Eberle, et al v. Wilkinson, et al Doc. 431

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY EBERLE, *et al.*,

Plaintiffs,

v. **Case No. 2:03-CV-272**
MAGISTRATE JUDGE KING

REGINALD WILKINSON, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court, with the consent of the parties pursuant to 28 U.S.C. § 636(c), for consideration of the Defendants' *Motion for Summary Judgment* on the claims of Plaintiffs Eberle, Mann and Swint. Doc. No. 344. For the reasons that follow, the motion is granted. Plaintiffs' *Motion for Appointment of Counsel*, Doc. No. 406, is denied as moot.

I.

Plaintiffs Jeffrey Eberle, Brian Mann and David Swint [collectively "Plaintiffs"] are three of six inmate plaintiffs in this action instituted pursuant to 42 U.S.C. § 1983. The claims of the plaintiffs differ in many respects but all include alleged violations of rights in connection with prison disciplinary proceedings. Plaintiffs Eberle, Mann and Swint claim that their rights under the First Amendment to the United States Constitution were violated by those proceedings. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiffs were incarcerated at the Warren Correctional Institution ["WCI"] at the time of

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the events giving rise to this action. On August 15, 2002, Plaintiffs, along with five other inmates, were "arrested" while in the recreation yard. *Complaint* at ¶ 1. Plaintiffs claim that the "arrest" was based on the fact that they maintain beliefs based on white supremacy and that they share a similar tattoo. *Id.* The Plaintiffs were placed in administrative segregation, for investigative purposes, for fourteen days. *Id.* at ¶ 2.

The Conduct Reports issued to Plaintiffs allege that Plaintiffs and other inmates were observed gathered together in the recreation yard. The inmates were shaken down and a "large quantity of contraband was discovered, *i.e.*, tobacco, commissary items, tattoo gun / and patterns." Exhibit A attached to *Defendants' Motion for Summary Judgment*. The reports further allege that the items were "intended to be delivered to other white inmates . . . in segregation." *Id.* Following the investigation, it was determined that the inmates involved were part of a "distinct group" affiliated with white supremacist activities. *Id.* Prison officials noted Plaintiff Swint's tattoo "of a bulldog that states (100% Honky) [with] lightning bolts on the outside." *Id.* Also noted was Plaintiff Eberle's and Plaintiff Mann's tattoos resembling a University of Cincinnati "bear claw" with swastika markings. *Id.* According to prison officials, the tattoos are symbols "commonly associated with white supremacist groups." *Id.*

Plaintiffs were charged with violation of Class II, Rule 31, which prohibits inmates from engaging in "unauthorized group activity." Plaintiffs Swint and Mann were found guilty of the charge following separate hearings before the Rules Infraction Board ["RIB"]. Those convictions were reversed on appeal, however, after the Managing Officer noted that "the mere fact of . . . having a tattoo identified with a STG affiliation does not constitute a rule infraction." Exhibit A attached to *Defendants' Motion for Summary Judgment*. Plaintiff Eberle was found

guilty of "unauthorized group activity" after a hearing before the RIB and his conviction was affirmed on appeal. *Id.*

On deposition, Plaintiff Mann and Plaintiff Swint testified that they observed Plaintiff Eberle packaging and labeling commissary items. *Deposition of Brian Mann*, Doc. No. 339, at 39-41; *Deposition of David Swint*, Doc. No. 340, at 27-29; 33-34. Both Plaintiffs further testified that they were aware that the items constituted contraband. *Id.* Plaintiff Eberle testified on deposition that he did in fact package commissary items in the recreation yard and that the items were labeled for inmates in segregation. *Deposition of Jeffrey Eberle*, Doc. No. 338, at 17-18. Plaintiff Eberle admitted that the items had been taken to the recreation yard so that another inmate could transport them to the segregation area. *Id.* Plaintiff Eberle denied knowing, however, that there was a prohibition on taking commissary items to the recreation yard. *Id.* at 23.

Plaintiffs contend that the charge of "unauthorized group activity" violated their First Amendment rights. Plaintiffs specifically contend that the regulation prohibiting such activity, as well as the regulation regarding possession of contraband, is overbroad or vague. Plaintiffs further contend that they were charged with a rule violation in retaliation for their affiliation with white supremacist groups. Defendants move for summary judgment on Plaintiffs' claims.

II.

The standard for summary judgment is well established. This standard is found in Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The judgment sought shall be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show that there

> is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Pursuant to Rule 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact . . . ." *Id.* In making this determination, the evidence "must be viewed in the light most favorable" to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The "mere existence of a scintilla of evidence in support of the [opposing party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party]." *Anderson*, 477 U.S. at 252.

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56(e)). "Once the moving party has proved that no material facts exist, the non-moving party must do more than raise a metaphysical or conjectural doubt about issues requiring resolution at trial." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

III.

Plaintiffs allege that their First Amendment rights were violated as a result of the incident on the recreation yard on August 15, 2002. According to Plaintiffs, they were punished on account of having similar tattoos and for their affiliation with white supremacist groups. Plaintiffs submit the affidavits of nine inmates in support of their argument that only inmates with certain tattoos were charged with unauthorized group activity, *see* Exhibits A - I attached to Plaintiffs' *Memorandum contra*, Doc. No. 351.

As noted above, each Plaintiff appeared before the RIB for a hearing on the charge of engaging in "unauthorized group activity." Although the RIB convicted each Plaintiff, the convictions of Plaintiffs Swint and Mann were reversed on appeal. *See* Exhibit A attached to *Defendants' Motion for Summary Judgment*. Defendants contend that, although Plaintiffs were charged with violating the prohibition against "unauthorized group activity," there is evidence that Plaintiffs were actually engaged in the activity of preparing illegal contraband for delivery to inmates in segregation. Defendants argue that, because Plaintiffs were not engaged in protected conduct, there was no violation of Plaintiffs' First Amendment rights.

The Court agrees that there was evidence to support the conviction of each Plaintiff on the charge of engaging in "unauthorized group activity." The record contains evidence that Plaintiffs, together with other inmates, were gathered on the yard and, after a shake down, a large quantity of contraband labeled for inmates in segregation was discovered. *See* Exhibit C attached to *Defendants' Motion for Summary Judgment*. Contrary to Plaintiffs' arguments, the RIB's convictions were not based on the single fact that Plaintiffs had similar tattoos or were believed

to be members of a white supremacist group. Although the RIB noted that Plaintiffs were members of a "distinct group," it was the large quantity of contraband found by prison officials that supports a finding that Plaintiffs were engaged in some form of unauthorized group activity. *See id.* Inmates are not permitted to bring commissary items to the recreation yard and inmates in segregation are not permitted to possess or receive commissary items. *Affidavit of Mark Stegemoller,* at ¶¶ 4-5, Doc. No. 346. The RIB expressly found: "A large quantity of contraband was found within this group that was packaged and marked for other known white supremacist [inmates] housed in Seg[regation]." *Exhibit C* attached to *Defendants' Motion for Summary Judgment*. Further, the fact that the convictions of Plaintiffs Swint and Mann were later reversed does not alter the fact that the RIB's decisions were based on some evidence of unauthorized group activity, *i.e.*, the apparent smuggling of contraband to inmates in segregation.

The record is clear that the large quantity of contraband was a concern to prison officials and provided a basis for the RIB convictions. As the Supreme Court has held, prison inmates retain "those First Amendment rights that are not inconsistent with [their] status as [ ] prisoner[s] or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Prison officials "should be accorded wide-ranging deference in the . . . execution of policy 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). In the Court's view, there is no genuine issue of material fact on the issue of the basis for disciplining Plaintiffs. Contrary to Plaintiffs' assertion, the record supports the decision to discipline Plaintiffs for engaging in the unauthorized group activity of preparing contraband for distribution to inmates in segregation. Plaintiffs were not disciplined in violation of their First

Amendment rights.

Plaintiffs claim that they were placed in segregation in retaliation for exercising their First Amendment rights.[1] In order to state a claim for retaliation, a plaintiff must show that he engaged in protected conduct, that he was subjected to an adverse action, and that there existed a causal connection between the protected conduct and the adverse action. *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999). As explained above, the conduct that led to Plaintiffs being placed in segregation was not constitutionally protected conduct. In addition, there is no evidence, other than Plaintiff's conclusory assertions, that the conduct reports were issued based on Plaintiffs having engaged in allegedly protected conduct. Thus, Defendants are likewise entitled to summary judgment on Plaintiffs' retaliation claims.

Plaintiffs also argue that their RIB convictions were obtained in violation of the consent decrees in *Morris v. Voinovich*, C1-93-436 (S.D. Ohio) [*"In re Southern Ohio Correctional Facility*"], *see* Exhibit I attached to *Defendants' Reply Memorandum*, and *Cahill v. Zent*, C2-93-777 (S.D. Ohio). As Defendants point out, *Cahill* was not a class action and Plaintiffs were not parties to that action.[2] Moreover, Plaintiffs do not assert in what respect their RIB convictions were obtained in violation of the consent decree in *In re Southern Ohio Correctional Facility.* In any event, a separate action under 42 U.S.C. § 1983 is not the proper method for addressing an alleged violation of a consent decree. *See Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986). Thus, to the extent that Plaintiffs' claim is based on an alleged violation of a consent decree, that

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[1] The mere fact that Plaintiffs were placed in segregation pending an investigation of the alleged smuggling of contraband – a not infrequent consequence of a prison disciplinary charge – did not constitute a separate violation of Plaintiffs' First Amendment rights.

[2] Plaintiffs also refer to *Person v. Wilkinson*, C1-94-583 (S.D. Ohio), which, like *Cahill*, was not a class action and Plaintiffs were not parties to *Person.*

claim is without merit.

Plaintiffs also challenge the constitutionality of the departmental regulation prohibiting "unauthorized group activity."[3] This issue was addressed in *Ratcliff v. Moore*, 614 F.Supp.2d 880 (S.D. Ohio 2009) (Spiegel, J.) in the context of inmates claiming that the regulation prohibited them from exercising the Asatru religion.[4] The court found that the regulation was not unconstitutional and noted that "policies or regulations will be considered valid even if they impinge on prisoners' constitutional rights as long as they are 'reasonably related to legitimate penological interests.'" *Id.* at 896, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). Defendants have presented evidence that unauthorized group activity in prisons "is inherently disruptive" and

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[3]Ohio Admin. Code 5120-9-37, which prohibits unauthorized group activity by inmates, provides in pertinent part as follows:

> An "unauthorized group" is defined as:
>
> (1) An association of two or more persons with common characteristics (e.g., sharing a common interest, activity or purpose; acting in concert on an ongoing or recurrent basis; having a highly organized or loosely structured internal organization; recognizing themselves as a distinct group) which serves to distinguish that association from other inmates or groups, and;
>
> (2) Has not been approved by the department pursuant to this rule or any departmental directive.
>
> * * *
>
> (B) An inmate shall not knowingly or intentionally engage in, whether individually or in concert with others:
>
> (1) Forming, organizing, promoting, encouraging, recruiting for, or participating in, etc., an unauthorized group;
>
> (2) Possessing, creating, reproducing, using or circulating, etc., any material related to an unauthorized group;
>
> (3) Communicating support of, association with, or involvement in any unauthorized group. The form of communication may be verbal (written or spoken) as through codes, jargon, etc., or non-verbal (conduct as through hand signs, symbols, displays, drawings, graffiti, distinctive clothing, hairstyles, colors, ornaments, etc.;
>
> (4) Participating in criminal activities, or disruptive activities such as disturbances, riots, fostering racial or religious hatred, or union activities; and,
>
> (5) Violating institutional rules or directives or state or federal laws.
>
> * * *
>
> (D) When an inmate is charged with unauthorized group activity the conduct report shall indicate that the charge is brought under this rule, describe with specificity the alleged conduct forming the basis of the charge, and cite the pertinent identified sub-section of this rule that describes the unauthorized group activity prohibited.

[4]Plaintiffs Weisheit and Blankenship, who are Plaintiffs in this action, were also Plaintiffs in *Ratcliff*.

threatens "institutional security and . . . the resources of the prison." *Affidavit of Mark Stegemoller,* at ¶¶ 7-8. The regulation addressing unauthorized group activity is, in the view of this Court, reasonably related to legitimate penological interests. *See Turner v. Safley*, 482 U.S.at 89. It is not, therefore, violative of the First Amendment.

Plaintiffs also argue that the departmental regulations prohibiting "unauthorized group activity" and "contraband"[5] are unconstitutionally overbroad. For the reasons stated *supra*, the

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[5]Ohio Admin. Code §5120-0-55 addresses "contraband" and provides in pertinent part:

(A) There shall be two classes of contraband as defined in this rule. Contraband shall be classified as "major" or "minor" contraband. This distinction shall determine the method or manner of disposition of such contraband.

> (1) "Major contraband," as used in this rule, shall refer to items possessed by an inmate which, by their nature, use, or intended use, pose a threat to security or safety of inmates, staff or public, or disrupt the orderly operation of the facility. Major contraband also includes any material related to unauthorized group activity that is found in the possession of an inmate. Any items referred to in section 2921.36 of the Revised Code shall also be considered major contraband, including deadly weapons or dangerous ordnance, drugs of abuse, intoxicating liquor and cash.
>
> (2) "Minor contraband", as used in this rule, shall refer to items possessed by an inmate without permission and:
>
> > (a) The location in which these items are discovered is improper; or
> >
> > (b) The quantities in which an allowable item is possessed is prohibited; or
> >
> > (c) The manner or method by which the item is obtained was improper; or
> >
> > (d) An allowable item is possessed by an inmate in an altered form or condition.

(B) Any staff member who confiscates contraband from an inmate shall enter the fact of such confiscation on a log designed for such a purpose.

> (1) The log shall specify the date of the confiscation, the person or inmate from whose possession the contraband was taken, if known, and a brief description of the contraband.
>
> (2) A copy of the log shall be prepared once a year. the copy shall include all log entries for a calendar year. The copy shall be made as soon as is practical after the end of the calendar year, and shall be submitted by each institution to the attorney general no later than the first day of March. The sending institution shall notify the appropriate regional security administrator of the submission.

(C) Disposition of contraband: any item considered contraband under this rule may be confiscated. . . .

Court concludes that the regulations are not unconstitutional as applied to the facts of this case. To the extent that Plaintiffs present a facial challenge to the regulations, the Court concludes that neither regulation is overbroad. A regulation is facially overbroad if it reaches "a substantial number of impermissible applications relative to the law's legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 771 (1982). The regulations challenged by Plaintiffs in this action do not sweep so broadly. Moreover, the declaration of a regulation as facially overbroad is an "extraordinary" remedy under the First Amendment. *Odle v. Decatur Cty.*, 421 F.3d 386, 393 (6th Cir. 2005). Plaintiffs have not established that such an extraordinary remedy is appropriate in this case.

The Court also disagrees with Plaintiffs' argument that the regulations are unconstitutionally vague. Both regulations challenged by Plaintiffs, Ohio Admin Code §§ 5120-0-37, 5120-9-55, give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). These regulations are not unconstitutionally vague.

In sum, the Court concludes that Defendants' *Motion for Summary Judgment* is meritorious.

The Court notes that, subsequent to briefing of the Defendants' *Motion for Summary Judgment*, Plaintiffs Eberle and Swint filed a *Motion for Appointment of Counsel*, Doc. No. 406. In that motion, these Plaintiffs represented that they were in segregation at the time and could not access the law library without making specific requests for legal research through prison staff. Because the *Motion for Summary Judgment* had been fully briefed at the time these Plaintiffs filed their motion, the *Motion for Appointment of Counsel* has been, with the grant of

Defendants' *Motion for Summary Judgment*, rendered moot.

IV.

For the foregoing reasons, Defendants' *Motion for Summary Judgment* on the claims of Plaintiffs Eberle, Mann and Swint, **Doc. No. 344**, is **GRANTED**. The *Motion for Appointment of Counsel*, **Doc. No. 406**, is **DENIED as moot**. The case remains pending, however, as to all other remaining claims.

October 18, 2010
DATE

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE