

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

JAMES J. KAUFMAN,

Plaintiff,

v.

JEFFREY PUGH, SANDRA COOPER,
TERRY SHUK, ISMAEL OZANNE
and OFFICER O'CONNELL,

Defendants.

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OPINION and ORDER

11-cv-421-bbc

In a June 14, 2011 order, I screened plaintiff James Kaufman's complaint in case no. 11-cv-168-bbc, which had been removed from state court by defendant prison officials, and explained that the complaint contained two lawsuits that could not be litigated in the same action. I gave defendants the opportunity to litigate both cases in this court by submitting another \$350 filing fee, which they have now done.

In the lawsuit assigned this case number, plaintiff alleges that defendants Officer O'Connell, Terry Shuk, Sandra Cooper, Jeffrey Pugh and Ismael Ozanne violated the First Amendment, the Wisconsin Administrative Code and Department of Corrections internal management procedures by denying plaintiff possession of greeting cards and books of

postcards on the grounds that they were pornographic and against rules forbidding postcards.

As an initial matter, plaintiff has filed a motion to direct defendants to file a preliminary report pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) (en banc) (per curiam) (“In this circuit we allow a court authorized report and investigation by prison officials to determine whether a pro se prisoner's allegations have any factual or legal basis.”) I will deny this motion because it is not the practice of this court to require prison officials to prepare Martinez reports in prisoner civil rights cases, and at any rate, this case does not present factual or legal complexity that needs to be addressed before screening of the complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A.

Having reviewed the complaint, I conclude that plaintiff may proceed on his First Amendment claims but I will remand his state law claims.

ALLEGATIONS OF FACT

Plaintiff James Kaufman was transferred to the Stanley Correctional Institution on September 17, 2009. On December 11, 2009, defendant Officer O’Connell called plaintiff to the prison’s property department and told him that plaintiff had been sent “postcards.” O’Connell showed plaintiff the items, which were 22 loose greeting cards and two bound books. O’Connell said that postcards were not allowed, and that the items had not come from a vendor. Plaintiff and O’Connell argued about whether the items had come from a proper vendor. O’Connell stated that even if they had come from a proper vendor, the

postcards would not be allowed. Plaintiff said that the items were not postcards, but rather bound books. O'Connell ripped one of the pages out of a book and said, "See, the postcards come out."

On December 16, 2009, plaintiff submitted written requests to defendants Property Sergeant Terry Shuk and Property Captain Sandra Cooper, telling them what had occurred. Neither of them responded to plaintiff's requests. On December 21, 2009, plaintiff filed an inmate complaint about the denial of these items. The institution complaint examiner recommended dismissal of the complaint, stating that postcards were not allowed, and that the items were in violation of department rules because they contained nudity. Plaintiff appealed to defendant Warden Jeffrey Pugh and then defendant Ismael Ozanne, the deputy secretary of the Wisconsin Department of Corrections, but they dismissed his appeals. Defendants applied department rules to these items incorrectly; there was only limited male nudity contained in a handful of the pictures, and none of them depicted any sexually explicit activity.

On January 14, 2010, plaintiff submitted a request to the institution complaint examiner asking, "Why can we receive greeting cards sent by family in the mail, but not the exact same thing sent by a vendor? If it's the exact same card, where's the 'security' risk?" The institution complaint examiner replied, "You can not receive unsigned greeting cards from family. They can only be approved through an approved vendor." On January 15, 2010, Kaufman sent a request to the mailroom, asking, "If we have a postcard or greeting

card sent in, is that allowed?" Defendant Shuk responded, "Allowed only if they are signed and addressed to you."

DISCUSSION

Plaintiff alleges that defendants Officer O'Connell, Terry Shuk, Sandra Cooper, Jeffrey Pugh and Ismael Ozanne violated the First Amendment, the Wisconsin Administrative Code and Department of Corrections internal management procedures by denying plaintiff possession of greeting cards and books of postcards on the grounds that they were pornographic and against rules forbidding postcards.

A. First Amendment

Several United States Courts of Appeals have held that prisoners' access to sexually explicit material may be restricted without violating the First Amendment because such restrictions are rationally related to the legitimate penological interests of security, rehabilitation and the prevention of harassment of female guards. Sperry v. Werholtz, 413 Fed. Appx. 31 (10th Cir. 2011); Frost v. Symington, 197 F.3d 348 (9th Cir. 1999); Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (en banc); Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999); Amatel v. Reno, 156 F.3d 192 (D.C.Cir. 1998). Owen v. Wille, 117 F.3d 1235 (11th Cir. 1997). In each case, the court of appeals applied a version of the test articulated by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987), to determine the validity of

prison regulations that allegedly impinge upon the exercise of constitutionally protected rights.

Under Turner, a prison regulation does not infringe impermissibly upon rights protected by the First Amendment so long as the regulation is “reasonably related to legitimate penological interests.” Id. at 89. In determining whether a reasonable relationship exists, the 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.

Because an assessment under Turner requires an evaluation of the prison officials’ reason 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 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). Under this standard, plaintiff has stated claims upon which relief may be granted against defendants. Accordingly, I will allow plaintiff to proceed on these claims.

In allowing plaintiff to proceed, I note that in the past, these claims may have been

barred by the settlement agreement in Aiello v. Litscher, 98-cv-791-bbc. In a recent order I noted that the parties in that case seem to agree that the settlement agreement is no longer enforceable in federal court, Aiello, 98-cv-791-bbc (W.D. Wis. May 18, 2011), so the settlement agreement does not appear to be an impediment in this case. However, defendants remain free to raise this issue going forward if they think that it is appropriate.

B. State Law Claims

Plaintiff states that the denial of these materials also violates Wisconsin Administrative Code provisions and Department of Corrections internal management procedures regulating the possession of publications. See Wisconsin Admin. Code § DOC 309.02; DOC 309 IMP 50. However, I am not aware of any law stating that a violation of Wis. Admin Code chs. DOC 309 or department internal management procedures may be enforced through a civil action, which means plaintiff's only possible mechanism for seeking relief is in state court by writ of certiorari. Kranzush v. Badger State Mutual Insurance Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature); Outagamie County v. Smith, 38 Wis. 2d 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute expressly, action is reviewable only by writ of certiorari).

Outside of a civil action, there is no parallel mechanism in federal district courts by which a plaintiff could obtain review of a state agency's actions to determine whether they

conform with state law. Anderson v. Raemisch, 2009 WL 806588 (W.D. Wis. Mar. 26, 2009). As a general matter, federal courts have no business monitoring state agency actions under state law. Id. State courts have exclusive jurisdiction to hear writs of certiorari under the inherent power of the state judiciary to “determine whether another agency of the government has properly performed its legislatively delegated function.” Outagamie County, 38 Wis.2d at 34. Accordingly, I will remand these claims to the Circuit Court for Chippewa County, Wisconsin. 28 U.S.C. § 1441(c) (district court has discretion to “remand all matters in which State law predominates” in cases removed pursuant to federal question jurisdiction).

ORDER

IT IS ORDERED that

1. Plaintiff James Kaufman’s motion to direct defendants Officer O’Connell, Terry Shuk, Sandra Cooper, Jeffrey Pugh and Ismael Ozanne to file a preliminary report pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), dkt. #3, is DENIED.

2. Plaintiff is GRANTED leave to proceed on his First Amendment claims that defendants denied plaintiff possession of greeting cards and books of postcards on the ground that they were pornographic.

3. Plaintiff’s claims that the denial of these materials violates Wisconsin Administrative Code provisions and Department of Corrections internal management

procedures are REMANDED to the Circuit Court for Chippewa County, Wisconsin.

4. Plaintiff 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 documents.

5. Pursuant to an informal service agreement between the Department of Justice and this court, the department has agreed to accept electronic service of documents on behalf of the defendants it represents. Therefore, for the remainder of this lawsuit, plaintiff does not have to send a paper copy of each document he files with the court to the department. All he has to do is submit the document to the court, and the department will have access to the document through the court's electronic filing system. Discovery requests or responses are an exception to the electronic service rule. Usually, those documents should be sent directly to counsel for the opposing party and do not have to be sent to the court. Discovery procedures will be explained more fully at the preliminary pretrial conference, to be held after defendants file their answer.

Entered this 30th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge