the workload of already overburdened guards and providing material that

could be used to create fires, clog plumbing or conceal contraband. The affidavits establish that it would take extra time for jail officials to deal with the publications, which would adversely affect their ability to perform their other duties. According to the affidavit of Captain Kathryn McMahon, Butler County Sheriff's Office Jail Administrator, there is only one corrections officer for every ninety-six inmates in each pod and requiring this officer to deal with inmate publications would pose a hardship. Each corrections officer already has an extensive list of safety-related responsibilities and the jails are operating with reduced numbers due to recent budget cuts. (Doc. 100-1, Aff. of Captain McMahon, ¶ 5-9). Jail officials, in their sworn affidavits, state that allowing publications and requiring corrections officers to check every publication for contraband, sort it, deliver it, and dispose of it would detract from their ability to perform their more important safety functions and increase their workload to an unsafe level. This is a rational safety concern which Defendants have supported with competent evidence and which must be afforded judicial deference.

Defendants offer three additional affidavits which attest to the security problems caused by allowing publications. Two of these affidavits come from jail officials in neighboring counties which also have "no publications" policies in place to avoid fire hazards, concealment of contraband, and other unsafe conditions. (Doc. 91-1, Aff. of Chief Deputy Michael Nolan; Doc. 91-2, Aff. of Lieutenant Jeffrey Ryan) Defendants have also submitted an affidavit of Jeff Eiser, an expert in the operation and administration of local correctional systems. In that affidavit, Mr. Eiser states that the "no publications policy" is in line with national standards for similar jails and is in place to prevent fire hazards, the creation of weapons, and the concealment of contraband. According to Mr. Eiser, "[f]ailure to minimize the presence of contraband and

potential fire hazards adds significantly to the already dangerous problems involved in the daily operation of a jail." (Doc. 93, Aff. of Jeffrey Eiser, ¶ 15)

In sum, these affidavits demonstrate that there is a rational, valid connection between the publications regulation and the government's goal of maintaining a safe prison. In addition, Defendants have shown that there are alternative means for inmates to exercise the rights abridged by the "no publications policy." Although the policy denies inmates unfettered access to material that would provide them with entertainment and information about current events, inmates have access to both entertainment and information about current events through other media sources since the jails provide televisions and a cart full of books. These alternatives are satisfactory given the brief average stay of 11 days at Hanover and 30 days at Resolutions, which makes it impractical for inmates to receive outside publications and at the same time lessens the impact of the deprivation on inmates. Therefore, access to televisions and the book cart provides a suitable alternative to outside publications at these particular facilities.

Defendants have offered sufficient evidence in support of their supplementary summary judgment motion to show that the "no publications policy" is reasonably related to a legitimate penological interest. Because there is a valid, rational connection between the regulation and the justifications offered for it, and because Plaintiff has not submitted evidence to show that the regulation is an exaggerated response to those justifications, the prison officials' judgment is entitled to deference.

IV. Conclusion

Defendants' Supplemental Motion for Summary Judgment (doc. 91) is **GRANTED**. Plaintiff's Motion for Telephone Conference (doc. 88) and Plaintiff's Motion for an Extension of Time (doc. 101) are **DENIED**.

Pursuant to the foregoing and the Order of this Court entered September 30, 2009 (doc. 85), summary judgment is **GRANTED** in favor of the Defendants and against the Plaintiff. This case is **DISMISSED** and terminated on the docket of this Court.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that for the foregoing reasons an appeal of this Court's order would not be taken in good faith. ***See McGore v. Wrigglesworth***, 114 F.3d 601 (6th Cir. 1997).

IT IS SO ORDERED.

S/ Herman J. Weber
HERMAN J. WEBER, SENIOR JUDGE
UNITED STATES DISTRICT COURT