

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

NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

GARY R. MCCAUGHTRY,

Defendant.

ORDER

01-C-209-C

In an order dated June 20, 2003, this court stayed plaintiff Nathaniel Allen Lindell's motion to compel defendant Gary McCaughtry to provide him with a copy of Issue 45 of *Pagan Revival* magazine and defendant's corresponding motion for protection from that discovery. The court concluded that it would not decide the motions until defendant supplemented his *in camera* submission of Issue 45 by specifying the passages upon which he based his decision to withhold it from plaintiff. Defendant has now complied with that order, which means that the parties' mirror-image motions concerning disclosure of Issue 45 are now again before the court. In addition to those motions, three other motions are before the court: plaintiff's motion for an extension of time within which to file a motion for summary judgment (dkt. #50); plaintiff's motion to compel the institution to make copies of particular documents (dkt. #51); and defendant's motion to stay discovery until this court decides his pending motion for summary judgment (dkt. #55).

Plaintiff's motion to compel disclosure of Issue 45 will be denied. As this court noted in its order of June 20, 2003, plaintiff's interest in challenging the warden's reasoning behind his decision to withhold the magazine must be balanced against defendant's interest in maintaining order and security in the institution. This balance weighs in favor of defendant. Allowing plaintiff to obtain through litigation the magazine 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. Although this may mean that plaintiff will not be able to present his case as effectively as he would like, it does not mean that he is completely hamstrung. In its brief in support of his summary judgment motion, defendant has told plaintiff that he was denied the magazine because it contains references to the numbers "14" and "88," both of which are code references for white supremacist gang-related greetings; it contains numerous references to homosexuals, or to the Christian God or Jesus by the use of vulgar language or slurs; and in one section, on page 29, the writer refers specifically to a desire to do physical harm to African Americans or Jewish people and advocates "genocide." This court has compared these descriptions with the specific passages from Issue 45 as identified in the affidavit of Debra Tetzlaff and finds that defendant's descriptions accurately characterize the text in these passages. This information is sufficient to allow plaintiff to mount an adequate challenge to the warden's decision to withhold the magazine.

Plaintiff contends that even if the magazine contained some offensive passages, defendant was wrong to have withheld the entire magazine; therefore, plaintiff argues, he needs access to the non-offending portions of the magazine in order to prove his point. I disagree. Plaintiff does not need to see the magazine in order to argue that the passages identified by defendant did not justify his decision to withhold the entire magazine. Plaintiff has admitted to having received other issues of the magazine, so presumably he is familiar with its typical length and content.

Having resolved the most substantive of the issues before the court, I now turn to the remaining motions. Plaintiff's motion for a request for an extension of time within which to file his own motion for summary judgment is denied as unnecessary. Defendant has already filed a motion for summary judgment. Under this court's procedures, plaintiff may submit in opposition to defendants' motion for summary judgment all the evidence he has to prove his claims. Because a non-moving party can be granted summary judgment in his favor if the evidence shows that he is entitled to it, there is no need for plaintiff to file his own motion.

To the extent that plaintiff seeks more time to file his response to defendant's motion for summary judgment, that motion is granted. Plaintiff shall have until August 11, 2003, within which to file his response. His deadline will not be stayed indefinitely until he obtains certain evidence, as he requests in his motion. Evidence relating to the 1990 *Hatch* lawsuit and affidavits from fellow prisoners stating that they do not object to racist literature

is irrelevant to proving that the warden's denial of plaintiff's access to Issue 45 in July 2000 amounted to an unconstitutional deprivation of plaintiff's First Amendment rights. The issue in this case is whether the defendant had a rational basis for concluding that Issue 45 advocated violence or hatred in a way that could present a danger to institutional security and order, not whether the publication would actually offend other inmates or that defendant may have wrongfully withheld a different publication in 1990.

This leads into plaintiff's request for an order compelling the institution to make copies of certain documents. Among the documents plaintiff wants copied are declarations from other inmates stating that they do not object to plaintiff's racist literature. As just stated, this evidence has no place in this lawsuit. Plaintiff also seeks copies of postcards sent to him by the publisher of *Pagan Revival* that verify that the publisher sent Issues 45 and 46 to plaintiff. This too is irrelevant. For the purposes of this lawsuit, the court accepts as true plaintiff's allegation that the publisher mailed the issue to WCI but prison officials refused to deliver it to plaintiff. Last, plaintiff seeks copies of a racist ideological statement called the "88 Precepts." Plaintiff says he needs this to show that the references to "Hail 88" in Issue 45 were not references to "Hail Hitler" as the defendant has contended but were references to this creed. However, plaintiff can refute defendant's evidence adequately with a sworn affidavit setting forth his personal understanding of what the phrase "Hail 88" means; it is not necessary for him to attach an actual copy of the 88 Precepts.

Finally, defendant requests the court to stay any further discovery between the parties until it resolves the pending summary judgment motion. The motion will be denied. Although I agree with defendant that many of plaintiff's discovery requests are somewhat repetitive, I am not persuaded that plaintiff has attempted to harass defendant or abuse the discovery process. Most of plaintiff's requests are succinct and straightforward; the bulk of them have been requests for admissions. Furthermore, in his requests for discovery dated June 25, 2003, plaintiff stated that he hoped they would be his last. Accordingly, I see no need to stay discovery at this time. However, I will enter a stay if plaintiff persists in seeking discovery on issues this court has stated are not relevant or about which defendant has already provided a response. It is time for plaintiff to change his focus from drafting discovery motions to using the information he already has to respond to defendant's motion for summary judgment.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion to compel defendant to provide him with Issue 45 of *Pagan Revival* magazine is DENIED. Defendant's corresponding motion for protection from that disclosure is GRANTED.

2. Plaintiff's motion for an extension of time within which to file a motion for summary judgment is DENIED.
3. Plaintiff has until August 11, 2003, within which to file his response to defendant's motion for summary judgment. Defendant shall have until August 21, 2003, within which to file a reply.
4. Plaintiff's motion to compel the institution to make copies of particular documents is DENIED.
5. Defendant's motion to stay discovery until this court decides his pending motion for summary judgment is DENIED.

Entered this 21st day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge