IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM F. WEST,

Petitioner, ORDER

v. 04-C-173-C

MATTHEW J. FRANK; GERALD A. BERGE;
PETER HUIBREGTSE; KELLY TRUMM;
SANDRA GRONDIN; JUDITH HUIBREGTSE;
JOHN RAY; and CINDY O'DONNELL,

Respondents.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner William West, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He alleges that respondents refused to deliver mail from his family because it contained pages printed off the internet, in violation of the First Amendment.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if, on three or more previous occasions, the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

I conclude that petitioner has stated a claim upon which relief may be granted. Respondents will have to show that the prison policy restricting inmates from receiving materials from the internet is reasonably related to a legitimate penological interest.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner suffers from a number of medical conditions related to his liver, including chronic liver disease. When prison medical staff could not answer his questions about his conditions, petitioner's family mailed him seven pages printed from www.medstudents.com, an internet site. On August 14, 2003, respondent Sandra Grondin, a prison employee in the mail room, refused to deliver the information, stating that it was contraband under DOC 309 IMP 1. This procedure prohibits inmates from receiving information from the internet

unless it comes "directly from the Internet site or other recognized commercial source." When petitioner's family mailed medical information from the internet to him a second time, respondent Judith Huibregtse, another mail room employee, denied delivery on September 15, 2003. Huibregtse cited DOC 309 IMP 1. On November 18, 2003, Huibregtse denied delivery of mail to petitioner again under the same IMP. This time, petitioner's family had mailed him information about "Supermax" prisons from an internet site operated by Human Rights Watch.

There is no other "readily available" source from which petitioner can obtain the information he seeks.

Petitioner complained to respondents Matthew Frank, Gerald Berge, Peter Huibregtse, Kelly Trum, Cindy O'Donnell and John Ray either personally or through the inmate complaint review system. Each respondent rebuffed his complaint. Respondent Frank is Secretary of the Wisconsin Department of Corrections. Respondent Berge is the warden of the Secure Program Facility; respondent Huibregtse is the deputy warden. Respondent Trumm is an inmate complaint examiner. Respondent Ray is a corrections complaint examiner; he reviews the decisions of inmate complaint examiners. Respondent O'Donnell is Deputy Secretary of the Department of Corrections. She reviews inmate complaints on behalf of respondent Frank.

OPINION

I understand petitioner to contend that respondents have violated his First Amendment right to free speech by prohibiting him from receiving information from the internet about his medical conditions and about prison conditions in general because it did not come directly from the site operator. The Supreme Court has recognized that inmates retain a limited constitutional right to receive and read materials that originate outside the prison. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Procunier v. Martinez, 416 U.S. 396 (1974); Pell v. Procunier, 417 U.S. 817 (1974). In Thornburgh, 490 U.S. at 413, the Court held that "[r]egulations affecting the sending of a 'publication' . . . to a prisoner . . . are 'valid if [they are] reasonably related to legitimate penological interests.'" To determine whether a regulation meets this test, a court should consider four factors: (1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether the prisoner has available alternative means of exercising the right in question; (3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and (4) whether there are obvious, easy alternatives at a minimal cost.

At this stage of the proceedings I cannot determine definitively whether or not respondents will be able to satisfy this standard. However, I note that in a previous case, I concluded that prison officials had failed to show that their interests in security and limiting

administration costs were reasonably related to a rule prohibiting inmates from receiving "publications" unless they were sent directly from the publisher or another recognized commercial source. Lindell v. Frank, No. 02-C-21, 2003 WL 23198509, *14-18 (W.D. Wis. May 5, 2003). In a later order, I rejected the defendants' argument that the publishers only rule was justified as part of the Secure Program Facility's level program. Lindell v. Frank, No. 02-C-21-C, 2003 WL 23100272 (W.D. Wis. May 30, 2003). The defendants have appealed this decision, but the court of appeals has not issued a ruling yet.

The validity of the rule in this case may be even more doubtful than the one in Lindell. In the context of publications such as books, magazines and articles, an inmate has the option (at least if he has the financial means) of purchasing the publication directly. However, it is unlikely that there are many internet site operators that "sell" copies of their web pages in paper form. Many sites do not even provide contact information for the site's operator. Thus, in a prison like the Secure Program Facility, which does not provide inmates with access to the internet, IMP 1 has the potential to completely foreclose an inmate's ability to access any information found on the internet. This and similar points were made by the court in Clement v. California Department of Corrections, 220 F. Supp. 2d 1098 (N.D. Cal. 2002), on which I relied in Lindell. In Clement, the court held that a similar prison policy limiting inmates from receiving mail that included internet materials was unconstitutional. Cf. Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp.

2d 1199 (D. Ariz. 2003) (state statute prohibiting inmates from accessing internet violated First Amendment). In any event, because of the similarities in the rules at issue in this case and in Lindell, respondents will have an uphill battle to show that DOC 309 IMP 1 passes constitutional muster. (I am enclosing a copy of both Lindell opinions so that the parties may evaluate their positions in light of this court's earlier holdings.)

A word is required regarding the respondents in this case. To recover monetary damages for a constitutional violation under 42 U.S.C. § 1983, a plaintiff must show that each of the defendants was personally involved in the illegal conduct. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Direct participation is not necessary. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2002). Rather, a plaintiff must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). In addition, the Court of Appeals for the Seventh Circuit has held that an official may be held liable if he or she had a "realistic opportunity" to prevent another official from violating the plaintiff's constitutional rights. Windle v. City of Marion, Indiana, 321 F.3d 658, 663 (7th Cir. 2003).

There is no question that the prison employees who denied petitioner his mail would meet the personal involvement requirements. In addition, as Secretary of the Wisconsin Department of Corrections and Warden and Deputy Warden of the Secure Program Facility,

respondents Frank, Berge and Peter Huibregtse could be liable if it was their policy that respondents Judith Huibregtse and Grondin were enforcing. However, petitioner has also named all of the complaint examiners that reviewed (and rejected) his complaints. It is not clear that an inmate complaint examiner "approves" or "condones" a constitutional violation simply because he or she rejects an inmate complaint. I am not aware of any decision by the Court of Appeals for the Seventh Circuit that has addressed this question. If the examiners have authority to find in favor of an inmate on the ground that they believe a regulation is unconstitutional, this might be sufficient to find liability. However, if examiners do not have such authority, that is, if they consider only whether a regulation was followed without looking at that regulation's validity, it would be difficult to argue that they are condoning any unconstitutional behavior by rejecting a complaint. At this stage of the proceedings, I will assume that each of the respondents may be personally involved in the alleged violation. Petitioner should know that it will be his burden to prove that each respondent is responsible for the alleged deprivation of his constitutional rights.

Finally, I note that petitioner has attached to his complaint many of the documents he filed and received during the inmate review process. In a document dated February 14, 2004, respondent O'Donnell informed petitioner that the Department of Adult Institutions was in the process of revising the policy restricting internet materials. If the new policy would permit petitioner to receive the information at issue in this case, his claim for

injunctive relief may be moot.

ORDER

IT IS ORDERED that

1. Petitioner William West is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claim that respondents Matthew Frank, Gerald Berge, Peter Huibregtse, Kelly Trumm, Sandra Grondin, Judith Huibregtse, John Ray and Cindy O'Donnell violated his First Amendment right to free speech by implementing a policy that prohibits inmates from receiving materials from the internet unless they are sent by the site operator or other recognized commercial source.

2. The unpaid balance of petitioner's filing fee is $133.65; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondents or to respondents' attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable

to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 19th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge