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

HUMBERTO LAGAR,

Plaintiff,

v.

LIZZIE A. TEGELS, S. BARTON and EILENE MILLER,

Defendants.

OPINION & ORDER

14-cv-036-wmc

In this proposed class action for claimed violations of the First and Fourteenth Amendments, *pro se* plaintiff Humberto Lagar alleges that Department of Corrections staff members maintain internal rules precluding inmates from sending "talking letters" to their families in Spanish. Lagar asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and has made his initial partial payment of $82.00 as required by § 1915(b)(1). The court must next determine whether Lagar's proposed lawsuit: (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Because Lagar has stated a valid claim for relief under both the First and Fourteenth Amendments, the court will permit him to proceed in this suit and will require the state to respond.

ALLEGATIONS OF FACT

In addressing a *pro se* litigant's pleadings, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the purposes of this order, the court accepts the plaintiff's well-pled allegations as true and assumes the following facts.

Plaintiff Humberto Lagar is in the custody of the Wisconsin Department of Corrections at Jackson Correctional Institution ("JCI"). Defendant Lizzie Tegels is currently acting Warden at JCI, although at all times relevant to this case, Judy P. Smith was JCI's acting Warden. Defendant Scott Barton was at all relevant times the Program Service Supervisor at JCI, and defendant Eilene Miller was the JCI Recreation Leader.

On June 19, 2012, Lagar wrote to Miller, asking for permission to make a "talking letter," a message recorded on a DVD player, to send to his mother. Lagar is Latino, and Spanish is his family's native language; his mother knows very little English. Accordingly, he asked to record his talking letter in Spanish. Miller responded that all talking letters must be in English.

Lagar renewed his request on July 9, stating that he had spoken to several institution officials about the English-language requirement and all agreed that Lagar ought to be able to speak Spanish for his talking letter. Miller responded by asking if Lagar had contacted Barton, her supervisor. Barton, she said, would need to approve an interpreter for Lagar to be able to record his talking letter in Spanish.

Accordingly, on July 18, Lagar wrote to Barton, asking why he and other Latino inmates were not permitted to send talking letters in Spanish and indicating he needed to send the letter to his mother in Spanish. Barton responded tersely, indicating that a talking letter in Spanish was not allowed "at this time."

On July 23, Lagar wrote Barton another letter. He informed Barton that other Spanish-speaking inmates at JCI wanted to send their loved ones talking letters in Spanish as well, and again asked him what the latest status was with respect to the situation. Barton responded two days later denying this second request. This time, Barton stated that the

rules governing talking letters required that the Recreation Leader be present to listen to and understand what the inmate was saying, but that JCI did not have a Spanish-speaking Recreation Leader at that time. Other inmates wishing to send talking letters in Spanish would have to follow procedure and send in requests to Miller as well. Barton concluded his letter by pointing out that Lagar appeared to communicate clearly in both written and spoken English.

On August 2, 2012, Lagar wrote to the Warden, informing her of the perceived discrimination against Latino inmates in JCI. He laid out his complaints about the talking letter program and indicated that when he spoke with Miller and asked why they could not send talking letters in Spanish, Miller told him that if he continued to press the issue, they would discontinue the talking letter program entirely. His letter also pointed out that JCI had no Spanish TV channels, Spanish-speaking medical staff or Spanish-speaking teachers, leaving Latino inmates to rely on the interpretation abilities of other inmates, who might not keep the information confidential.

Lagar wrote again to Barton on August 7, informing him that discrimination was a violation of state and federal law. Barton responded, "Thank you for the information – you – Mr. Lagar are invited to participate in the talking letter activity by using English as the language to convey your message." Also on August 7, Lagar wrote to Administrative Captain Scharpf, asking him if JCI had any problems or had enacted any policies prohibiting Latinos from speaking Spanish during their talking letters. Scharpf never responded to his letter.

On August 8, Lagar wrote to Dr. Dennis Baskin, who works at the Bureau of Program Services, informing him that Barton was discriminating against the Latino

population at JCI by refusing to allow inmates to send Spanish-language talking letters. He indicated that he had filed a formal complaint against both Barton and Miller, but that the Institution Complaint Examiner ("ICE"), Jodi Dougherty, informed him that if he continued to press his complaint, JCI would terminate the talking letter program. He never received a response from Baskin either.

Lagar alleges that he has exhausted his remedies, having filed a three-page complaint on August 5, 2012. ICE Dougherty recommended dismissal of the complaint on August 7, 2012, because the rules require the Recreation Leader to supervise and listen as the letter is recorded, and because Lagar, who speaks English fluently, could record an English talking letter for his mother, who could in turn have someone interpret on her end. Acting Warden Smith accepted the recommendation and dismissed the complaint on August 14, 2012. Lagar appealed on August 19, 2012, and both the Corrections Complaint Examiner ("CCE") and the Secretary subsequently affirmed the dismissal.

OPINION

I. Freedom of Expression

Inmates have a First Amendment right both to send and receive mail. *Kaufman v. McCaughtry*, 419 F.3d 678, 685 (7th Cir. 2005). In the case of non-legal outgoing mail, courts scrutinize restrictions on an inmate's outgoing mail under *Procunier v. Martinez*, 416 U.S. 396 (1974), *abrogated in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). *See Koutnik v. Brown*, 456 F.3d 777, 784 (7th Cir. 2006) (applying *Martinez* to inmates' personal outgoing correspondence despite partial abrogation). The *Martinez* test has two prongs: (1) the regulation or practice in question must further an important or

substantial governmental interest unrelated to the suppression of expression," and (2) the challenged action must be "no greater than is necessary or essential" to the protection of the interest in question. 416 U.S. at 413..

While the "talking letter" is a somewhat unusual form of correspondence, the court sees no reason that the *Martinez* standard would not apply with equal force in this context. Under that rubric, Lagar has stated a colorable First Amendment claim, premised on the prison's refusal to allow him to send a talking letter to his mother in Spanish. Although the prison may ultimately be able to show that the restrictions it has imposed further some substantial governmental interest and are no greater than necessary, no such justification appears in Lagar's pleadings, and the court cannot presume such an interest at screening. *See, e.g.*, *Lindell v. Frank,* 377 F.3d 655, 658 (7th Cir. 2004) (district court erroneously dismissed First Amendment claim at screening without requiring defendants to explain the basis for their actions). Lagar may, therefore, proceed with this claim.

II. Equal Protection

Lagar also alleges that JCI has violated his Fourteenth Amendment rights by requiring that talking letters be in English, thereby effectively, if not explicitly, preventing him from participating in the talking letter program, at least with respect to communicating with those who speak only Spanish, like his mother. Inmates retain the right to equal protection under the laws, *Williams v. Lane*, 851 F.2d 867, 871 (7th Cir. 1988), but in general, unequal treatment among inmates "is justified if it bears a rational relation to

legitimate penal interest[s]." *Id.* at 881 (citing *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984)).[1]

JCI may well be able to establish a rational basis for its *de facto* policy requiring that talking letters be recorded in English (or at least for its failure to provide an interpreter that would make Spanish-language talking letters possible under its rules). *See, e.g.*, *Pabon v. McIntosh*, 546 F. Supp. 1328, 1341 (E.D. Pa. 1982) (educational program offered only in English bore a rational relationship to prison's purpose of serving the greatest number of prisoners within limits of educational budget). Nevertheless, Lagar has adequately alleged that he was part of a group -- Spanish-speaking inmates -- whose members were treated differently from English-speaking inmates in the context of the talking letter program. The court can "envision a security justification that would support the defendants' action," *Lindell*, 377 F.3d at 657, but will not presume such a justification and will allow Lagar to proceed past screening on this claim as well in light of the limited factual development in this case thus far.

III. Requested Relief

While Lagar will be allowed to proceed past the screening stage with both his First and Fourteenth Amendment claims, he may not do so with respect to his request for punitive damages against defendant Tegels in her individual capacity. Lagar names Tegels, Barton and Miller in their official and individual capacities, seeking injunctive relief and punitive damages. With respect to his request for injunctive relief, "a claim for injunctive

[1] The Supreme Court has held that in cases of racial discrimination in prison, strict scrutiny, not the deferential "rational basis" standard, applies. *See Johnson v. California*, 543 U.S. 499, 515 (2005). The prison's policy requiring that talking letters be in English is not based on race, however, and so it does not appear that strict scrutiny would apply here.

relief can stand only against someone who has the authority to grant it." *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007). The pleading leaves unclear which of the three defendants, if any, would have the ultimate authority to enter the injunction that Lagar seeks. For the time being, therefore, Lagar may proceed against all three of these defendants in their official capacities for injunctive relief, although the court would entertain a motion to dismiss the official-capacity claims against any of these defendants should they lack the authority to grant this relief.

Municipalities are immune from punitive damages under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). This means that a plaintiff cannot recover punitive damages in an official-capacity suit absent a waiver of sovereign immunity. *Hill v. Shelander*, 924 F.2d 1370, 1373 (7th Cir. 1991). There has been no such waiver in this case. Thus, to recover punitive damages from the three defendants, Lagar must also state a claim against each of them in his or her individual capacity. This requires him to allege facts showing that each defendant was personally involved in the constitutional violations at issue. *Love v. Sheahan*, 156 F. Supp. 2d 749, 757 (N.D. Ill. 2001) (quoting *Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997)).

Lagar has adequately alleged that both Barton and Miller were personally involved in the decision to prohibit his Spanish-language talking letter by refusing to allow him to record it. Allegedly, Barton also refused to seek a Spanish-language interpreter, which would have made the letter possible. However, Lagar has alleged *no* facts suggesting that Tegels was personally involved in the deprivations in question. In fact, Lagar explicitly alleges that Judy Smith, not Tegels, was the acting Warden at JCI at all times relevant to his complaint. Thus, while he may proceed against Barton and Miller in their individual

capacities, he has not stated a claim against Tegels in her individual capacity and may not proceed on a claim against her for damages.

ORDER

IT IS ORDERED that:

1) Plaintiff Humberto Lagar is GRANTED leave to proceed on his claims against defendants Lizzie Tegels, S. Barton and Eilene Miller in their official capacities, as well as defendants Barton and Miller in their individual capacities, for violations of the First and Fourteenth Amendments. Leave to proceed against Tegels in her individual capacity is DENIED.

2) 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 the defendants. Under the agreement, the Department of Justice will have forty (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.

3) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the 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 defendant's 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.

Entered this 22nd day of January, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge