IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATANAEL RIVERA,

Plaintiff,

v.

NICHOLAS JOHNSON,

Defendant.

OPINION and ORDER

10-cv-286-bbc

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In this civil action for declaratory, injunctive and monetary relief, plaintiff Natanael Rivera contends that defendant Nicholas Johnson violated his right to freedom of speech and expression under the First Amendment by prohibiting him from writing his return address sideways on his outgoing mail. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915(a)(1), and has made an initial partial payment.

Because plaintiff is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny plaintiff leave to proceed if his complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). In addressing any pro se litigant's complaint, the court must read the allegations of the

complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing plaintiff's complaint, I conclude that he has failed to state a constitutional claim upon which relief may be granted because he has not engaged in conduct protected as speech by the First Amendment. Therefore, I am dismissing plaintiff's complaint.

In his complaint, plaintiff alleges that following facts.

ALLEGATIONS OF FACT

Plaintiff Natanael Rivera is incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Inmates at the Columbia Correctional Institution are permitted to correspond with family, friends, lawyers and courts through the United States Postal Service. They are required to place a return address on their outgoing envelopes, but there is no policy specifying where the return address must be placed on the envelope. Plaintiff utilizes a practice of placing his return address sideways, on the left side of his outgoing envelope, rather than in the top left corner of the envelope.

Defendant Nicholas Johnson is a corrections officer at the Columbia Correctional Institution whose duties include sorting inmate outgoing mail and stamping the mail with an institution seal. On March 13 or 14, 2010, defendant told plaintiff not to place his return address on the side of the envelope and has refused to mail plaintiff's letters that have the return address written sideways on the envelope.

OPINION

Plaintiff contends that defendant's refusal to mail envelopes on which his return address is written sideways is a violation of his right to free expression under First Amendment. Prisoners have protected First Amendment interests in both sending and receiving mail, Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999), and restrictions on an inmate's First Amendment rights are valid only if reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987); Lindell v. Frank, 377 F.3d 655, 657 (7th Cir. 2004).

However, not every form of conduct is protected by the First Amendment right of free speech. United States v. O'Brien, 391 U.S. 367, 376 (1968). It is not enough for plaintiff simply to show that he intended to communicate an idea. Id. ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.") As the Supreme Court has noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes–for example, walking down the street or meeting one's friends at the shopping mall–but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). Therefore, it is necessary to determine whether plaintiff's sideways return address is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth

Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974).

For conduct to be sufficiently communicative to invoke First Amendment protections, it must demonstrate both an "intent to convey a particularized message" and a great likelihood "that the message would be understood by those who viewed it, in light of the timing and particular circumstances." Id. at 410-11. For example, the Supreme Court has recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505-06 (1969); a sit-in by blacks in a "whites only" area to protest segregation, Brown v. Louisiana, 383 U.S. 131, 141-142 (1966); the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, Schacht v. United States, 398 U.S. 58, 63 (1970); peaceful picketing, United States v. Grace, 461 U.S. 171, 176 (1983); and various conduct related to flags, e.g., Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (burning flag at protest rally); Spence, 418 U.S. at 409-10 (taping black peace symbols to United States flag in 1970 to express political criticisms of recent events); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632-33 (1943) (refusing to salute the flag).

In contrast, courts have found that conduct that does not communicate a particular idea or communicates only that the actor endorses the conduct at issue is not protected by the First Amendment. E.g., Brandt v. Board of Education of City of Chicago, 480 F.3d 460,

465 (7th Cir. 2007) (school students enjoy no protected speech right to "self-expression" that would allow them to wear T-shirt of their own design); Willis v. Town of Marshall, N.C., 426 F.3d 251, 257-59 (4th Cir. 2005) (recreational dancing, although containing a "kernal" of expression, is not conduct sufficiently communicative to bring it under First Amendment protection); Zalewska v. County of Sullivan, N.Y., 316 F.3d 314, 320 (2d Cir. 2003) (rejecting school bus driver's claim that wearing a skirt is protected First Amendment conduct because, although a person's choice of dress or appearance may be expressive, "in an ordinary context [a person's dress] does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection"); Cabrol v. Town of Youngsville, 106 F.3d 101, 109-10 (5th Cir. 1997) (employee's act of not removing chickens from yard after mayor instructed him to do so did not amount to expressive conduct protected by First Amendment); Stephenson v. Davenport Community School District, 110 F.3d 1303, 1307 n. 4 (8th Cir. 1997) (concluding that student's tattoo was merely "self-expression" not entitled to First Amendment protections); Fowler v. Board of Education of Lincoln County, Ky., 819 F.2d 657, 664 (6th Cir. 1987) (teacher's decision to show R-rated movie to students was not expressive because there was little likelihood that students would derive any meaning from it); Villegas v. City of Gilroy, 363 F. Supp. 2d 1207, 1217-18 (N.D. Cal. 2005) (motorcycle club members did not engage in expressive conduct by wearing their club vests at festival).

In this case, plaintiff's decision to write his return address sideways on his outgoing mail is not "speech" protected by the First Amendment because it does not convey a particular message to the public that those viewing it would be likely to understand. The First Amendment requires more than vague and attenuated notions of expression. Blau v. Fort Thomas Public School District, 401 F.3d 381, 390 (6th Cir. 2005). Unlike the cases in which courts have found expressive conduct protected by the First Amendment, plaintiff's sideways address does not convey an "unmistakable message" that would be "difficult for the great majority of citizens to miss." Spence, 418 U.S. at 410. Plaintiff has not alleged that he intends to communicate a particular message to the family members, friends and lawyers with whom he corresponds by writing his return address sideways and his conduct conveys no discernible message. Although plaintiff states that he writes his address sideways as a form of expression, "expression" that is disconnected from a desire to communicate a particular message does not fall within the scope of the First Amendment. O'Brien, 391 U.S. at 376; see also Blau, 401 F.3d at 389 (student's desire to wear clothes she "feel[s] good in," as opposed to her desire to express "any particular message" held not to be protected speech); Brandt, 480 F.3d at 465 (First Amendment does not protect clothing intended to send messages such as "I am rich," "I am sexy"or "I have good taste" because such "[s]elf-expression is not to be equated to the expression of ideas or opinions"); Bar-Navon v. Brevard County School Board, 290 Fed. Appx. 273, 275-77 (11th Cir. 2008) (unpublished)

(student's desire to express her "individuality" and "non-conformity" by wearing pierced jewelry not protected by First Amendment).

Moreover, in order for a message to be communicated through plaintiff's sideways address, it must be reasonably apprehended by viewers, in context. Johnson, 491 U.S. at 404 (current events gave meaning to symbol); Spence, 418 U.S. at 410 (same); Tinker, 393 U.S. at 505 (same). Even if I were to assume that plaintiff writes his address sideways in order to convey a message beyond his own uniqueness or preference for writing sideways, plaintiff's conduct does not communicate a message that would be understood by viewers because nothing is obviously conveyed by sideways writing on outgoing mail. With no likelihood that most viewers would perceive a message from plaintiff's conduct, there is no expressive conduct to be protected by the First Amendment.

Because plaintiff's decision to write his return address sideways on his outgoing mail is not conduct protected by the First Amendment, he has failed to state a claim against defendant. Therefore, I am dismissing plaintiff's complaint.

ORDER

IT IS ORDERED that

1. Plaintiff Natanael Rivera is DENIED leave to proceed on his claim that defendant Nicholas Johnson violated his rights under the First Amendment and his complaint is

DISMISSED with prejudice for failure to state a claim on which relief may be granted.

2. A strike will be recorded against plaintiff pursuant to 28 U.S.C. § 1915(g) because his claim has been dismissed for failure to state a claim upon which relief may be granted.

3. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Columbia Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

4. The clerk of court is directed to close this case.

Entered this 25th day of June, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge