IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES R. SCHULTZ,

OPINION and ORDER

Plaintiff,

10-cv-581-bbc

v.

Warden PUGH, Security Director RICHARDSON,
Captain KASTEN, Correctional Officer ERIC JOHNSON,
Correctional Officer JOHN SEVERSON
and Correctional Officer DeMARS,

Defendants.

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Plaintiff James Schultz has filed two motions that are now before the court: (1) a motion in which he asks the court to "rescind" the October 28, 2010 order screening his complaint under 28 U.S.C. § 1915A; and (2) a motion for leave to supplement his complaint to include a claim against two new defendants, "Milbeck" and "Lt. Hoover." The first motion will be denied; the second motion will be granted, though not under the legal theory identified in the supplement.

With respect to his first motion, plaintiff argues that his complaint is not subject to screening because he did not file his complaint in this court; defendants removed the case from state court under 28 U.S.C. §§ 1441 and 1446. He relies on a discussion in the

October 28 order in which I concluded that removed cases should not be assessed "strikes" under 28 U.S.C. § 1915(g) because the provision applies only to cases that the "prisoner . . . brought" to federal court.

Plaintiff's argument fails because the screening provision uses different language from 28 U.S.C. § 1915(g). Under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." This provision does not distinguish between complaints filed in federal court by the plaintiff or removed from state court by the defendants. Rather, it applies to any complaint in which the prisoner is seeking relief from a government defendant. Because plaintiff alleges that each of the defendants is employed by the state, § 1915A applies to his complaint.

Plaintiff's second motion arises out of allegations in the original complaint that failed to comply with Fed. R. Civ. P. 8. He alleged that he had been disciplined "for using his title as Special Agent in Piety Global International, Inc., for his investigations (religious) into corruption in government," but he failed to identify the individuals that he believed were responsible for the alleged retaliation. In his supplement, plaintiff alleges that Milbeck and Hoover gave him a conduct report and placed him in segregation after finding out that he was associated with Piety Global and that he possessed information regarding misconduct

by prison officials.

Plaintiff says that his status as an agent of Piety Global gives him immunity under 22 U.S.C. § 288a and he wishes to bring a claim under that statute. However, the statute has no application in this context. First, it gives certain international *organizations* immunity from certain governmental conduct; it does not apply to individuals. Second, an organization does not fall within the statute simply because the group has members in other countries; the group must be one "in which the United States participates pursuant to any treaty or under the authority of any Act of Congress." 28 U.S.C. § 288. Plaintiff does not suggest that Piety Global meets this requirement. Third, even if the statute applied to plaintiff, it is an *immunity* statute. That is, it is a shield, not a sword. It does not create a private right of action for damages against public officials.

Plaintiff has identified a frivolous legal theory, but that does not necessarily doom his claim. "[P]laintiffs in federal courts are not required to plead legal theories" and "citing the wrong statute needn't be a fatal mistake." Hatmaker v. Memorial Medical Center, 619 F.3d 741, 743 (7th Cir. 2010). See also Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992) ("But the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal.")

Plaintiff alleges that Milbeck and Hoover punished him because of his involvement in an organization and because he sought to expose government abuse. Those allegations

state a claim under the First Amendment. As a general matter, the First Amendment protects a person's right to associate with a group of his choice. E.g., Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010). Further, speech about government wrongdoing may also be protected by the Constitution.

If plaintiff shows at summary judgment or trial that defendants Milbeck and Hoover punished him for his speech or association, the next question will be whether the discipline was reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78 (1987). In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89.

Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for

district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same).

I give plaintiff a few words of caution. First, plaintiff should be aware that courts "must accord substantial deference to the professional judgment of prison administrators," Overton v. Bazzetta, 539 U.S. 126, 132 (2003), particularly on matters of security. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding regulation that prohibited prisoners from receiving publications "detrimental to the security, good order, or discipline of the institution"); Singer v. Raemisch, 593 F.3d 529 (7th Cir. 2010) (deferring to prison staff's assessment that role playing games were detrimental to security); Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). Thus, if defendant comes forward with "a plausible explanation" for his actions, Singer, 593 F.3d at 536, plaintiff may be required to come forward with evidence showing that it would be unreasonable to believe his speech or involvement in the group poses a threat to security or other legitimate penological interest. Beard v. Banks, 548 U.S. 521 (2006) (concluding that prisoner failed to meet burden on summary judgment, because he failed to "offer any fact-based or expert-based refutation" of defendants' opinion).

On the other hand, defendant should be aware that deference does not imply abdication. Miller El v. Cockrell, 537 U.S. 322, 340 (2003). Even under the deferential Turner standard, courts have a duty to insure that a restriction on the constitutional rights

of prisoners is not an exaggerated response to legitimate concerns. As the Supreme Court held in Beard, 548 U.S at 535, "Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."

ORDER

IT IS ORDERED that

1. Plaintiff James Schultz's motion for reconsideration, dkt. #13, is DENIED.

2. Plaintiff's motion for leave to file a supplement to his complaint, dkt. #11, is GRANTED. The operative pleading will be plaintiff's amended complaint, dkt. #6, and the supplement to the complaint, dkt. #12.

3. Plaintiff is GRANTED leave to proceed on his claims that defendants Milbeck and Hoover punished him because of his involvement with Piety Global International, Inc. and because he possessed information critical of prison officials.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendants Milbeck and Hoover. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants. The remaining defendants may file their answer the same day

as defendants Milbeck and Hoover.

Entered this 12th day of November, 2010.

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