

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

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TONY WALKER,

Plaintiff,

v.

JON E. LITSCHER, DANIEL R. BERTRAND,  
LORA HALLET, PATRICK BRANT,  
FRANCIS LARDINOIS, RICHARD JAUQUET,  
GLEN RIPLEY and WENDY BRUNS,

Defendants.

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ORDER

02-C-135-C

In an order entered on June 19, 2002, I granted plaintiff Tony Walker's request for leave to proceed in forma pauperis on his claims that defendants violated his Eighth Amendment rights to be free from cruel and unusual conditions of confinement when they subjected him to extreme cell temperatures, constant illumination and inadequate food and his First Amendment right to free speech when they confiscated certain items of his mail allegedly containing contraband.

The parties are currently briefing defendants' motion to dismiss on the grounds that plaintiff has failed to exhaust his administrative remedies and that defendants enjoy qualified

immunity. Defendants' recent submissions make it clear that it will be necessary to give separate treatment to plaintiff's claim that defendants violated his right to free speech by confiscating certain items of his mail as contraband. A stay will be imposed as to this claim.

In contending that defendants acted improperly in rejecting certain items of mail as pornography, plaintiff may be implicating issues litigated in Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000), a class action. Counsel for the plaintiffs in Aiello should have the opportunity to determine whether plaintiff's claim is related directly to that case and, if so, whether counsel wishes to raise plaintiff's claim in the context of the Aiello class action lawsuit. If so, plaintiff's free speech claim would be dismissed from this case.

Plaintiff's free speech claim will be stayed for a second reason. Defendants have filed a motion to seal exhibit C to John Ray's affidavit in support of their motion to dismiss. Exhibit C is a photocopy of a pamphlet relating to plaintiff's free speech claim; defendants rejected the pamphlet on the ground that it advertises sexually explicit materials that constitute contraband under prison rules. Defendants argue that the exhibit should be sealed so that no inmates would have access to the alleged pornography, including plaintiff.

The problem with defendants' motion to seal is two-fold. First, placing a document under seal means only that the document is removed from public inspection. It does not mean that the parties cannot view the document. Therefore, I construe defendants' motion to seal as a request for the court to review exhibit C in camera. The second difficulty with

defendants' request is that by introducing exhibit C, defendants' motion to dismiss plaintiff's free speech claim must be treated as a motion for summary judgment. Fed. R. Civ. P. 12(c). Unlike the exhaustion documentation, which is a matter of public record, exhibit C constitutes matters outside the pleadings that are not excluded by the court because they are necessary to defendants' argument. However, the motion to seal is premature because there is no motion for summary judgment pending and because the proceedings relating to plaintiff's free speech claim will be stayed. For these reasons, I will reserve a decision on defendants' request to review exhibit C in camera. At that time, I will consider the motion to review in light of a third problem: the need for plaintiff to view any matters of relevance in his lawsuit. Exhibit C will be kept in the court's file because plaintiff has no need to review the document at this time.

In addition to his free speech claim, plaintiff was granted leave to proceed on three additional claims: that defendants violated his Eighth Amendment right to be free from cruel and unusual conditions of confinement by subjecting him to extreme cell temperatures, inadequate food and constant illumination in segregation. Unlike the free speech claim, these claims will not be stayed. Plaintiff may have until August 13, 2002, in which to serve and file a response to defendants' motion. Defendants may have until August 23, 2002, in which to serve and file a reply to plaintiff's response.

One final matter requires attention. In a letter dated July 21, 2002, plaintiff asks the

court to return a magazine that he submitted prematurely. That submission will be enclosed with this order.

## ORDER

IT IS ORDERED that

1. The proceedings relating to plaintiff's claim that defendants violated his First Amendment right to free speech when they confiscated certain items of his mail allegedly containing contraband are STAYED;

2. A decision on defendants' request for the court to review in camera exhibit C to John Ray's affidavit in support of defendants' motion to dismiss is STAYED; and

3. Defendants' motion to dismiss plaintiff's claim that defendants violated his Eighth Amendment right to be free from cruel and unusual conditions of confinement by subjecting him to extreme cell temperatures, inadequate food and constant illumination in segregation is not stayed. Plaintiff may have until August 13, 2002, in which to serve and file a response to defendants' motion. Defendants may have until August 23, 2002, in which to serve and

file a reply to plaintiff's response.

Entered this 25th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge