IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

OPINION AND ORDER

Plaintiff,

01-C-209-C

v.

GARY R. McCAUGHTRY,

Defendant.

- -

In this civil action for monetary, injunctive and declaratory relief brought pursuant to 42 U.S.C. § 1983, plaintiff Nathaniel Lindell alleges that his First Amendment free speech rights were violated when, on or about July 25, 2000, prison personnel working under defendant Gary McCaughtry, the warden of the Waupun Correctional Institution, intentionally deprived him of Issue #45 of *Pagan Revival*, a magazine plaintiff describes as expressing "Euro-centric" religious, philosophical and political views. Jurisdiction is present under 28 U.S.C. § 1331.

The case is presently before the court on plaintiff's and defendant's cross-motions for summary judgment. Because plaintiff has failed to provide sufficient evidence to put into

dispute defendant's showing that the rejection of Issue #45 of *Pagan Revival* was related to a legitimate penological purpose, defendant's motion for summary judgment will be granted and plaintiff's motion for summary judgment will be denied.

In making the following findings of material and undisputed facts, I have disregarded proposed facts that do not comply with this court's summary judgment procedures.

UNDISPUTED FACTS

Plaintiff Nathaniel Allen Lindell was an inmate at the Waupun Correctional Institution during the time relevant to this suit. Defendant Gary R. McCaughtry was, and is, the warden of the Institution. The Waupun Correctional Institution is a state of Wisconsin maximum-security institution that incarcerates approximately 1240 inmates, many of whom have been convicted of assaultive offenses.

On any given day, the Waupun Correctional Institution receives thousands of pieces of mail addressed to inmates. It is institution policy to review incoming publications on a case-by-case basis and to refuse delivery if incoming or outgoing mail would be "injurious" to the institution. A publication is deemed "injurious" when it is pornography, poses a threat to the security, orderly operation, discipline or safety of the institution or is inconsistent with or poses a threat to the safety, treatment or rehabilitative goals of an inmate or facilitates criminal activity. In addition, the institution may refuse to deliver a

publication that threatens or harms any person or contains information that, if communicated, would create a clear danger or mental harm to any person, teaches or advocates illegal activity, disruption, or behavior consistent with a gang or a violent ritualistic group if the warden determines on a case-by-case basis that the material interferes with an inmate's penological interests, goals or needs. If it is determined that the publication should be denied, the department is to notify the inmate and the sender. The inmate may appeal the decision.

The library at the Waupun Correctional Institution contains literature accessible to inmates. Available literature includes: *The Holy Bible*, *The Koran*, *The Portable Nietzsche*, *The Sicilian*, *Silence of the Lambs*, *Crime and Punishment*, *The Fourth Protocol*, *It* and *Andersonville.* Also, the institution allows inmates liberal access to television and radio broadcasts and has allowed inmates to watch or listen to: "Things to do When You Are Dead," "So What," "Sanitarium," "Master of Puppets," "Madame Bovary" and various rap songs.

Plaintiff was and is a known and admitted white supremacist. Beginning in late February of 2000, plaintiff had a subscription to *Pagan Revival*, a magazine that expresses white supremacist views. He received *Pagan Revival* Issues #39 to #44, but not Issue #45. He did not receive notification of the denial of Issue #45. Later, plaintiff was told that his Issue #45 was lost while being processed. Prison officials gave plaintiff two dollars as compensation for the cost of the magazine and told him that reordering the issue would be

a waste of his time because Issue #45 of *Pagan Revival* had been determined to contain articles that advocated hatred of Jews and non-whites and were gang-related and had been denied to another inmate who had ordered it. Plaintiff understands the magazine to convey messages of non-violence and these messages helped him refrain from injuring a black cell mate. Before plaintiff was denied Issue #45, he engaged in two fights with cell mates who were minorities. In response to the charges brought against him with respect to those fights, plaintiff referred to racial hostility toward him because of his white supremacist views as an underlying factor in the altercations.

Debra Tetzlaff, Program Director of the Waupun Correctional Institution at the time, was the person who reviewed Issue #45. She concluded that the issue was a publication that "teach[es] or advocate[s] violence or hatred and present[s] a danger to the institutional security and order," as defined by Wis. Admin. Code § DOC 309.05(2)(b). She based her decision on the fact that "the magazine contained numerous references to homosexuals, or to the Christian God or Jesus by the use of vulgar language or slurs; and in one section, the writer refers specifically to a desire to do physical harm to African Americans or Jewish people and advocates 'genocide.'" In correspondence with the publisher of *Pagan Revival*, defendant McCaughtry explained that Issue #45 was banned because it contained passages that were "hate filled" and were "contrary to any treatment or rehabilitation" that defendant was trying to accomplish. He quoted two passages from the issue as examples: one that

referred to Jesus as "The Fagot on a stick" and another that stated, "Monothesism [sic] was created by gay monks."

Plaintiff sought to receive his Issue #45 by filing an inmate complaint. When the initial complaint was dismissed, he filed for a review of the complaint. Eventually, the complaint examiner wrote to plaintiff that he had exhausted his remedies available through the complaint system and that the examiner would not comment further on his complaint.

OPINION

A. Orders on Various Motions

Before I consider the central issues of the case, two procedural matters must be cleared up.

On August 4, 2002, roughly two months after filing his proposed findings of fact, defendant filed supplemental proposed findings of fact and additional affidavits intended to strengthen his assertion that his decision to deny Issue #45 was reasonably related to a legitimate penological interest. Plaintiff has moved to strike the supplemental materials, asserting that defendant's additional submission is improper under the court's procedures for briefing motions for summary judgment. I agree that most of the supplemental proposed facts must be struck. However, I will deny plaintiff's motion to strike with respect to three supplemental proposed facts that were timely and responsive to facts plaintiff proposed in

his opposition to defendant's motion for summary judgment.

The court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was sent to each party with the preliminary pretrial conference order dated March 19, 2003, clearly describes the permissible filings on motions for summary judgment and their respective deadlines. A party must include in its initial proposed findings of fact all factual propositions it considers necessary for judgment in the party's favor. Thereafter, additional facts may be submitted only if necessitated by the opposing party's response. Most of the facts in defendant's supplemental proposed facts simply bolster his reasons for rejecting Issue #45. He cannot claim that he became aware for the first time when he saw plaintiff's response to his motion for summary judgment that he would need to prove that the reason for rejecting Issue #45 was reasonably related to a legitimate penological interest.

However, three of defendant's supplemental proposed facts are directly responsive to an issue first raised by plaintiff in his response to defendant's motion. Plaintiff responded to defendant's motion with a brief, a response to defendant's proposed findings of fact, and a document listing 24 additional proposed findings of fact. In paragraph 23 of plaintiff's additional proposed findings of fact, plaintiff asserts that it was because of the teachings in *Pagan Revival* that he refrained from engaging in a fight with a black cell mate. In his reply, defendant objected to this fact by challenging the admissibility of plaintiff's evidence in support of it. In addition, he countered plaintiff's assertion in paragraphs 27, 28 and 29 of

his supplemental proposed findings of fact with facts intended to show that plaintiff has engaged in two altercations with two different minority inmates. Defendant's response to plaintiff's proposed findings of fact and his supplemental facts were filed on the same day. Because paragraphs 27, 28 and 29 are directly responsive to matters raised in plaintiff's response to defendant's motion, they are permissible under the court's summary judgment procedures. Accordingly, plaintiff's motion to strike will be denied as to paragraphs 27, 28 and 29 of defendant's supplemental findings of fact. As to all other supplemental facts proposed by defendant, however, plaintiff's motion will be granted.

The second matter that needs to be addressed preliminarily is plaintiff's motion for permission to file an additional affidavit in opposition to defendant's motion. This affidavit was filed on September 3, 2003, well after the August 11, 2003 deadline plaintiff had to respond to defendant's motion. The affidavit is not responsive to defendant's supplemental proposed findings of fact. Instead, it is the affidavit of an African-American inmate who avers that he "has no problem" with plaintiff's receiving racist books or materials.

In addition to being late, the affidavit contains information that is immaterial to a decision in this case. The fact that an African-American inmate has "no problem" with what plaintiff reads has no bearing on the reasonableness of defendant's decision to deny Issue #45. In any event, the affidavit is duplicative. Plaintiff already has proposed facts in opposition to defendant's motion that rely on affidavits from other inmates that are similar

in content. Therefore, the court will deny plaintiff's motion for permission to file a late affidavit in opposition to defendant's motion for summary judgment.

Turning to the merits of defendant's motion for summary judgment, I note that this case is limited to one narrow issue. The Court of Appeals for the Seventh Circuit remanded the case for consideration of plaintiff's as-applied First Amendment claim. It affirmed the dismissal of all other claims plaintiff raised in his complaint. Lindell v. Doe, 01-2527 (7th Cir., Jan. 3, 2002). Hence, the only issue before this court is whether defendant's content-based denial of Issue #45 of *Pagan Revival* violated plaintiff's First Amendment free speech rights.

Defendant moved for summary judgment on three grounds: 1) plaintiff failed to exhaust his administrative remedies; 2) plaintiff failed to put into dispute defendant's facts establishing an essential element on which he bears the burden of proof (here, the reasonableness of defendant's decision to deny Issue #45); and 3) defendant is entitled to qualified immunity.

B. Failure to Exhaust Administrative Remedies

Defendant argues in his brief that plaintiff has not exhausted his administrative remedies because he failed to name defendant McCaughtry specifically in his inmate

complaint challenging his inability to receive *Pagan Revival* Issue #45. I must address the affirmative defense of failure to exhaust administrative remedies before considering the merits of plaintiff's claim. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." Moreover, the court of appeals has held that "if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Massey, 196 F.3d at 733.

The Court of Appeals for the Seventh Circuit has held that "[t]o exhaust

administrative remedies, a person must follow the rules governing filing and prosecution of a claim." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Wisconsin Administrative Code § DOC 310.04 details the exhaustion requirement for claims involving prison conditions: "[B]efore an inmate may commence a civil action ... the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14."

Defendant argues that plaintiff did not properly prosecute his inmate grievance against defendant. However, defendant's exhaustion argument is too nebulous to support a grant of summary judgment in his favor. First, defendant does not even propose as a fact that plaintiff failed to name defendant in an inmate complaint. Hedrich v. Board of Regents of University of Wisconsin System, 274 F.3d 1174, 1178 (7th Cir. 2001) (courts will consider only evidence set forth in proposed finding of fact with proper citation). Second, even if I accept defendant's allegation that plaintiff did not name defendant in his inmate complaint, defendant is not entitled to summary judgment on this claim.

Defendant does not suggest that plaintiff failed to exhaust his administrative remedies regarding the question whether he could receive Issue #45 of *Pagan Revival*. Instead, he seems to suggest only that plaintiff never named him specifically in a complaint that he pursued to a final judgment within the prison grievance system.

Although some courts "demand[] that [an inmate's] administrative grievance name each person who ultimately becomes a defendant" in a subsequent civil action, the Seventh Circuit has generally not required such specificity in inmate administrative complaints. Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). Rather, in the Seventh Circuit, "grievances must contain the sort of information that the [particular] administrative system requires." Id. The specificity requirements imposed by an administrative system can run the gamut from a general notice pleading standard (in which individuals need not be named in a grievance in order to be named subsequently as defendants in a section 1983 action), to the heightened specificity required under a fact pleading regime. But ultimately, it "is up to the administrators to determine what is necessary to handle grievances effectively." Id. In Strong, which involved an Illinois inmate, the court of appeals noted that "Illinois has not established any rule or regulation prescribing the contents of a grievance or the necessary degree of factual particularity." Id. at 650. Under those circumstances, the court concluded, "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Id. In this case, defendant has not identified any administrative rules dealing with the degree of factual particularity required of inmates utilizing Wisconsin's prison grievance system. In the absence of such evidence, I am unwilling to find as matter of law that Wisconsin inmates filing §1983 actions may never name as defendants in a lawsuit persons not specifically named in an inmate complaint.

Because defendant's exhaustion argument is based not on plaintiff's failure to exhaust his remedies but rather on the absence of defendant's name from his fully-exhausted inmate complaint, defendant's motion for summary judgment will be denied as to plaintiff's failure to exhaust administrative remedies.

C. Plaintiff's Free Speech Rights

Plaintiff contends that defendant violated his First Amendment free speech rights because defendant's decision to deny Issue #45 of *Pagan Review* had no reasonable relation to a legitimate penological interest. The First Amendment states in relevant part, "Congress shall make no law . . . abridging the freedom of speech." The First Amendment protects "the right to receive ideas no less than it protects the rights to disseminate them." Sizemore v. Williford, 829 F.2d 608 (7th Cir. 1987); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (prison policy of refusing to deliver mail written in language other than English violated First Amendment when one-third of prison population was Hispanic and government offered no justification for policy).

Although prisoners retain their constitutional rights while incarcerated, those rights may be limited by the fact of confinement and the needs of the penal institution. Bell v. Wolfish, 441 U.S. 520, 545 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977). "A prison regulation [that] impinges on inmates' constitutional

rights . . . is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

I note at the outset that courts are required to give considerable deference to prison officials. Because the judiciary is "ill equipped" to deal with the "inordinately difficult undertaking" that is prison management, a court may not substitute its judgment for that of prison officials who regulate the relations between prisoners and the outside world. Thornburgh v. Abbott, 490 U.S. 401, 407-08 (1989); Aiello v. Litscher, 104 F. Supp. 2d 1068, 1075 (W.D. Wis. 2000).

Plaintiff has failed to provide the court with admissible evidence to show that defendant's decision to deny Issue #45 was unreasonable. Although all inferences are to be drawn most favorably for a non-movant, plaintiff cannot simply rest on allegations that no reasonable relationship exists between the challenged action and a legitimate penological interest. Matter of Wade, 969 F.2d 241, 245 (7th Cir. 1992). As the Court of Appeals for the Seventh Circuit has repeatedly stated, summary judgment is the "put up or shut up" moment in a lawsuit, and the failure of the plaintiff to show what evidence he has to convince a trier of fact to accept his version of the facts will result in summary judgment for the opposing party. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

I have found as an undisputed fact that defendant determined that Issue #45 of *Pagan Revival* teaches or advocates violence or hatred and presents a danger to institutional security and order. In support of defendant's assertion that Issue #45 teaches or advocates violence or hatred, defendant submitted Issue #45 to the court for in camera review. Plaintiff objected to this procedure by moving to compel disclosure of the issue to him. In an order dated July 21, 2003, the magistrate judge denied plaintiff's motion. He reasoned correctly that allowing plaintiff to obtain through litigation the publication that the institution has determined to pose a threat to institutional security would render the institution's review system superfluous and would encourage inmates to file lawsuits as a way to circumvent the institution's security procedures. The magistrate judge noted that although his ruling meant that plaintiff would be unable to oppose defendant's motion as effectively as he would have liked, it did not mean that he was unduly prejudiced. This was because defendant had explained to plaintiff in his brief in support of the motion for summary judgment that the issue was banned from the prison because it contained numerous references to homosexuals, or to the Christian God or Jesus by the use of vulgar language or slurs; and in one section, the writer refers specifically to a desire to do physical harm to African Americans or Jewish people and advocates 'genocide.' Both the magistrate judge and I have compared these descriptions with the specific passages from Issue #45 identified in the affidavit of Debra Tetzlaff. Like the magistrate judge, I find that

defendant's descriptions accurately characterize the text in these passages. This information was sufficient to allow plaintiff to mount an adequate challenge to the warden's decision to withhold the magazine.

As an example of the kind of lack of security and order that can arise from racial tensions in a prison setting, defendant has offered undisputed evidence to show that on at least two occasions, plaintiff has engaged in altercations with minority inmates that plaintiff admits were caused by his known white supremacist views and that Waupun Correctional Institution incarcerates numerous inmates with a history of violence. These facts are sufficient to show that it was reasonable for defendant to believe that it might encourage increased violence between inmates in the prison population and therefore threaten the security and order of the institution to allow Issue #45, which contains strong derogatory language regarding Christians and non-whites.

Plaintiff argues that the decision to ban Issue #45 was not reasonably related to security concerns because some of his fellow inmates have "no problem" with racist literature and because *Pagan Revival* has a pacifying rather than a provocative effect on him personally. Alternatively, he argues that defendant's justifications are mere pretexts and that there was, in fact, a prison-wide ban on white supremacist publications.

It is irrelevant whether some other inmates have "no problem" with plaintiff's receiving and reading white supremacist literature in the abstract (none of the affiants has

seen Issue #45). The law does not require prison officials to base their decision to prohibit incoming publications on a sampling of inmate reactions to the publication's content. It requires only that prison officials reasonably relate their decision to a legitimate penological purpose. Even accepting plaintiff's declaration that the publication generally has a calming effect on him, the law is not concerned only with the recipient's behavior. So long as other inmates may act out on the messages in Issue #45 that advocate genocide and encourage racial hatred, prison officials are justified in banning the issue from the prison. See Thornburgh, 490 U.S. at 418 (expressing concern regarding "ripple effect" caused by possible magazine circulation).

Plaintiff's contention that there was a prison-wide ban on white supremacist literature is refuted by his own admissions that he has received Issue ##39-44 of *Pagan Revival* and that *Pagan Revival* expresses white supremacist views.

In summary, plaintiff has failed to put into dispute facts that show that the denial of Issue #45 was reasonably related to the legitimate penological interest in security and order. Therefore, defendant's motion for summary judgment on the merits of plaintiff's First Amendment claim will be granted.

D. Qualified Immunity

Because I have found that defendant did not violate plaintiff's First Amendment

constitutional rights in denying him Issue #45 of *Pagan Revival*, it is not necessary to address the question whether defendant is entitled to qualified immunity.

ORDER

IT IS ORDERED that

1. Plaintiff Nathaniel Allen Lindell's motion to strike defendant's additional materials is GRANTED in part and DENIED in part. It is DENIED as to defendant's supplemental proposed facts numbered 27, 28 and 29. In all other respects, the motion is GRANTED.

2. Plaintiff Nathaniel Allen Lindell's motion for permission to file an additional affidavit in opposition to defendant's motion for summary judgment is DENIED.

3. Defendant Gary R. McCaughtry's motion for summary judgment is GRANTED.

4. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 7th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge