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United States District Court, S.D. New York.

Thomas HIGGINS, Plaintiff,
v.
Philip COOMBE, Jr., Acting Commissioner of the New York Department of Correctional Services (DOCS); G. Goord, Deputy Commissioner of Facility Operations (DOCS); D. Selsky, Director of Special Housing (DOCS); C. Artuz, Superintendent of Green Haven Correctional Facility; L. Portuondo, First Deputy Superintendent; C. Coefield, Dep. Sup't. of Security; D. Bliden, Dep. Sup't of Administration; Bushek, Dep. Sup't of Administration; G. Haponik, Steward; G. Blaetz, Senior Counselor; S. Kapland, Senior Counselor; Snyder, Captain Security; Naggy, Lieutenant Security; Cottington, Sergeant Security; Whitney, Sergeant Security; R. Murphy, Correction Officer; Surber, Correction Officer; John Doe, Correction Officer; Correspondence Department Employees, Defendants.

No. 95 Civ. 8696 RCC. | Sept. 27, 1999.

Opinion

MEMORANDUM AND ORDER

CASEY, J.

***1** Plaintiff has brought this suit *pro se* pursuant to 42 U.S .C. § 1983, alleging eight counts of violations of his civil rights while incarcerated at Green Haven Correctional Facility ("Green Haven") in Stormville, New York. On June 16, 1997, Judge Sotomayor[1] dismissed six of the eight claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The six claims dismissed (as categorized by Judge Sotomayor) concerned: prison job assignment; missing § 1983 appendix in *Higgins v. Artuz,* No. 96 Civ. 4810(SS) (S.D.N.Y.1996); emergency telephone call; missing police report; cell search allegations; and, hearing/confinement issues.

The Defendants' summary judgment motion on the remaining two motions—lost legal documents and retaliatory false misbehavior report—remain before the court. Furthermore, because of a recent Second Circuit decision, *Jenkins v. Lt. Haubert,* 179 F.3d 19 (2d Cir.1999), the hearing/confinement issues must be reexamined by the court according to the doctrine of 'law of the case.' For the reasons set forth below, Defendants' motion is granted in part and denied in part.

BACKGROUND

Plaintiff alleges that on January 19, 1995, he was transferred from Green Haven Correctional Facility to Wende Correctional Facility ("Wende"), *see* Complaint at 30,[2] and that eight bags of his property were packed and shipped out of Green Haven. Upon his arrival at Wende, he discovered that "a bag and a half of his legal materials were missing." *Id.* at 31. Plaintiff claims that Defendants Bliden, Bushek, Haponik, and Surber are responsible for the disappearance of the missing bags of legal materials, and that the disappearance was "maliciously" undertaken because Plaintiff had filed a prisoner's rights suit on June 30, 1994. *See Higgins v. Artuz,* No. 96 Civ. 4810(SS) (S.D.N.Y.1996); Complaint at 34–35. However, Plaintiff has failed to allege the nature of the missing materials in his complaint, and has admitted essentially that the missing legal materials had no effect on any of his pending litigation, including his habeas corpus petition. *See, e.g.,* Deposition of Higgins at 40–41.

The habeas petition filed by Plaintiff was denied in a 25 page opinion by Judge Ross of the Eastern District of New York. The lost legal materials were not mentioned as decisive in any part of the opinion. *See Higgins v. Artuz,* 95 Civ. 1747 (E.D.N.Y. June 27, 1997). Moreover, Defendant Surber alleges that he has never intentionally lost or destroyed an inmate's property. *See* Affidavit of Jerry W. Surber ¶ 3.

Plaintiff alleges that Defendants placed a razor in his cell during a cell search on November 17, 1994. *See* Affidavit of Michael B. Siller, Ex. 1 at 53–54. Plaintiff was allowed to watch the search of his cell. *See id.* at 33. The cell search took place 49 days after the filing of his prisoner's rights suit. Subsequently, Plaintiff was convicted in a disciplinary hearing for possession of the razor. That conviction was affirmed on appeal, and the conviction has never been overturned. *See id.* at 54.

DISCUSSION

A. Standard for Summary Judgment

***2** Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is

entitled to summary judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2509–10 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53 (1986).

In reviewing a grant of summary judgment all ambiguities and all factual inferences must be resolved in favor of the party opposing the motion. *See Nora Beverages, Inc. v. Perrier Group of Am., Inc.,* 164 F.3d 736, 742 (2d Cir.1998). Moreover, the pleadings of a *pro se* plaintiff must be read liberally and interpreted to "raise the strongest arguments that they suggest." *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Liberty Lobby, Inc.,* 477 U.S. at 250, 106 S.Ct. at 2511; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S.Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.,* 477 U.S. at 248–49, 106 S.Ct. at 2510–11; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S.Ct. at 1356.

B. Retaliatory Confiscation

In order to prove retaliation, a plaintiff must satisfy a two-prong test:

> 1) Plaintiff must prove that the conduct at issue was constitutionally protected;
>
> 2) Plaintiff must also prove that the protected conduct was a substantial or motivating fact in the prison officials' decision to discipline plaintiff.

Higgins v. Coombe, 1997 WL 328623 at *9 (S.D.N.Y.) (quoting *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996)).

A retaliatory confiscation of legal papers claim may be construed as a denial of the right of access to courts claim. If there is no actual injury from the retaliatory confiscation (i.e., no denial of Plaintiff's right of access), the loss of legal papers is viewed as merely an inconvenience, and "[w]hile such inconvenience is understandably frustrating, it does not violate a Constitutional right." *Smith v. O'Connor,* 901 F.Supp. 644, 649 (S.D.N.Y.1995).

The court in *Smith* articulated this principle when it held that in order to prove a Constitutional violation as to right of access to the court system, a plaintiff must be able to demonstrate that defendants "deliberately and maliciously interfered with his access to the courts, and that such conduct materially prejudiced a legal action he sought to pursue." *Smith,* 901 F.Supp. at 649 (citing *Morello v. Smith,* 810 F.2d 344, 347 (2d Cir.1986)).

***3** The requirement of actual harm has recently been affirmed by the Supreme Court in *Lewis v. Casey,* 518 U.S. 343, 349–350, 116 S.Ct. 2174, 2179–2180 (1996). In that case, inmates brought a civil rights action alleging that state prison officials violated their constitutional right of access to the court. The Court reversed the lower courts' injunction that restructured the Arizona Department of Corrections' law libraries and legal assistance programs because the plaintiff inmates lacked standing to bring the suit, because they failed to allege any actual injury. Therefore, because the legislature must address issues of potential for injury, there must be proof of actual injury in order for a court to involve itself. *See Lewis,* 116 S.Ct. at 350.

Here, Higgins is unable conclusively to prove material prejudice regarding any of his litigation from his alleged loss of legal documents, and therefore is unable to prove that he suffered actual harm. In dismissing six of Plaintiff's eight claims pursuant to Federal Rule of Civil Procedure 12(b)(6), Judge Sotomayor discussed at length the legal reasoning behind each dismissal, and each retained cause of action. As to the lost legal documents, Judge Sotomayor stated: "Whether the deprivation of these legal documents prejudiced plaintiff's ability to litigate a habeas action and ultimately caused actual injury cannot be resolved by the instant motion. Plaintiff has pled the possible violation of a substantive constitutional right." *Higgins,* 1997 WL 328623 (citing *Morello,* 810 F.2d at 344). However, Judge Sotomayor decided *Higgins v. Coombe,* 1997 WL 328623, on June 16, 1997, before Judge Ross ruled on Higgins' habeas petition on June 23, 1997. Judge Ross' decision examined each claim thoroughly and never contemplated the alleged missing legal documents as having any bearing on the merits of Higgins' petition. *See Higgins v. Artuz,* 95 Civ. 1747 (E.D.N.Y.1997). Furthermore, Higgins admitted in his deposition that the legal materials which were lost had little or nothing to do with his pending habeas case. *See* Affidavit of Michael B. Siller, Ex. 1 at 41, 46–47. Thus, it is clear that, had Judge Ross' opinion been available at the time of Judge Sotomayor's decision, she would have dismissed Higgins' claim for missing legal documents under Rule 12(b)(6). Because failure to prove actual injury requires dismissal of the missing documents claim, Higgins' claim for retaliatory confiscation is dismissed.

C. Retaliatory False Misbehavior Report

Plaintiff argues that, as a direct result of his filed claims against Defendants, the Defendants searched his cell, and filed a false misbehavior report related to that search. *See* Complaint at 24. The cell search and misbehavior report led to a disciplinary hearing wherein the plaintiff was assigned to 60 days keeplock, loss of packages, recreation, commissary, and phone. *See* Complaint at 28.

Until recently, § 1983 claims were not allowed to challenge intra-prison disciplinary hearings regardless of whether the disposition of the hearing affected the fact or duration of the confinement, or in the alternative, only the conditions of confinement. *See, e.g., Edwards v. Balisok,* 520 U.S. 641, 117 S.Ct. 1584 (1997); *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364 (1994). *Heck* held that a claim for damages was not feasible where, if granted, it would "necessarily demonstrate the invalidity of the conviction." 512 U.S. at 481–82. If the original conviction were invalidated, the claim would affect fact or duration of confinement and therefore resemble a writ of habeas corpus more than a § 1983 claim. *Edwards* broadened the *Heck* ruling by holding that a prisoner's § 1983 suit was not cognizable where the hearing resulted in revocation of good-time credits, because revocation affected the fact or duration of confinement. 520 U.S. at 648.

***4** Thus, *Edwards* and *Heck* drew a clear delineation between the remedies available under a writ of habeas corpus and a § 1983 claim. A habeas petition could be entertained only when a prisoner was challenging the fact or length of confinement. *See Edwards,* 520 U.S. at 648. Conversely, § 1983 claims were to be used only when fact or length of confinement was in no way an issue in the case.

Subsequent decisions, however, have applied *Edwards* to hold that no intra-prison hearing, whether affecting good-time credits or not, can serve as the basis for a § 1983 claim. *See Jenkins,* 179 F.3d 19; *Jackson v. Johnson,* 15 F.Supp.2d 341, 349 (S.D.N.Y.1998). *Jackson* involved a plaintiff inmate who filed a § 1983 claim asserting that he was denied due process of law because a razor was planted in his belongings in retaliation for not following the request of DOCS officials that he implicate fellow inmates who he claimed were harassing him. Judge Kaplan held that, although the magistrate judge recommended summary judgment for the defendants, summary judgment should not be granted, because "[t]his Court is persuaded that *Edwards* does not apply where the disciplinary hearing at issue has no impact on the fact or duration of the prisoner's confinement in prison." *Jackson,* 15 F.Supp.2d at 349.

In *Jenkins,* a former inmate of DOCS claimed that the defendant, an employee of DOCS, violated his constitutional right to procedural due process in two separate disciplinary hearings. Judge Mukasey dismissed the § 1983 claim, holding in part that the claim was not cognizable under *Edwards* and *Heck. See Jenkins v. Lt. Haubert,* 1996 WL 350685 (S.D.N.Y. June 25, 1996). The Second Circuit, however, found that Jenkins' claim could be distinguished from that brought in *Heck:* "the [Supreme] Court has never announced that the *Heck* rule bars a prisoner's challenge under § 1983 to an administrative or disciplinary sanction that does not affect the overall length of confinement." *Jenkins,* 179 F.3d at 28 (finding that to apply *Heck* where a prisoner is challenging a term of disciplinary segregation would be to "contravene the pronouncement of five justices that some federal remedy—either habeas corpus or § 1983—must be available") (citing *Spencer v. Kemna,* 118 S.Ct. 978, 988–90, 992 n. 8 (1998) (concurring and dissenting opinions)). Other circuits have considerably narrowed the *Edwards* and *Heck* decisions. *See, e.g., Carr v. O'Leary,* 167 F.3d 1124, 1127 (7th Cir.1999); *Cabrera v. City of Huntington Park,* 159 F.3d 374, 380 n. 6 (9th Cir.1998) (per curium)); *see also Jackson,* 15 F.Supp.2d at 349. *Jackson* and *Jenkins* have distinguished *Edwards* to hold that if good-time credits are not at issue, an intra-prison hearing can serve as the basis for a § 1983 claim. Thus, the two aforementioned cases dictate that when habeas is not available to a prisoner, and when that prisoner is not challenging the fact or length of his confinement, *Heck* and *Edwards* should not be applied, and a disciplinary hearing can be challenged pursuant to § 1983.

Footnotes

1 Judge Sotomayor was elevated to the 2nd Circuit in the fall of 1998.

2 Because the Complaint has no paragraph numbers, the Court shall refer to the page numbers of the Complaint instead.