

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 and ORDER

13-cv-798-jdp¹

Plaintiff Thaddeus Jason Karow, a prisoner incarcerated at the New Lisbon Correctional Institution, has submitted a proposed civil action under 42 U.S.C. § 1983. Plaintiff alleges that prison staff retaliated against him for communicating with the editor of a religious publication and soliciting legal advice in that publication. In a May 6, 2014 order, the court granted plaintiff's motion to amend his complaint, so I will consider plaintiff's amended complaint, Dkt. 6, as the operative pleading.

Plaintiff has paid an initial partial payment of the filing fee as previously directed by the court. Accordingly, the next step in this case is for the court to screen plaintiff's complaint and dismiss any portion that 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 & 1915A. In screening 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 review of the complaint with this principle in mind, I conclude that plaintiff may proceed on his First Amendment retaliation claims.

¹ This case was reassigned to me pursuant to a May 16, 2014 administrative order. Dkt. 10.

The following facts are drawn from plaintiff's amended complaint and the exhibits attached to his original complaint.

ALLEGATIONS OF FACT

Plaintiff Thaddeus Jason Karow is a prisoner incarcerated at the New Lisbon Correctional Institution. Plaintiff practices the Asatru religion.

On June 26, 2013, defendant Lieutenant Martinson called plaintiff to the property room and questioned him about a religious publication addressed to plaintiff titled *Rune Quest*. Martinson told plaintiff that the publication was denied because it was mailed from a secure treatment facility without approval from that facility² and contained “inflammatory racial remarks” and an “unauthorized advertisement seeking legal assistance in getting [plaintiff's] religion recognized and separated from the Pagan Umbrella Group.”³ The advertisement read as follows:

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

Plaintiff told Martinson that the advertisement was protected by the First Amendment, did not violate any prison policies, and his effort to separate Asatru from the Pagan umbrella group was an issue he could legally grieve through the prison inmate grievance system. Martinson placed plaintiff on temporary lockup status, issued him a conduct report for

² It is my understanding from the amended complaint and exhibits that the editor of the publication resides in a Minnesota sex offender treatment facility.

³ The Wisconsin Department of Corrections (DOC) has created “Umbrella Religious Groups” designed to allow inmates to congregate with those who share relatively similar beliefs. . . . The existing umbrella groups are Protestant, Islam, Native American, Catholic, Jewish, Eastern Religions, and Pagan.” *Kaufman v. Pugh*, 733 F.3d 692, 695 (7th Cir. 2013). Plaintiff amended complaint and exhibits seem to refer to the final group in this list interchangeably as either the “Pagan” or “Wicca” group.

violations of the Wisconsin Administrative Code prohibiting “Group Resistance and Petitions” and “Enterprising and Fraud,” and confiscated the copy of *Rune Quest*, plaintiff’s typewriter, and a letter to plaintiff addressed from the editor of the publication, Benjamin Alverson. The conduct report stated that plaintiff asked Alverson for help with supplies in his efforts to separate Asatru from the Pagan group and that Alverson gave plaintiff the typewriter. The conduct report alleged that plaintiff’s efforts were “unsanctioned group activity since the [DOC] has an authorized procedure to follow to request a new religious practice.”

On July 31, 2013, plaintiff had his “full due process” disciplinary hearing before a three-member committee. The committee found plaintiff not guilty, stating in part:

We find it more likely than not, the accused did not violate [the regulation against group resistance and petitions] when he participated in an approved religious group under the Wicca Religious Umbrella Group and did not violate [the regulation against enterprises and fraud] as the Hearing Committee could not prove beyond a reasonable doubt the inmate offered to buy or order any item with the intention of not paying for it.

A member of the committee ordered that the confiscated items be returned to plaintiff.

On August 16, 2013, defendant Martinson called plaintiff to the property room to discuss the conduct report and plaintiff’s confiscated property. Martinson refused to return plaintiff’s typewriter, stating that plaintiff did not get prior approval to have the typewriter “donated from a religious group through the chapel.” However, when the typewriter arrived at the prison in April 2013, an unnamed property staff member “issued” plaintiff the typewriter, which I understand to mean that plaintiff was allowed to possess it.

Plaintiff filed an inmate grievance against Martinson for refusing to return the typewriter. When plaintiff met with the institution complaint examiner, the examiner gave plaintiff the option of receiving the typewriter immediately or continuing with the grievance

process and receiving the typewriter at the conclusion of the process. Plaintiff agreed to take the typewriter immediately on the condition that the examiner “officially document” the grievance in the inmate grievance system record. The examiner agreed.

On September 9, 2013, Martinson again called plaintiff to the property room. Martinson said that he and defendant Security Director Fuchs discussed the conduct report, concluded that the disciplinary committee was wrong, and still believed that plaintiff was guilty of illegally soliciting the typewriter and participating in group resistance by placing the advertisement in *Rune Quest*. Martinson told plaintiff that he and Fuchs “conspired to have [plaintiff] rescind the advertisement . . . or face severe punishment” and that he would file another conduct report and “make sure that [plaintiff] was found guilty and [be] given the maximum segregation time as punishment” unless plaintiff wrote a letter to Alverson demanding that the advertisement be removed from future issues. Plaintiff did as Martinson asked.

On September 19, 2013, defendant Sergeant Armstrong called plaintiff to the property room to discuss the August issue of *Rune Quest*. Armstrong stated that defendant Martinson told him to check *Rune Quest* to see if the advertisement had been taken out. Although the August issue still contained plaintiff’s advertisement, Alverson had also sent a letter stating that the advertisement would be taken out of future issues. Armstrong said that further disciplinary action would not be taken against plaintiff because it appeared that plaintiff had complied with Martinson’s order.

OPINION

I understand plaintiff to be bringing First Amendment retaliation claims against defendants Martinson, Fuchs, and Armstrong for confiscating his typewriter and threatening him with conduct reports in response to plaintiff's communications seeking help in his efforts to separate Asatru from the Pagan umbrella group.

To state a claim for retaliation under the First Amendment, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by the defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009).

I conclude that plaintiff properly states a retaliation claim against each of these defendants. With regard to the question whether plaintiff was engaged in protected activity, prisoners generally have a protected interest in outgoing communications. *See Koutnik v. Brown*, 456 F.3d 777, 784-86 (7th Cir. 2006); *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999). However, outgoing correspondence may be censored when the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989). Plaintiff's allegations that defendants threatened him even though the disciplinary committee

concluded that his actions *did not* violate prison regulations⁴ suffice to show, at least at the screening stage of the proceedings, that there was not a legitimate reason to censor his communications; instead, he was engaged in protected activity.

Plaintiff's allegations also show that defendants' retaliatory actions would deter a person of ordinary firmness from continuing to send out the advertisement. Indeed, plaintiff gave in to defendants' threats by telling Alverson to stop running the advertisement.

Finally, plaintiff's allegations are sufficient to infer that his protected activity was one of the reasons each defendant took action against him. It is clear from the allegations that Martinson confiscated the typewriter and that he and Fuchs decided to threaten plaintiff with conduct reports because of plaintiff's communications with Alverson. Later, defendant Armstrong enforced Martinson's threats by checking to make sure that the advertisement was being discontinued, which suffices to show that he was involved in the retaliatory scheme as well.

Although I am allowing plaintiff to proceed on his claims, I give him a few words of caution going forward. First, plaintiff should be aware that in these types of cases, courts "must accord substantial deference to the professional judgment of prison administrators," *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), particularly if matters of security are implicated in the decision. *E.g.*, *Thornburgh*, 490 U.S. 401 (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

⁴ It is difficult to understand exactly what the disciplinary committee meant when it said that plaintiff did not violate the group resistance regulation "when he participated in an approved religious group." I would not characterize plaintiff's correspondence with Alverson or his advertisement as "participation" in his religion, but rather an attempt to communicate with fellow members of the Asatru religion about the best way to improve the faith's status in Wisconsin prisons. In any case, it seems clear that the committee concluded that plaintiff did not violate the regulation.

prison staff's assessment that role playing games were detrimental to security); *Koutnik*, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). On the other hand, defendants should be aware that deference to prison officials "does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

ORDER

IT IS ORDERED that

1. Plaintiff Thaddeus Jason Karow is GRANTED leave to proceed on his First Amendment retaliation claims against defendants Lieutenant Martinson, Security Director Fuchs, and Sergeant Armstrong.

2. Under 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 the state defendants. 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 on behalf of the state defendants.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve their lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under *Lucien v. DeTella*, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 28th day of May, 2014.

BY THE COURT:
/s/
JAMES D. PETERSON
District Judge