IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

MATTHEW J. FRANK, JON E. LITSCHER, CINDY O'DONNELL, JOHN RAY, GERALD BERGE, PETER HUIBREGTSE, JULIE BIGGAR, ELLEN RAY, SGT. JANZEN, C.O. WETTER, C.O. S. GRONDIN, C.O. MUELLER, C.O. CLARK, and JOHN SHARPE,

Defendants.

OPINION AND ORDER

02-C-0021-C

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In an order dated May 5, 2003, I declared that the First Amendment was violated by defendants' application of a publisher's only rule to prevent inmates from receiving any and all magazine and newspaper clippings and photocopies in the mail from sources other than a publisher or a recognized commercial source. In that same order I enjoined defendants from enforcing the publisher's only rule to the extent that it prohibits inmates from receiving any newspaper and magazine clippings and photocopies in the mail from any source other than the publisher or a recognized commercial source. Pursuant to the order and injunction,

the Wisconsin Secure Program Facility instituted a policy allowing inmates to have five newspaper or magazine clippings in their possession at a time. Dfts.' PFOF, dkt. # 127, at 5. Now defendants have moved to stay the injunction pending appeal.

Fed. R. Civ. P. 62(c) grants district courts the authority to stay an injunction pending appeal. There are four factors to consider in determining whether to do so: 1) whether the applicant for the stay has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and 4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); see also Glick v. Koenig, 766 F.2d 265, 269 (7th Cir. 1985); EEOC v. Quad/Graphics, 875 F. Supp. 558, 559 (E.D. Wis. 1995). The standards are similar to those employed by courts in deciding whether to grant a preliminary injunction. See Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992) (setting forth relevant factors).

Although defendants argue that they are finding it difficult to enforce the injunction, I am persuaded that the public interest requires keeping the injunction in place and that defendants can minimize their administrative problems by making minor adjustments to their procedures that will not violate the injunction.

A. Likelihood of Success on the Merits

A party seeking a stay of the entry of an injunction pending an appeal need not show that it has a "probability" of success on appeal in order to succeed on its motion. Such a showing logically could not be required because any district court believing the party seeking the stay has a probability of success on appeal would have denied entry of the injunction in the first place. Thus, the "likelihood of success" standard requires something less than a 50% chance of success. Thomas v. City of Evanston, 636 F. Supp. 587, 590 (N.D. Ill. 1986). It is sufficient that a party have a substantial case on the merits. Id.

In briefing the motion for a stay, defendants cite numerous cases discussing this court's obligation to give deference to corrections administrators. Although I continue to believe that the decision I reached is the correct one, I recognize that defendants have legitimate grounds for their arguments. Because defendants' chance of success on appeal is not negligible, I will consider the three other factors.

B. Irreparable Injury to Defendants Absent a Stay

Defendants argue that absent a stay they will continue to encounter a considerable drain on staff resources, which in turn jeopardizes the safety and security of the Wisconsin Secure Program Facility. Defendants represent that implementation of the injunction has or will have the following impact:

1) Staff spend approximately 45 minutes a day processing documents that were not

allowed under the publisher's only rule. (Dfts.' PFOF 33);

2) There has been a substantial increase in the receipt of mail containing voluminous photocopies, such as copies of books, lengthy articles, and other materials. (Dfts.' PFOF 30);

3) The current policy imposes a limit of five newspaper or magazine clippings at a time for each inmate. Even so, staff must still spend administrative time with those documents, even if those documents are not delivered to the inmate. Id.; see also Wis. Admin. Code § 309.04(e). This administrative time includes sending a written notice to the sender and the inmate explaining why the documents were not delivered and giving the inmate an opportunity to appeal the decision of non-delivery to the warden. (Dfts.' PFOF 3; see also Wis. Admin. Code § 309.04(e) & (f));

4) Staff time spent on processing documents prevents staff from performing other vital functions such as area searches and safety checks. (Dfts.' Brf. In Support of Motion to Stay, at 10);

5) In order to enforce the five clipping limit, defendants must conduct cell searches, which can lead to conflict or unrest with the inmate, result in discipline, and jeopardize the safety and security of the officers. (Dfts.' PFOF 40);

6) It is impossible to limit the number of photocopies received by inmates because staff are unable to determine whether the photocopies are legal materials or exhibits attached to legal materials. (Dfts.' PFOF 24). Defendants note that the Wisconsin Secure Program

Facility is unable to limit legal materials. Id.

7) Staff are confused as to what items fall within the definition of "newspaper and magazine clippings and photocopies." (Dfts.' PFOF 29). For example, defendants assert that one inmate has received copies of crossword puzzles, despite the fact that inmates on the more secure levels at the Wisconsin Secure Program Facility are not allowed puzzles or games. Id.

8) There may be increased "fishing," which defendants define as inmate transferring of clippings and photocopies from cell to cell. (Dfts.' PFOF 43-46);

9) Allowing inmates on higher security levels to have puzzles or other clippings and photocopies disrupts the facility's incentive or "level" system. (Dfts.' PFOF 47-49);

10) After the court issued the injunction, one inmate's sister has offered a free clipping and copy service to inmates. (Dfts.' PFOF 36). Defendants contend that this is an indication that such activity provides inmates with the opportunity to attain a higher status in prison, which can lead to strong-arming, bartering, and other fraudulent practices. (Dfts.' PFOF 37);

11) There has been an increase in the number of inmate complaints being filed through the inmate complaint review system concerning the receipt and possession of clippings and photocopies as allowed under the court's injunction. (Dfts.' PFOF 50-51).

Irreparable harm is harm that "cannot be repaired, retrieved, put down again, atoned

for." Graham v. Medical Mut. of Ohio, 130 F.3d 293, 296 (7th Cir. 1997) (citing Gause v. Perkins, 56 N.C. (3 Jones Eq.) 177 (1857)). I am unconvinced that defendants have shown irreparable harm. Defendants fail to offer concrete examples in support of their assertion that the time staff is spending to process inmate documents and conduct cell searches jeopardizes the safety and security of the facility. Rather, many of defendants' arguments can be characterized as speculative and as examples of inconvenience.

The very nature of injunctions often causes inconvenience for the party against whom the injunction is entered. As to the clipping and copy service offered by an inmate's sister, plaintiff has submitted evidence indicating that this particular service has ceased. Aff. Maggie Dorn, dkt # 134. Furthermore, defendants fail to show how such activity cannot be curtailed through the use of approved mailing lists.

I note that nothing in the original injunction would prevent defendants from creating a policy limiting newspaper and magazine clippings and photocopies through approved mailing lists. In any case, the potential of irreparable harm to defendants is outweighed by the potential of substantial injury to plaintiff and the public interest in this matter.

C. Substantial Injury to Plaintiff

Plaintiff contends that without the injunction, he and others confined at the Wisconsin Secure Program Facility have no way of reasonably obtaining newspaper and

magazine clippings and photocopies in the mail. The injury at stake for plaintiff is a violation of his First Amendment right to receive published information. A deprivation of a constitutional right qualifies as a substantial injury. Admittedly, this injury is difficult to compare to any administrative burden that may be experienced by the defendants if a stay of the injunction is denied. In situations where it is difficult to compare the harms to each party, one court has considered these harms in light of the public interest. Decker v. U.S. Dept. Of Labor, 485 F.Supp 837, 845 (E.D.Wis. 1980) aff'd, Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980).

In Decker, 485 F.Supp at 839, 845, the court realized that one party, federal taxpayers, would suffer constitutional infringement under the establishment clause if the court stayed the injunction that prohibited defendants from providing federal funds to elementary or secondary schools operated by sectarian or religious organizations. The court also realized that if it did not stay the injunction, employees in these sectarian or religious organizations would lose their jobs. Id. A similar situation exists in this case. If this court stays the injunction, plaintiff will not have a reasonable way of obtaining published material, a loss that violates the First Amendment. On the other hand, if this court denies defendants' motion, defendants may experience administrative burdens in trying to satisfy the terms of the injunction while at the same time maintaining order and safety at the Wisconsin Secure Program Facility. Thus, I will consider both plaintiff's and defendants' harms in light of the

public interest.

D. Public Interest

Defendants contend that the injunction affects the orderly and secure operation of the Wisconsin Secure Program Facility and undermines the public interest in the safe and orderly management of prisons. Yet, as I noted earlier, defendants fail to provide concrete examples of the way the injunction jeopardizes the safety and security of the institution or to explain why those concerns cannot by addressed by modifying the current policy to further limit the number of clippings and photocopies. Therefore, I find that the public interest will best be served by upholding the First Amendment of the Constitution, see, e.g., Decker, 485 F.Supp, at 845 (denying a motion to stay an injunction prohibiting direct government payments to sectarian schools stating that "the public interest is best served if the law is upheld").

I note again that the injunction does not restrict defendants from creating rules limiting such materials through mailing lists or setting maximum page numbers. It does not forbid limiting the maximum size of photocopies of newspaper and magazine clippings or limiting the size and number of photocopied pages mailed to inmates. The injunction does not prohibit defendants from distributing to inmates the prison's rules on clippings and photocopies in order to clarify what the injunction allows and to curtail the number of

inmate complaints. The injunction merely forbids defendants from enforcing the "publisher's only" rule so as to prohibit inmates from receiving *any* newspaper and magazine clippings and photocopies in the mail from any source other than the publisher or recognized commercial source. As long as inmates can receive some published material in the mail from sources other than the publisher or other recognized commercial source, defendants will satisfy the injunction.

In sum, I find that the four factors do not weigh heavily enough in defendants' favor to warrant a stay of the injunction. Accordingly, defendants' motion will be denied.

ORDER

IT IS ORDERED that the motion for a stay of this court's injunction and order of May 5, 2003 pending appeal by defendants Frank, Litscher, O'Donnell, J. Ray, Berge, Huibregtse, Biggar, E. Ray, Janzen, Wetter, Grondin, Mueller, Clark and Sharpe is DENIED.

Entered this 25th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge