

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

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

GARY R. McCAUGHTRY,

Defendant.  
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ORDER

01-C-209-C

Presently before the court is plaintiff's motion to file a second amended complaint. Plaintiff is proceeding on a claim that defendant violated the First Amendment by refusing to give him an issue of Pagan Revival magazine because defendant disliked its content. In his second amended complaint, plaintiff seeks to add new defendants, legal theories and causes of action. Fed. R. Civ. P. 15(a) states that "a party may amend [its] pleading once as a matter of course at any time before a responsive pleading is served" and that otherwise amendments are permissible "only by leave of court." Plaintiff requires leave of the court to amend his complaint because defendant has filed an answer. Whether to grant leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court.

Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995). According to the rule, leave to amend " shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Elaborating on this standard, the Court of Appeals for the Seventh Circuit has noted that "in the absence of undue delay, undue prejudice to the party opposing the motion, or futility of the amendment, leave should be freely given." Eastern Natural Gas Corp. v. Aluminum Co. of America, 126 F.3d 996, 999 (7th Cir. 1997).

Plaintiff's motion will be denied. Plaintiff's motion to amend was received on May 27, 2003, less than a month before the deadline for filing dispositive motions. Adding new defendants and claims at this point would unduly delay the progress of this case. Moreover, the main motivation for plaintiff's motion to amend appears to be his desire to add a claim that defendant withheld the magazine at issue from him on the basis of a Department of Corrections regulation banning hate literature and that such a regulation itself violates the First Amendment. See Wis. Admin. Code § DOC 309.05(2)(b)1 (prohibiting inmates from receiving publications that "[t]each or advocate violence or hatred and present a danger to institutional security and order"). It would be futile for plaintiff to amend his complaint to add such a claim. Courts have routinely upheld similar prison regulations against First Amendment challenges. See, e.g., Chirceol v. Phillips, 169 F.3d 313 (5th Cir. 1999) (upholding regulation prohibiting material that "advocates racial, religious, or national hatred in such a way as to create a serious danger of violence"); Shabazz v. Parsons, 73 F.3d

374, 1996 WL 5548 (10th Cir. 1996), on appeal after remand, 127 F.3d 1246 (10th Cir. 1997) (same); Murphy v. Missouri Department of Corrections, 814 F.2d 1252, 1257 (8th Cir. 1987) (approving ban on “materials that advocate violence or that are so racially inflammatory as to be reasonably likely to cause violence at the prison”); Winburn v. Bologna, 979 F. Supp. 531, 533-34 (W.D. Mich. 1997) (upholding similar regulation). The question in this case is not whether the regulation is constitutional, but whether defendant had a legitimate penological interest for preventing plaintiff from receiving a particular issue of Pagan Revival. See Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (regulations affecting sending of publications to prisoners are valid if reasonably related to legitimate penological interests). Plaintiff does not need to amend his complaint to resolve this issue.

There is one potential problem with plaintiff’s complaint as it currently stands. If plaintiff prevails, he may be able to collect nominal and perhaps punitive damages (assuming defendant is not entitled to qualified immunity), see Calhoun v. DeTella, 319 F.3d 936, 941-42 (7th Cir. 2003). In addition, plaintiff may be entitled to an injunction allowing him to possess the issue of the magazine that was withheld from him. Because plaintiff is no longer housed in the prison in which the events giving rise to this suit occurred and where defendant is the warden, defendant would not be in a position to insure that plaintiff received his magazine. Accordingly, if plaintiff prevails on a motion for summary judgment or if his claim survives the summary judgment phase, I will allow him to amend his

complaint to name as a defendant a Department of Corrections official who is in a position to insure that plaintiff benefits from any injunctive relief ordered in this case.

IT IS ORDERED that plaintiff's motion to file a second amended complaint is DENIED.

Entered this 9th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge