1-6-2022

Daniel Cousins v. Rebecca Dutton-McCormick

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 21-1561

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DANIEL R. COUSINS,
Appellant

v.

REBECCA DUTTON-MCCORMICK,
Law Librarian for James T. Vaughn Correctional Center;
C/O ENOCH TOTIMEH; LT. BARRY BURMAN;
MICHAEL LITTLE, Director of Legal Services

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On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-16-cv-00302)
District Judge: Honorable Leonard P. Stark

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on October 8, 2021

Before: GREENAWAY, JR., KRAUSE, and BIBAS, Circuit Judges

(Opinion filed: January 6, 2022)

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OPINION*

PER CURIAM

Daniel R. Cousins, an inmate proceeding pro se, appeals from the District Court's order granting summary judgment to the defendants and from the denial of his motion to add the Delaware Department of Correction as a defendant. For the reasons set forth below, we will affirm.

I.

Cousins is a state prisoner currently housed at James T. Vaughn Correctional Center ("JTVCC") in Smyrna, Delaware. On June 16, 2014, Cousins complained to defendant Rebecca Dutton McCormick ("McCormick"), a JTVCC paralegal whose duties included supervising inmate paralegals and scheduling prisoner's requested legal appointments, that his access to the law library was being improperly restricted to only one visit a week. Cousins alleged that McCormick responded that she was responsible for deciding legal appointments for the law library. The next day Cousins wrote to the former director of legal services raising a concern that McCormick was limiting his access because of his offense of conviction.[1] The legal director explained that McCormick scheduled law library

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] Cousins was convicted of several sexual offenses, including two counts of first-degree rape. See Cousins v. State, 850 A.2d 302 (Del. 2004).

appointments on a weekly basis, that the appointments could not be guaranteed, and the appointments were not based on an offender's conviction.

A little over a week later, on June 25, Cousins had an appointment in the law library where he checked out one of the library's typewriters. An inmate paralegal noticed that, during his scheduled legal appointment, Cousins was using the typewriter to transcribe his handwritten, sexually explicit manuscript. The paralegal informed McCormick of Cousins's activity. McCormick investigated the paralegal's report and observed that Cousins was working solely on his erotic manuscript and was not working on any legal matter. McCormick then reported the situation to defendant Correctional Officer Enoch Totimeh ("Totimeh") who was responsible for supervision and security for the law library.

Totimeh searched Cousins and his materials. After confirming that Cousins was producing sexually explicit material, Totimeh confiscated the manuscript, informed Cousins that his actions were an improper use of law library resources, and ordered Cousins to leave the library. Totimeh stated that Cousins was initially disorderly but ultimately complied with the order to leave the library. Cousins was then charged with multiple disciplinary violations and, after a hearing, was found guilty of abuse of privileges, failure to obey an order, and possession of non-dangerous contraband. Cousins was also transferred to a higher security housing area.[2]

[2] Cousins did not appeal the disciplinary action. However, he did file a grievance requesting the return of his confiscated novel, which was denied, and wrote the former warden indicating that he intended to file a lawsuit over the incident.

In April 2016, Cousins filed a civil rights complaint alleging various claims related to the confiscation of his manuscript. The District Court screened his complaint under 28 U.S.C. § 1915 and allowed two claims to proceed: 1) that the confiscation of his sexually explicit manuscript violated his First Amendment rights; and 2) that officers improperly retaliated against him following the complaints he raised regarding McCormick's scheduling of law library appointments. Cousins filed a motion to amend that included a request that the Delaware Department of Correction be added as a defendant, which the District Court denied. The defendants then filed a motion for summary judgment, which the Court granted. Cousins appeals from that order and from the denial of his request to add the Delaware Department of Correction as a defendant.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment, see Williams v. Beard, 482 F.3d 637, 639 (3d Cir. 2007), and review the Court's orders denying leave to amend for abuse of discretion, Connelly v. Steel Valley Sch. Dist., 706 F.3d 209, 217 (3d Cir. 2013). Summary judgment is appropriate "if the movant 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). We may affirm on any basis supported by the record, Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam), and construe Cousins's pro se filings liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam).

III.

Cousins first argues that the confiscation of his sexually explicit manuscript violated his First Amendment rights. We disagree.

To evaluate whether a prison regulation violates a prisoner's First Amendment right to possess publications or legal materials, the Supreme Court has outlined four factors that are relevant in determining the reasonableness of the regulation: (1) there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether the inmate has an "alternative means of exercising the right" at issue; (3) the burden that the accommodation would impose on prison resources; and (4) whether "ready alternatives for furthering the governmental interest [are] available." Beard v. Banks, 548 U.S. 521, 529 (2006) (internal quotation marks omitted).

As for the first factor, JTVCC maintains several policies that prohibit the introduction, possession, and distribution of sexually explicit material.[3] The regulations apply to "book[s], booklet[s], pamphlet[s], similar document[s] . . . plus other such materials," and provide guidance to prison officials for reviewing sexually explicit material.[4] Moreover, the prison rules and regulations make clear that sexually explicit material will be considered contraband and that prisoners cannot maintain such material among their possessions.[5]

[3] See Delaware Department of Correction Bureau of Prisons Policy 4.5; Delaware Department of Correction Bureau of Prisons Policy 4.2; Delaware Department of Correction, JTVCC Inmate Housing Rules and Reference Guide.

[4] See Delaware Department of Correction Bureau of Prisons Policy 4.5 (defining what constitutes "sexually explicit" material).

[5] See Delaware Department of Correction Bureau of Prisons Policy 4.2; Delaware

The policies also make clear that sexually explicit material is prohibited for multiple reasons, including to promote safety, security, order, and discipline. There is no question that this is a legitimate penological interest, and that it is rationally related to the prison's rules barring sexually explicit material. See Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) ("[I]t is rational for the Bureau to exclude materials," including sexually explicit materials, "that, although not necessarily 'likely' to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time."); Mauro v. Arpaio, 188 F.3d 1054, 1059 (9th Cir. 1999) (approving a "policy of excluding sexually explicit materials"); see also Pell v. Procunier, 417 U.S. 817, 823 (1974) (promoting prison security is "central to all other corrections goals.").

With respect to the other factors, the District Court found that Cousins failed to refute that he was able to "exercise his First Amendment rights in other ways, although not with respect to sexually explicit material," that the regulations were limited to "sexually explicit material," and that Cousins "failed to suggest any reasonable alternative 'that fully accommodates the prisoner's rights at de minimis cost to valid penological interests.'" (quoting Thornburgh, 490 U.S. at 418). App. 31L. We concur.

While Cousins acknowledges that JTVCC has a policy prohibiting the introduction of sexually explicit material, he argues that his novel did not fall under the prison's policy because it was not mailed into the institution.[6] However, this argument fails to

Department of Correction, JTVCC Inmate Housing Rules and Reference Guide.

[6] Cousins also argues that his material, is a "fictional, action, adventure, erotic novel which was written in order to report on or make aware about the real world women's issues of sex trafficking and sex slavery." To the extent that he is arguing that his manuscript falls

acknowledge that the prison's regulations provide an expansive definition of what constitutes a sexually explicit "publication," prohibit the possession of such material, and explicitly bar the introduction of such material into the prison. Additionally, Cousins admits that he possessed the material and that he shared his manuscript with other prisoners. Cousins's circulation of his manuscript is precisely what the regulations are designed to prohibit. Accordingly, the District Court correctly denied his claim.

Cousins next argues that the defendants retaliated against him in violation of the First Amendment by searching him, confiscating his manuscript, and taking disciplinary action. To make out a prima facie case of First Amendment retaliation, a claimant "must prove that: 1) the conduct in which he was engaged was constitutionally protected; 2) he suffered 'adverse action' at the hands of prison officials; and 3) his constitutionally protected conduct was a substantial or motivating factor in the decision to discipline him." Carter v. McGrady, 292 F.3d 152, 157-58 (3d Cir. 2002).

If a prisoner makes out this prima facie case, the burden shifts to the prison officials to show that "they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." Rauser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001). "[W]e evaluate . . . 'the quantum of evidence' of the misconduct to determine whether the prison officials' decision to discipline an inmate for his violations of prison policy was within the broad discretion we must afford them." Watson v. Rozum,

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within an exception that allows sexual content of a "news or information type," we disagree. As the District Court's determined in reviewing excerpts of Cousins's manuscript, entitled "The Sexatary and the Secrets," there is no question that the material is "sexually explicit" within the meaning of the DOC's regulations.

834 F.3d 417, 426 (3d Cir. 2016) (quoting Carter, 292 F.3d at 159). "[M]ost prisoners' retaliation claims will fail if the misconduct charges are supported by the evidence." Id. at 425.

The District Court concluded that Cousins failed to state a prima facie case of retaliation but, even if he had, that defendants were entitled to summary judgment because the evidence supported the decisions to discipline him. We agree with the District Court's conclusion.

As outlined above, Cousins's manuscript was prohibited contraband and was properly confiscated under prison policy and there is no indication that Cousins was targeted for retaliation. The record established that a fellow prisoner first observed Cousins's improper use of the library typewriter and sexually explicit writing. Defendants were informed of the potential misconduct which initiated the search and confiscation. Cousins was then disciplined pursuant to JTVCC policies for abuse of privileges and possession of non-dangerous contraband, the prohibited manuscript. Accordingly, given the evidence that Cousins was disciplined in clear violation of prison policies there is no genuine issue of material fact that such action was "reasonably related to legitimate penological interests," and that Cousins "would have been disciplined notwithstanding" his prior complaints against McCormick. Carter, 292 F.3d at 159; Watson, 834 F.3d at 426. Thus, we will affirm the District Court's grant of summary judgment on the retaliation claim.[7]

[7] Additionally, as the District Court explained, Cousins failed to establish a prima facie case of retaliation against defendant Burman. Cousins showed no evidence that Burman personally confiscated his writings; ordered a search of his cell; ordered his placement to a higher security level; or was involved in the punishment imposed on him upon the finding

Finally, we conclude that the District Court did not abuse its discretion in denying Cousins's request to amend his complaint to add the Delaware Department of Correction as a defendant. While a district court should freely grant leave to a party to amend its pleadings when justice so requires, it may properly deny a party's motion to amend when amendment would be futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002). We are satisfied that amendment here would be futile because the Delaware Department of Correction is likely immune under the Eleventh Amendment from this §1983 action, see Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981). However, even if it were not, Cousins failed to state a claim against the Department because he did not identify a policy, practice, or custom that was the cause of his alleged injuries. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 583-84 (3d Cir. 2003).

Accordingly, we will affirm the judgment of the District Court. We also grant Appellee's motion to file Volume II of its supplemental appendix under seal, so that 3d Cir. ECF Nos. 12 and 14 will be sealed for 25 years. See 3d Cir. L.A.R. Misc. 106.1(c). However, the Appellees are directed to refile Cousins's manuscript, Exhibit P, as a separate volume. That separate volume will not be sealed as Appellees have not met their burden for relief as to the manuscript. See In re Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001).

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of guilt in the disciplinary report. Therefore, there is no genuine dispute of material fact indicating that Burman took any adverse action, and, even if there were, the retaliation claim would fail for the reasons outlined above.