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

THADDEUS JASON KAROW,

Plaintiff,

v.

SECURITY DIRECTOR FUCHS,
LT. MARTINSON and
SGT. ARMSTRONG,

Defendants.

OPINION & ORDER

13-cv-798-jdp

In this case, plaintiff Thaddeus Jason Karow, a Wisconsin Department of Corrections prisoner, brought claims that defendant prison officials retaliated against him for placing an advertisement in a newsletter, seeking legal advice about getting the Asatru religion recognized in Wisconsin prisons. In a September 29, 2015, order, I granted defendants summary judgment on plaintiff's claims under the doctrine of qualified immunity, because there was no clearly established law showing that plaintiff's advertisement was protected by the First Amendment. Dkt. 42.

Plaintiff has filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), contending that I incorrectly applied qualified immunity principles to the facts of this case. After considering plaintiff's motion, I conclude that my previous qualified immunity analysis was correct, so I will deny plaintiff's Rule 59 motion.

BACKGROUND

Plaintiff, a member of the Asatru religion, submitted the following advertisement to a newsletter titled "Rune Quest":

> Help! get Asatru recognized in the WI prison system As a legitimate religion, separate from Wicca. If you have any ideas please contact: Thaddeus J. Karow #191554 c/o Box 4000 – New Lisbon, WI 53950

Dkt. 36, at 11, ¶ 33.

Plaintiff received a conduct report for violating the prison regulation against "group resistance and petitions" for placing that advertisement. Defendant prison officials were concerned about white supremacist content in the newsletter and about gangs infiltrating religious groups. Even after plaintiff was found not guilty at a disciplinary hearing, defendant prison officials believed that he was breaking prison rules by continuing to place the advertisement in subsequent issues of the newsletter and told him they would give him further conduct reports. Ultimately, the "Rune Quest" newsletter was banned from DOC prisons for containing white supremacist content.

Plaintiff brought retaliation claims against defendants. To succeed on a retaliation claim, plaintiff must establish that: (1) he engaged in activity protected by the First Amendment; (2) defendants took actions that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) the First Amendment activity was at least a "motivating factor" in defendants' decisions to take those actions. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009).

The question whether a prisoner's speech is protected is governed by the standard established in *Turner v. Safley*, 482 U.S. 78, 89 (1987), under which a prison regulation that impinges on prisoners' constitutional rights is valid if "reasonably related to legitimate

penological interests." In applying the *Turner* standard to a First Amendment retaliation claim, courts examine whether the prisoner engaged in speech in a manner consistent with legitimate penological interests. *See Bridges*, 557 F.3d at 551.

The *Turner* Court set forth four factors to be used in evaluating whether this legitimate penological interests test is satisfied: (1) whether a valid, rational connection exists between the restriction 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 to the restriction showing that the current restriction was an exaggerated response to the penological concerns. 482 U.S. at 89-91. In applying this test, court must give "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

In applying *Turner* to the facts of this case, I called "[t]his case . . . a close one." Dkt. 42, at 13. I stated that "[d]efendants' invocation of [a security] interest in restricting the advertisement is at least rational, given the white-supremacist material in the newsletter and longstanding threats regarding infiltration of religious groups" but noted that the remaining *Turner* factors were not fully addressed by the parties, leaving me "reluctant to conclude as a matter of law that plaintiff's speech was not protected, or that no reasonable jury could conclude that defendants retaliated against plaintiff." Dkt. 42, at 14.

Nonetheless, I concluded that even assuming that the advertisement was protected speech, plaintiff's claims for damages should be dismissed under the doctrine of qualified

immunity, under which government officials are protected "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). I concluded that "plaintiff fail[ed] to show a clearly established constitutional right to send his advertisement to other prisoners. Plaintiff does not present a closely analogous case, nor does my research reveal one." In particular, I focused on a case presented by plaintiff, *George v. Smith*, 507 F. 3d 605 (7th Cir. 2007), for the proposition that prisoners' advertisements are protected by the First Amendment. I stated that *George* did not stand for the blanket proposition that all advertisements were protected. Rather, the *George* court confirmed that prisoners' advertisements "can be limited depending on the type of message a prisoner wishes to send . . . ." Dkt. 42, at 16.

ANALYSIS

Plaintiff brings his Rule 59 motion challenging my analysis of qualified immunity law and *George*.

"A Rule 59(e) motion will be successful only where the movant clearly establishes: (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (citations and internal quotation marks omitted). But Rule 59(e) is not "a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996).

This is not a case in which plaintiff presents new evidence to support his Rule 59 motion. Plaintiff argues that I erred in the qualified immunity analysis by requiring that he present a case factually analogous to his own, because courts have made clear that a plaintiff's right may be "clearly established" even in "novel, unprecedented factual situations." Dkt. 44, at 3 (citing *Hope v. Pelzer*, 536 U.S. 730, 731 (2002); *United States v. Lanier*, 520 U.S. 259, 271-72 (1997) (noting the similarities between "fair warning" in criminal context and qualified immunity in civil cases)). This proposition is true as far as it goes. *Hope* is the classic example, in which defendant prison officials could not invoke qualified immunity to argue that they were unaware that it was unconstitutional to handcuff a prisoner to a hitching post for seven hours without regular water or bathroom breaks. This behavior was so egregious that it obviously violated the Eighth Amendment, despite there not being previous cases about the *exact* type of treatment at issue. *Hope*, 536 U.S. at 740-43.

But I did not ignore this concept in ruling on defendants' motion for summary judgment. I recognized that "the plaintiff must demonstrate either that a court has upheld the purported right in a case factually similar to the one under review, or that the alleged misconduct constituted an obvious violation of a constitutional right." Dkt. 42, at 15. (citations and quotations omitted). Plaintiff's case was simply not one in which the constitutional violation was so obvious that it resolved the qualified immunity analysis in his favor without the need to look for factually similar cases. I take plaintiff to contend that the his right to publish was obvious because of *George* and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment protections apply to paid advertisements), but these cases at most show that a prisoner's advertisement *can* be protected speech, not that *all* advertisements are protected or that the *Turner* factors do not apply. Neither of these cases

presented similar questions about prison security and gang issues. Because plaintiff failed to present factually similar cases showing that his right to publish his Asatru advertisement was clearly established, I conclude that my summary judgment decision was correct and plaintiff has not persuaded me to change that ruling. *See Kikumura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994) ("[T]he point of qualified immunity and its 'clearly established' requirement is that government officials are not, as a rule, liable for damages in close cases.").

ORDER

IT IS ORDERED that plaintiff Thaddeus Jason Karow's motion to alter or amend the judgment, Dkt. 44, is DENIED.

Entered July 21, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge