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

SAMUEL UPTHEGROVE,

Plaintiff,

v.

ALLEN PULVER,

Defendant.

OPINION AND ORDER

10-cv-469-slc

In this *pro se* prisoner civil rights lawsuit, plaintiff Samuel Upthegrove alleges that defendant Allen Pulver violated his First Amendment right to free speech by refusing to deliver two catalogs that Upthegrove had ordered from outside the Columbia Correctional Institution, where Upthegrove is incarcerated. Pulver moved for summary judgment on May 9, 2011, dkt. 17, but Upthegrove did not file a response. Even though the motion was unopposed, I concluded that Pulver had not provided enough admissible evidence to allow the court to make an informed decision. Therefore, on September 19, 2011, I stayed a ruling on the motion to allow both parties an opportunity to supplement the record. Dkt. 31.

Both parties have responded with supplemental briefs and additional proposed findings of fact. In addition, Pulver has moved to strike Upthegrove's "Brief Opposing Summary Judgment," dkt. 36, on the ground that it responds to the substantive arguments that Pulver made in his initial summary judgment brief. Dkt. 41. In the previous order, I instructed the parties that they should "present any other facts they deem relevant to the court's decision on summary judgment" and "may accompany any *newly-proposed* facts with brief argument explaining how and why those facts are relevant to the court's concerns." Dkt. 31 at 12-13 (emphasis added). Although it is unnecessary to strike plaintiff's brief in its entirety, the court will disregard those portions that address the previously-raised facts and arguments.

After reviewing the newly proposed facts and supporting argument, I conclude that a reasonable correctional officer would not have known that his failure to deliver catalogs to a segregation inmate pursuant to institution policy violated of the First Amendment. Therefore, Pulver is shielded from liability under the doctrine of qualified immunity.

In addition to the findings of fact found in the September 19 2011 order–which I incorporate by reference, and which should be read in conjunction with the instant order–I find the following additional facts to be material and undisputed:

FACTS

Daniel Westfield is the Security Chief for the Wisconsin Department of Corrections (DOC), Division of Adult Institutions (DAI). As Security Chief, Westfield is responsible for developing, coordinating and implementing security policies and procedures for DAI. On April 12, 2010, DAI Policy and Procedure 309.20.03, "Inmate Personal Property and Clothing," was revised to allow inmates to possess a limit of four personal books in segregation as a result of a lawsuit settlement in *Christopher Goodvine v. William Swiekatowski, et al.*, Case No. 08-cv-702-bbc (W.D. Wis.). During the period of April 14 to July 14, 2010, that policy allowed segregation inmates to have at least four personal publications in their cell. Page 27 of the policy defines publications as including catalogs and does not specify that it applies only to inmates in general population.

Between April 14, 2010 and July 14, 2010, inmates on DS-1 (segregation) at CCI were allowed to order, receive and possess books and magazines, but not publications that defendant Pulver deemed to be "catalogs." CCI's Segregation General Policies and Procedures stated that

no catalogs will be offered to inmates in segregation, with the exception of canteen catalogs. Pulver differentiated a catalog from a magazine by the publication's content. He claimed that "a catalog is primarily for purchasing items. A magazine is primarily for reading."

Westfield endorses as valid the security reasons and the institution management considerations that CCI Security Director Janel Nickel identified as reasons to prohibit segregation inmates from receiving commercial catalogs. The amended DAI policy was not intended to circumvent institution procedures and security measures that are necessary to protect staff and inmates in a segregation building. It is necessary to allow individual institutions to control property in a segregation unit to adequately search cells and property contained therein. CCI has some of the most problematic inmates in DOC, and its segregation building houses inmates that are problematic in a general population and pose a security risk to staff, other inmates and themselves. Inmates in a segregation unit are among the most staff-intensive and resource-intensive inmates. For that reason, they are permitted only a limited amount of property to maintain a safe and secure environment. In order for a CCI inmate in DS-1 (segregation) to order anything from a commercial vendor the inmate must submit a "Disbursement Request" to CCI staff in which the inmate must state the item to be purchased, its cost and the name of the vendor. CCI staff may deny such a request if they choose.

According to Westfield, inmates frequently use personal property items to manufacture contraband items that are used as instruments in behaviors that are disruptive. There are thousands of vendors that provide commercial catalogs offering everything from clothing and furniture to hunting equipment and bicycles, none of which an inmate can purchase or possess

in a correctional institution. Inmates are not allowed to purchase items from these commercial catalogs because the items being sold are not allowable personal property.

Inmate receipt of commercial catalogs that sell products inmates cannot buy taxes the limited staff resources required to process, search and distribute these catalogs. The institution allows inmates to utilize the DOC contracted vendor catalogs that are part of the institution canteen and offer products that are approved inmate purchases. There may be restrictions on what an inmate may purchase while he is in segregation; even so, his family and friends may purchase items from these catalogs (such as writing paper and envelopes) that may be allowed in a segregation unit.

The "Bargain Books" catalogs at issue in this lawsuit primarily offer books for sale and they provide brief summaries or descriptions of the listed titles. Upthegrove had no intention of ordering, or having ordered for him, any property not allowed in DS-1. Instead, he avers that he was interested in reading the book descriptions in the Bargain Books catalogs and ordering some books.

DISPUTED FACTS

Westfield avers that it has always been DOC's intention that segregation inmates not be permitted commercial catalogs and that the revised DAI policy never was intended to add commercial catalogs as allowable property for segregation inmates; he maintains that the policy revision, which implies otherwise, was poorly drafted. However, Upthegrove has produced an August 19, 2010 CCE Report in which Welcome Rose states that Westfield "confirmed for this examiner that catalogs are allowable publications to segregation inmates and that they are allowed as one of four personal publications in a segregation unit cell, so long as there are no

security reasons to deny an inmate possession of the catalog (e.g., a staple in the binding)." In addition, Rose reported that "CCI has already agreed to effect the change."

Westfield avers that inmates have removed staples from publications for the purposes of self-abuse and inflicting self-harm. Upthegrove avers that DOC removes all staples from the incoming mail addressed to segregation inmates, so there was no security reason to deny him the two catalogs.

Westfield avers that inmates in segregation frequently attempt to conceal contraband items. Westfield avers that allowing inmates in maximum security segregation to receive and accumulate catalogs from which the inmates may not order goods would erode a security procedure that is necessary to manage limited property to a population that poses challenges and security risks to staff. In response, Upthegrove points to the fact that before an inmate in segregation can purchase any item from a vendor, he must request and receive permission from CCI. He further observes that CCI allows segregation inmates to purchase up to four books.

DISCUSSION

I. No Constitutional Violation

As an initial matter, Pulver points out that although the court focused on the *Turner* factors (i.e., whether the non-delivery of the catalogs reasonably related to legitimate penological interests), he also argued (briefly) that isolated disruptions in the delivery of prisoner mail do not give rise to a constitutional violation. *Sizemore v. Willard*, 829 F.2d 608, 610 (7th Cir. 1987); *see also Zimmerman v. Tribble*, 226 F.3d 568 (7th Cir. 2000) (inmate failed to state First Amendment claim where prison allegedly delivered one piece of mail late); *Rowe v. Shake*, 196

F.3d 778, 782 (7th Cir. 1999) (no claim where inmate alleged delay of 2 to 26 days in delivery of 34 pieces of mail). It is true that the prison policy in this case *resulted* in Upthegrove only being denied two catalogs; this narrow result, however, did not make the policy itself less sweeping. "Courts have found infringement of prisoners' First Amendment rights in cases involving broad prohibitions on certain activities." *Pozo v. Hompe*, 2002 WL 32350035, *11 (W.D. Wis. Feb. 19, 2002) (citing *e.g.*, *Sizemore*, 829 F.2d 608 (prison officials allegedly permanently withheld and intentionally never delivered copies of inmate's daily newspaper); *Murphy v. Missouri Dept. of Corrections*, 814 F.2d 1252 (8th Cir. 1987) (total ban on materials from white supremacy organization violated Constitution); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (prison policy of refusing to deliver mail written in language other than English violated First and Fourteenth Amendments)). "These cases attack either broad policies or continuing practices." *Id.*

In *Rowe*, the Court of Appeals for the Seventh Circuit noted that the inmate "did not allege that prison regulations governing incoming mail were unconstitutional, but instead alleged that the conduct of the individual defendants interfered with the timely receipt of incoming mail." *Rowe*, 196 F.3d at 782. In this case, Upthegrove is not alleging that Pulver unilaterally delayed or disrupted his mail delivery for a short time. Pulver admits that it was his practice not to deliver any catalog to an inmate in segregation *because that was institution policy*. A pattern of disregard for a prisoner's First Amendment rights is substantially different from isolated instances of loss, theft or delay of an inmate's reading materials. *See Pozo*, 2002 WL 32350035, *11 (citing *Sizemore*, 829 F.2d at 610).

Therefore, I will not dismiss Upthegrove's claim on the ground that it fails to rise to a constitutional violation. For plaintiff's sake, however, I note that the fact that Upthegrove failed to receive only two catalogs would be relevant to the issue of damages, if this case were to make it that far.

II. *Turner* Analysis and Qualified Immunity

In the previous order, I outlined the legal standards governing both summary judgment and a prison's restriction on written materials possessed by inmates. Although I will not repeat that discussion here, I note that the relevant inquiry involves the following four-part test set forth in *Turner v. Safley*, 478 U.S. 82, 89 (1987): (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner has alternatives for exercising the right; (3) what impact the accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Pulver has the initial burden to demonstrate the validity of CCI's decision to limit Upthegrove's ability to receive catalogs in segregation. *Singer*, 593 F.3d at 536-37. Once Pulver provides a plausible explanation for the policy, the burden shifts to Upthegrove to call that explanation into question. *Id.*

In addition to arguing that Upthegrove has failed to put forth sufficient facts to demonstrate a violation of his constitutional rights as set forth in *Turner*, Pulver also contended in his original motion that summary judgment should be granted because he is entitled to qualified immunity. Qualified immunity shields public officials from liability when they act in a manner that they reasonably believe to be lawful. *Anderson v. Creighton*, 483 U.S. 635, 638-39

(1987). Therefore, the doctrine of qualified immunity permits reasonable mistakes of law, fact or mixed questions of law and fact. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Reher v. Vivo*, 656 F.3d 772, 778 (7th Cir. 2011).

The Supreme Court has identified two key inquiries for qualified immunity assertions: (1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. *Pearson*, 555 U.S. at 232; *Saucier v. Katz*, 533 U.S. 194, 201(2001). A negative answer to either question is enough to establish the defense of qualified immunity. *Pearson*, 555 U.S. at 236 (courts are free to decide questions in whatever order is best suited to case at hand). Even though qualified immunity is an affirmative defense, the plaintiff bears the burden.

Although the Supreme Court clearly has recognized that inmates retain a limited constitutional right to receive and read materials that originate outside the prison, the contours of that right are dependent on the particular facts of the case. *See West v. Frank*, 2005 WL 701703, *5 (W.D. Wis. Mar. 25, 2005) (citations omitted). Further, the qualified immunity inquiry into whether a constitutional right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

After reviewing Pulver's initial summary judgment submissions in this case, I concluded that relevant facts were missing from the record, which prevented the court from making an informed decision. Specifically, in Pulver's opening brief on summary judgment, Nickel, CCI's security director, averred that CCI restricted Upthegrove's access to catalogs for these reasons:

- Limiting property serves as a means of reducing privileges for "bad conduct."

- Inmates in segregation have a tendency to misuse property items to create instruments of escape or weapons. If segregation inmates were allowed to order items that they could not keep in their cells, CCI would then have to store the items for them, and CCI has limited storage space for inmate property.

- Because correctional staff are required to search every page of a catalog for contraband, prohibiting the possession of catalogs by segregation inmates helps reduce time spent searching incoming mail.

I expressed skepticism whether CCI's restriction on catalogs was a valid and reasonable means of furthering these penological goals, in light of the fact that DAI, and later CCI, changed their policies to lift restrictions on catalogs. Therefore, I asked the State to elucidate what factors caused the change to the DAI policy and later to the CCI policy and why those factors were persuasive in light of the penological interests identified by Nickel.

In response, Pulver has submitted the affidavit of Daniel Westfield, DAI Security Chief. Westfield explains that DAI changed its personal property policy to allow segregation inmates to possess up to four personal publications after the state settled the *Goodvine* case. Westfield avers that although the portion of the policy that includes catalogs in the definition of publication is poorly worded, it was never DAI's intent to allow segregation inmates to receive commercial catalogs. Westfield agrees with Nickel's stated security interests and adds that:

> (1) "[a]llowing inmates to receive and accumulate catalogs in a maximum security segregation that have no purpose for the inmate in a segregation status erodes a security procedure that is necessary in managing limited property to a population that poses challenges and security risks to staff;"
>
> (2) "inmates have removed staples from publications for the purpose of self-abuse and inflicting self-harm;" and

> (3) delivering commercial catalogs that inmates cannot utilize creates a burden on staff resources in receiving, sorting, inspecting and searching items that an inmate may not be able to purchase.

Dkt. 34 at ¶¶ 12-14.

In light of this, the burden falls becomes Upthegrove's, to show that it was unreasonable for CCI to perceive the restriction on catalogs in segregation to be necessary to prevent an increased administrative burden and a potential threat to security. *See Van den Bosch v. Raemisch,* 658 F.3d 778, 786 (7th Cir. 2011); *May v. Libby*, 256 Fed. Appx. 825, 829 (7th Cir. 2007). Upthegrove responds that CCI requires segregation inmates to get preapproval to purchase any item from a vendor, CCI already removes all staples from the incoming mail addressed to segregation inmates and CCI limits segregation inmates to four publications at a time.

From the parties' competing arguments, one reasonably could conclude that a wholesale ban on catalogs in segregation is at best an exaggerated method of limiting potentially dangerous property and preventing prisoner self-harm. Arguably, the institution is achieving these security goals with its more sweeping ban on staples, its restriction on the total number of publications available to inmates, and its preapproval requirement before a prisoner may place an order for property.

Next, although Westfield generally avers that allowing commercial catalogs in segregation erodes the security procedure of limiting and managing property items for segregation inmates, he fails to explain why this is the case. As Upthegrove points out, CCI already several limits a segregation inmate's possession of personal items, except for books and other publications, which happened to be the subject of the catalogs in question.

More persuasive is CCI's stated interest in reducing the administrative burden on its staff. The strongest evidence that Upthegrove cites to rebut Pulver's contention that it is burdensome for the institution to inspect catalogs coming into the prison for segregation inmates is that Upthegrove is only allowed to possess four publications at one time. However, the record is silent as to whether prison officials still must search every item addressed to an inmate in segregation, regardless of whether that inmate already has four publications in his possession. A similar question arises with respect to prison staff having to remove staples from all catalogs or reviewing a greater number of requests for personal property. As noted in the court's previous order, the fact that DAI and CCI changed their policy seems to undermine this argument because it appears that the prison has agreed that a less restrictive means was available to achieve its penological interests without causing a significant impact on prison administration.

As this discussion demonstrates, it's not clear whether CCI's former policy on catalogs would have passed constitutional muster. When the facts are viewed in the light most favorable to Upthegrove, it's a close question whether Pulver violated Upthegrove's constitutional rights by enforcing CCI's old policy. But the fact that the question is a close one poses a problem for Upthegrove: pursuant to the qualified immunity doctrine and its "clearly established" requirement, government officials are not, as a rule, personally liable for damages in close cases. *See Kikumura v. Turner*, 28 F.3d 592, 596 (7th Cir. 1994). Pulver didn't make the rules in segregation at CCI, he just enforced them. The facts found in this order, coupled with the facts found in the September 19, 2011 order, establish that a reasonable correctional officer working in segregation at CCI would not necessarily have known that CCI's old policy banning catalogs was constitutionally suspect; that officer reasonably could have believed that the prison had valid

and rational security and administrative interests in not delivering catalogs to segregation inmates. Even if he was mistaken in this belief, on the facts presented here, it would have been a reasonable mistake. This is enough for Pulver to avoid personal liability to Upthegrove for enforcing CCI's former policy. *Reher*, 656 F.3d at 778 (citing *Pearson*, 555 U.S. at 231). As a result, Pulver is entitled to summary judgment.

ORDER

IT IS ORDERED that defendant Allen Pulver's motion for summary judgment (dkt. 17) is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 16th day of November, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge