IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOSEPH D. KOUTNIK,

Plaintiff,

OPINION AND ORDER

v.

03-C-345-C

GERALD BERGE, JON E. LITSCHER, MATTHEW FRANK, KURT LINJER and GARY BLACKBOURN,[1]

Defendants.

- -

The issue in this civil action for monetary, declaratory and injunctive relief involves the scope of a prisoner's First Amendment right to free speech. Plaintiff Joseph Koutnik was disciplined by defendants Kurt Linjer, Gary Blackbourn, Gerald Berge and Jon Litscher for signing the name "Kujo," in a letter to his brother because defendants believed that Kujo was a gang nickname. They refused to deliver the letter and ordered it destroyed after

[1] In his complaint, plaintiff identified two defendants by the names of "Captain Linjer" and "Captain Blackbourn." The parties now identify the full names of these defendants as "Kurt Linjer" and "Gary Blackbourn." I have amended the caption accordingly.

disciplining plaintiff with 360 days of program segregation and 30 days of cell confinement for using a false name in violation of Wis. Admin. Code § DOC 303.31 and participating in gang activity in violation of Wis. Admin. Code § DOC 303.20. The disciplinary decision was later reversed by the Circuit Court for Dane County, Wisconsin, which concluded in a certiorari action that there was insufficient evidence to sustain a finding that plaintiff had violated either regulation. In addition, the circuit court concluded that disciplining plaintiff for using the name "Kujo" in an outgoing letter violated the First Amendment.

In an order dated August 25, 2003, I concluded that petitioner was not barred by the doctrine of claim preclusion from filing suit under § 1983 in this court. See Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (petition for writ of certiorari in state court does not bar later civil rights action because "certiorari is a limited form of review, while a claim under § 1983 exists as a uniquely federal remedy that is to be accorded a sweep as broad as its language"). I concluded as well that issue preclusion did not apply because resolution of the constitutional question was not necessary to the outcome of the circuit court's decision. May v. Tri-County Trails Commission, 220 Wis. 2d 729, 734, 583 N.W.2d 878, 880 (Ct. App. 1998); see also Peabody Coal Co. v. Spese, 117 F.3d 1001, 1008 (7th Cir. 1997).

Now before the court are motions for summary judgment filed by both sides. Because defendants have failed to show that it is "generally necessary" to maintain prison security

by prohibiting plaintiff from signing an outgoing letter with the name "Kujo," plaintiff's motion for summary judgment will be granted and defendants' motion for summary judgment will be denied. Defendants will be enjoined from prohibiting plaintiff from using this name in future outgoing letters. Further, I conclude that defendants are not entitled to qualified immunity. The case will proceed to trial on the issue of damages.

In addition to his motion for summary judgment, plaintiff has filed a motion to strike the expert report of defendant Linjer for various reasons. Because I conclude that plaintiff is entitled to judgment even if I consider Linjer's report, this motion will be denied as unnecessary.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Joseph Koutnik is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, where he has been incarcerated since September 13, 2001. Defendant Gerald Berge is the warden of the Secure Program Facility. Defendant Jon Litscher was Secretary of the Wisconsin Department of Corrections until 2003, when defendant Matthew Frank was appointed as the new secretary. Defendant Gary Blackbourn is a captain at the Facility.

Defendant Kurt Linjer was the disruptive groups coordinator for the prison in 2001 and 2002. Before that, he was the assistant disruptive groups coordinator. He relied on information provided from other Wisconsin prisons and law enforcement agencies to identify inmates that were involved with gangs. He has received training in the identification and operation of street gangs.

A. Prison Policies

Inmates at the Secure Program Facility are permitted to correspond with "anyone" through the mail. However, incoming or outgoing mail may not be delivered if its contents include any of the following: blackmail or extortion threats; physical threats or threats of criminal activity; escape plans; or discussions of contraband or any activity that, if completed, would violate Wisconsin or federal law.

Inmates are required to leave outgoing correspondence unsealed, unless it meets the definition of "legal mail" under the administrative code. Outgoing mail is inspected for contraband or discussions of the activities listed above. If the correspondence includes none of these things, it is processed and delivered to the addressee.

The Department of Corrections has a "zero tolerance" policy for any gang-related activity, including the use of hand signals, possession of gang literature or use of gang-related language or symbols.

B. Evidence of Plaintiff's Gang Involvement

Security staff at prisons in Wisconsin create "gang files" for inmates who are known or suspected to be involved in gang activity. The gang file is a compilation of conduct reports, pictures of gang-related tattoos and "disruptive group affiliation information." The security staff at Dodge Correctional Institution has created and maintains a list of inmates in the Wisconsin prison system that are known to have been affiliated with a gang. In addition, the list identifies the gang or gangs with which an inmate has been affiliated and the nickname that the inmate used in the gang. This list has been disclosed to security staff at the Secure Program Facility, who have used it to prepare a list including only inmates at the facility, known as the "Gang Detail List."

The facility's list identifies plaintiff as a member of the Simon City Royals. This conclusion is based on information from law enforcement agencies and "other gang intelligence resources, including other inmates residing in correction institutions." Both the Department of Corrections and the Milwaukee City Police Department have identified the Simon City Royals as a gang. Formed in Chicago, Illinois, the Royals are "usually" white. They oppose the introduction of other races into their territories. Members of this gang are incarcerated throughout the Wisconsin correctional system, including the Secure Program Facility. They have an extensive history of drug trafficking in the Wisconsin prisons.

In 1999, plaintiff admitted to the disruptive groups coordinator at the Green Bay

Correctional Institution that he was affiliated with the Simon City Royals. (Plaintiff denies that he told the disruptive groups coordinator that he had been a member of the Simon City Royals "since 1994." Plt.'s Resp. to Dfts.' PFOF, dkt. #31, at ¶ 59. However, he does not dispute Defendants' Proposed Finding of Fact ¶58, in which defendants state that plaintiff admitted his affiliation with the Royals.) Plaintiff's prison identification card indicates that he had several tattoos on his body, including the word "Royals" on his left hand, the initials "SCR" on his stomach and the letters "KUJO" on both of his upper arms. According to the Gang Detail List, plaintiff's gang nickname is "Kujo."

C. Plaintiff's Letter

On March 6, 2002, correctional officer Claude Lein was monitoring outgoing inmate correspondence at the Secure Program Facility. Lein noticed that a letter from plaintiff to his brother Jared was signed "KUJO," above plaintiff's full name, "Joseph David Koutnik." Kujo is plaintiff's childhood nickname; it is derived from the beginning syllables of his first and last names. Because the prison's Gang Detail List identifies Kujo as plaintiff's nickname in the Simon City Royals, Lein issued plaintiff a conduct report for violating Wis. Admin. Code. §§ DOC 303.31 (gang activity) and 303.20 (using false names). (Originally, Lein was a defendant in this case. However, I dismissed him without prejudice after the United States Marshal was unable to locate him with reasonable effort. Sept. 23, 2003 Order, dkt. #7.)

The matter was referred to defendant Linjer in his role as the disruptive groups coordinator. Linjer agreed that plaintiff had violated §§ DOC 303.31 and 303.20 by signing his letter "KUJO." Defendant Linjer provided plaintiff with a "notice of non-delivery of mail." As a reason for the non-delivery, the notice states: "Item concerns an activity which, if completed would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections."

A disciplinary hearing was held in March 2002. Defendant Linjer submitted the following written statement:

> In reviewing the above conduct report, my training and experience in the Department of Corrections indicates the material suspected of violating DOC 303.20(3) is consistent with gang literature, creed(s), symbols or symbolism's [sic]. As SMCI's Disruptive Groups Coordinator I find that the evidence provided in the above mentioned Conduct Report to be consistent with the following disruptive/unsanctioned group[:] the Simon City Royals. Inmate Koutnik is identified as an active member of this non-sanctioned group.

In a decision signed by defendant Gary Blackbourn, the adjustment committee found plaintiff guilty of violating both regulations. (Neither side indicates who besides Blackbourn was on the committee.) With respect to § DOC 303.31, the committee wrote in its decision that plaintiff admitted that he had signed the letter with his nickname "KUJO" rather than his "given name." With respect to § DOC 303.20, the committee relied on defendant Linjer's statements that plaintiff is "an identified member of the Simon City Royals and his gang nickname has been identified as "KUJ[O]." Plaintiff was sentenced to 360 days'

program segregation and 30 days' cell confinement. In addition, the committee ordered that the letter be destroyed. He appealed to defendant Gerald Berge, who affirmed the decision. Berge wrote: "Facts support the findings and disposition. No procedural errors noted." On May 19, 2002, the Office of the Secretary affirmed the dismissal of the complaint.

Plaintiff filed a petition for a writ of certiorari with the Circuit Court for Dane County, Wisconsin. The circuit court granted the writ and reversed the decision, concluding that the committee's decision was not supported by sufficient evidence and that it violated plaintiff's First Amendment rights.

OPINION

A. Sealing Outgoing Correspondence

In his complaint, petitioner seeks an injunction "requiring [the Wisconsin Secure Program Facility] to allow prisoners to seal all purely outgoing" mail. Plt.'s Cpt., dkt. #2, at ¶64. In the order granting plaintiff leave to proceed, I did not determine whether a prison official's refusal to allow plaintiff to seal his outgoing mail stated a claim under the First Amendment because I interpreted ¶64 not as an independent claim, but only as a request for relief in the event that plaintiff proved that censoring his mail violated his First Amendment rights. Nevertheless, in their brief, defendants ask for summary judgment "on these claims." To the extent that plaintiff did intend to assert a separate claim that the

prison's rule on the sealing of outgoing mail is unconstitutional, I agree with defendants that plaintiff has failed to state a claim upon which relief may be granted.

Plaintiff did not identify a prison rule in his complaint or in his brief, but defendants cite a rule in the prison handbook that states: "All outgoing correspondence must be left unsealed, with the exception of mail defined in DOC 309.04(3)." Wis. Admin. Code § DOC 309.04(3) instructs prison staff not to "open or read" mail from an inmate to any one of 10 different groups of people, including lawyers, legislators and judges.

In his briefs, plaintiff does not challenge the authority of prison staff to read his mail unless it is exempted by § DOC 309.04(3). Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987) (inmates have no generalized First Amendment right preventing prison staff from opening and reading mail); Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986) (upholding prison regulation that allowed nonprivileged, outgoing mail to be opened and inspected). Instead, he argues that if prison staff want to read his mail, they should have to open it themselves. This argument is frivolous. Petitioner fails to explain how any First Amendment interest is threatened by requiring him to leave his mail unsealed in lieu of requiring prison staff to open it. Finding in favor of plaintiff on this claim would accomplish nothing but impose an additional administrative burden on prison staff. This claim will be dismissed.

B. Constitutionality of Wis. Admin. Code §§ DOC 303.20(3) and 303.31(2) As Applied

to Plaintiff's Conduct

Defendants refused to mail plaintiff's letter, ordered the letter destroyed and disciplined him under the authority of Wis. Admin. Code §§ DOC 303.20 and 303.31. (Because the parties have done so, I refer to defendants collectively even though each of them was involved in different aspects of the enforcement of the regulations. Defendants have not argued that any of them should be dismissed for lack of personal involvement, see Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995), so I do not consider that issue. However, I note that plaintiff is proceeding against defendant Matthew Frank for the purpose of his claims for declaratory and injunctive relief. March 30, 2004 Order, dkt. #12.) Wis. Admin. Code § DOC 303.31 provides:

> Any inmate who uses any of the following is guilty of an offense:
>
> > (1) A title for the inmate other than Mr., Ms., Miss, or Mrs., as appropriate.
> >
> > (2) A name other than the name by which the inmate was committed to the department unless the name was legally changed.

Wis. Admin. Code § DOC 303.20 provides:

> (1) Any inmate who participates in group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense.
>
> (2) Any inmate who joins in or solicits another to join in any group petition or statement is guilty of an offense, except that the following activities are not prohibited:
>
> > (a) Group complaints in the inmate complaint review system.

(b) Group petitions to courts.

(c) Authorized activity by groups approved by the warden under s. DOC 309.365 or legitimate activities required to submit a request under s. DOC 309.365(3) or (4).

(d) Group petitions to government bodies, legislators, courts or newspapers.

(3) Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11), or possesses any gang literature, creed symbols or symbolism is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Petitioner contends that §§ DOC 303.31(2) and 303.20(3) are unconstitutional on their face and as applied to him. Because I conclude that the application of these regulations to plaintiff was a violation of the First Amendment, I need not decide the broader question whether the regulations are unconstitutional on their face. Sutton v. Rasheed, 323 F.3d 236, 254 (3d Cir. 2003) (declining to address facial challenge of prison policy after concluding that application of policy violated free exercise of religion); see also Sabri v. United States, 124 S. Ct. 1941 (2004) ("facial challenges are best when infrequent").

Generally, the applicable test for reviewing the constitutionality of the actions of prison officials is the one set forth in Turner v. Safely, 482 U.S. 78, 89 (1987): whether the official's action was reasonably related to a legitimate penological interest. However, there is an alternative test enunciated in Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), under which the official must show that his actions "further an important or substantial

government interest unrelated to the suppression of expression" and are "generally necessary" to protect that interest. Thus far, the Court has applied this test only in the context of censoring outgoing inmate correspondence to nonprisoners. See Thornburgh v. Abbott, 490 U.S. 401 (1989) (declining to apply test to censorship of incoming publications). Initially, the Court explained that it applied the heightened standard to outgoing correspondence because such mail implicates the First Amendment rights of the nonprisoner on the receiving end. Procunier, 416 U.S. at 408-09. More recently, the Court has explained that different tests for incoming and outgoing mail may be appropriate because outgoing correspondence poses a less significant security threat to the prison. Thornburgh, 490 U.S. at 413. Although one could argue that a separate standard for one narrow category of actions is unwise or unnecessary, the Court has not overruled Procunier with respect to outgoing mail and lower courts continue to apply it in this context. E.g., Nasir v. Morgan, 350 F.3d 366, 371 (3d Cir. 2003) (questioning continuing viability of Procunier in any context but nonetheless applying it to regulation restricting outgoing mail). Both sides have analyzed plaintiff's claim under Procunier, so that is the standard that I shall apply.

As an initial matter, I note that defendants appear to concede that the First Amendment is implicated by denying an inmate the ability to identify himself in the manner of his own choosing. It is difficult to imagine many acts of speech more integral to self expression than choosing one's own name. Salaam v. Lockhart, 905 F.2d 1168, 1170 (8th

Cir. 1990) ("A personal name is special. It may honor the memory of a loved one, reflect a deep personal commitment, show respect or admiration for someone famous and worthy, or . . . reflect a reverence for God and God's teaching.") Instead, defendants argue that their decision to bar plaintiff from using the name "Kujo" in outgoing mail is justified under the Procunier test.

Defendants do not argue that their actions were motivated by a desire to prevent plaintiff from deceiving the public or otherwise causing confusion. See Azeez v. Fairman, 795 F.2d 1296 (7th Cir. 1986) (prison officials have legitimate interest in limiting name changes because of confusion it could cause). Plaintiff's letter included his full name as well as the nickname. Instead, defendants rely primarily on their interest in restricting gang activity in the prison. The importance of this interest is obvious and needs no citation to authority, though there is plenty of case law demonstrating the need of prison officials to suppress gangs. E.g., Turner, 482 U.S. at 91-92; Fraise v. Terhune, 283 F.3d 506 (3d Cir. 2002); Young v. Lane, 922 F.2d 370 (7th Cir. 1991); Hadi v. Horn, 830 F.2d 779 (7th Cir. 1987); Rios v. Lane, 812 F.2d 1032 (7th Cir. 1987). The more difficult question is whether defendants have shown that prohibiting plaintiff from using the name "Kujo" in outgoing mail is "generally necessary" to restrict gang activity in the prison. I conclude that they have not.

Although it is undisputed that plaintiff was a member of the Simon City Royals,

plaintiff denies that Kujo is a gang nickname. Defendants rely solely on the "gang detail list" as proof that plaintiff's gang nickname was Kujo. However, they do not point to any facts showing how the name "Kujo" got on that list. (Prison staff may have put the name on the list as a result of plaintiff's tattoos, but defendants do not say that this is the case.) Arguably, defendants have failed to comply with the requirement of Fed. R. Civ. P. 56 to set forth "specific facts" to support their position. Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.") Alternatively, it could be argued that by failing to explain the basis for their belief, defendants have failed to show that they are furthering a legitimate interest by prohibiting plaintiff from using the name. See In re Long Term Administrative Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469-70 (4th Cir. 1999) (upholding reasonableness of gang designation under Turner in part because of evidence that group had been involved in three violent acts). I need not decide, however, whether defendants have sufficiently established that Kujo was a gang nickname. Even if it was, defendants have not satisfied their burden under Procunier.

If defendants were censoring plaintiff's use of a possible gang nickname *in the prison*, they would have a very strong argument that doing so would be necessary to protect prison

security. For example, defendants would more likely prevail against a First Amendment challenge to a decision prohibiting plaintiff from displaying his tattoos to other prisoners. Young, 922 F.2d at 376-77 (upholding restrictions on wearing headgear in prison because of dangers related to gang affiliation). However, defendants do not explain why prison security is threatened if plaintiff uses a possible gang nickname in a letter going outside the prison that other inmates will never see.

According to defendants, gang symbols and expressions of affiliation with gangs are prohibited in prison because there is a significant risk of inter-gang violence and disruption if inmates are aware of each other's membership in a particular gang. See Dfts.' PFOF, dkt. #20, at ¶18 ("Institutional security is threatened by the presence of gangs because of the direct threat of gang violence, and because gangs undermine prison authority by providing a support system for taking an opposition stance to the prison administration."); id. at ¶46 ("Once the gang members within the institution are aware of each other's gang affiliation, the propensity for violence increases and puts all inmates and staff at risk."). This risk is simply not implicated by language in a letter that will never be viewed by another inmate. See Procunier, 416 U.S. at 416 (prison security not threatened by outgoing letters that contain "inflammatory political, racial, religious or other views or beliefs"); Loggins v. Delo, 999 F.2d 364 (8th Cir. 1993) (insults to prison staff in outgoing letter did not implicate security concerns); McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979) (accusing prison

staff of masturbating and having sex with cat in outgoing letter did not threaten prison security); Moore v. Miller, No. 96 C 1347, 1997 WL 269595 (N.D. Ill. May 12, 1997) (censoring use of "abusive and provocative" language in outgoing inmate letters violated First Amendment because it presented no threat to prison order or security). Other inmates cannot be incited by something of which they are not even aware. (There is a theoretical possibility that an inmate could show other inmates his outgoing mail. However, I know from other prison lawsuits brought before this court that many inmates at the Secure Program Facility have little to no contact with other prisoners. E.g., Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001). Defendants have not argued that there is a risk that other inmates might see plaintiff's outgoing mail, so I do not consider whether inmates in less isolated institutions could be disciplined for using a possible gang nickname in outgoing letters.)

To the extent defendants believe that *any* use of a gang name, even in private, increases the likelihood of overt gang activity and violence, they have not supported their belief with evidence in the record. Similarly, defendants do not cite any evidence, or even argue, that prohibiting plaintiff from using his nickname was "generally necessary" to aid in his rehabilitation. Although Procunier does not call for a "strict scrutiny" test, Thornburgh, 490 U.S. at 411, it requires more than conclusory assertions. Even under Turner, prison officials must point to *some* evidence showing that their fear is a reasonable one. See Aiello

v. Litscher, 104 F. Supp. 2d 1068, 1072 (W.D. Wis. 2000) (prison officials do not meet their burden to show rational connection between interest and regulation "in the absence of both scientific or expert credible evidence and common sense"); see also Shimer v. Washington, 100 F.3d 506, 509-10 (7th Cir. 1996) (under Turner, "[t]he prison administration must proffer some evidence to support its restriction of . . . constitutional rights. The prison administration cannot avoid court scrutiny by reflexive, rote assertions.") (citations and internal quotations omitted); DeMallory v. Cullen, 855 F.2d 442, 448 (7th Cir. 1988) ("Generalized security concerns, however, are insufficient to support such a ban. Instead, prison officials must come forward with evidence that the specific contact at issue threatens security and must show that less restrictive measures, such as precounseling searches, are not possible."); Caldwell v. Miller, 790 F.2d 589, 596 (7th Cir. 1986) ("It is critically important that the record reveal the manner in which security concerns are implicated by the prohibited activity."). Certainly, under Procunier, defendants must do more than assert generally that "gangs are bad" without making any showing that their interest in stamping out gangs is implicated by particular inmate conduct. Courts must defer to prison officials' reasoned judgment, but if the First Amendment is to have any meaning in the prison setting, a reason of "because we said so" without further support cannot be sufficient to pass constitutional muster. Cf. Thornburgh, 490 U.S. at 414 (stating that Turner standard is not "toothless").

Defendants argue also that plaintiff's letter might have been encoded, that plaintiff "may be signaling something to [his brother] in the letter concerning possible escape plans or crimes to be committed on the outside." Dfts.' Br., dkt. #26, at 21. Of course, both of these concerns represent a substantial government interest. Procunier, 416 U.S. at 413 ("Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity.") Again, however, defendants may not simply cite these interests without demonstrating that those interests are significantly furthered by censoring plaintiff's outgoing mail. *Any* letter that an inmate sends out of the prison *could* be encoded with nefarious messages, but this speculative possibility would not justify a ban on all outgoing mail.

Defendants do not point to any evidence suggesting that because plaintiff signed his letter "Kujo," he is significantly more likely to have included messages telling his brother to engage in criminal activity. See Clement v. California Dept. of Corrections, 364 F.3d 1148, 1152 (9th Cir. 2004) (rejecting argument that internet messages more likely to be encoded with messages than other types of publications when defendants did not support assertion with evidence). Defendants admit that they have no reason to believe that plaintiff's brother is a member of a gang or inclined to commit crimes. Compare Stevens v. Ralston, 674 F.2d 759 (8th Cir. 1982) (censoring of inmate's letters to former prison guard not justified in part

because there was "nothing in the record which even suggest[ed] that the former employee ha[d] ever . . . aided or facilitated in any manner any potential escape by any prisoner"), with Turner, 482 U.S. at 91-92 (upholding restrictions on correspondence between inmates in part because "prison officials have particular cause to be concerned" that "inmates at other institutions within the Missouri prison system" would likely be involved in gangs). To the extent that defendants mean to argue that the name "Kujo" could be a secret code by itself, they do not explain how a single word could convey a detailed escape plan or crime scheme.

Defendants point to other parts of the letter that they suggest could form a code. This argument goes beyond the scope of this lawsuit. Plaintiff was disciplined and his letter censored solely because he signed the letter with the name "Kujo;" defendants did not rely on any other content in the letter. Thus, to avoid liability, they cannot argue now that plaintiff's letter *could have* been justifiably censored on other grounds. In this case, I conclude only that defendants violated plaintiff's First Amendment right to free speech by disciplining him and censoring his mail for his use of the name, "Kujo." I express no opinion on the question whether defendants may censor future letters for other reasons.

As noted above, plaintiff seeks an injunction requiring defendants to allow him to seal all outgoing mail. Granting this relief would violate 18 U.S.C. § 3626, which states that injunctions in civil actions brought by prisoners "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." The

constitutional violation will be remedied sufficiently if defendants are enjoined from disciplining plaintiff or censoring, destroying or refusing to mail his outgoing letters because he has signed them with the name "Kujo."

The only remaining question is whether defendants are entitled to qualified immunity with respect to plaintiff's claim for damages. Knox v. McGinnis, 998 F.2d 1405, 1412-13 (7th Cir. 1993) (qualified immunity does not apply to claims for injunctive relief). Defendants contend that they are entitled to qualified immunity because plaintiff has not shown that there is clearly established law requiring prison officials to allow prisoners to use gang nicknames in outgoing letters. Hope v. Pelzer, 536 U.S. 730 (2002) (setting forth standard for qualified immunity). Defendants are correct that plaintiff has not identified a case in which a court held that prison officials violated an inmate's First Amendment rights on facts identical to this case. However, this does not necessarily mean that defendants are immune. The Supreme Court has emphasized that liability for money damages does not hinge on the existence of a previous case with "materially similar" facts. Hope, 536 U.S. at 739. Rather, the question is whether the defendant had a "fair warning" that he was violating the Constitution. Id. at 741. Thus, qualified immunity may be unavailable even in "novel factual circumstances." Id.

Defendants appear to concede that it is clearly established that plaintiff has a First Amendment interest in choosing how to identify himself. See Dfts.' Br., dkt. #19, at 24.

See also Malik v. Brown, 71 F.3d 724 (9th Cir. 1995); Salaam, 905 F.2d 1168; Felix v. Rolan, 833 F.2d 517 (5th Cir. 1987); Azeez, 795 F.2d 129; Barrett v. Commonwealth of Virginia, 689 F.2d 498, 503 (4th Cir. 1982). Although these cases focus on a prisoner's right to change his or her name under the free exercise clause, defendants have not suggested that free exercise rights are greater under the Constitution than the right of free speech. Further, it has been clearly established since Procunier that prison officials must show that censorship of outgoing mail is generally necessary to further a substantial government interest. It is also clearly established that justifications for prohibiting speech *within* the prison do not apply automatically to correspondence being sent *outside* the prison. Loggins, 999 F.2d 364; Brooks v. Andolina, 826 F.2d 1266 (3d Cir. 1987); McNamara,606 F.2d 621; Moore, 1997 WL 269595.

Although the precise factual scenario of this case may be new, there are no novel legal questions involved, such as when a time, place or manner restriction becomes overly restrictive, Martin v. Snyder, 329 F.3d 919 (7th Cir. 2003)(law not clearly established that one-year marriage delay is unconstitutional), or to what extent prisons may impose non-content related restrictions on speech, Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002) (law not clearly established that prison officials are prohibited from requiring inmates to pay for all publications they receive). Rather, this case involves outright censorship of protected speech. Thus, defendants had fair notice that they could not act as they did in the absence

of a substantial government interest, yet they have not shown even a reasonable relationship between the need for security and the censorship of plaintiff's letter. When a constitutional right is clearly implicated, an inmate does not need to point to a case with similar facts. It is sufficient if he can show that the defendants should have known that they had not satisfied their burden under Turner or Procunier to justify a restriction of that right. Ford v. McGinnis, 352 F.3d 582, 597 (2d Cir. 2003) (denying qualified immunity when case law had established that defendants needed to show reasonable relationship to legitimate penological interest to justify denial of religious accommodation); Davis v. Norris, 249 F.3d 800 (8th Cir. 2001) (defendants not entitled to qualified immunity on First Amendment correspondence claim when defendants had not shown reasonable relationship to legitimate penological interest); see also Babcock v. White, 102 F.3d 267, 276 (7th Cir. 1996) (prisoner suing for retaliation under First Amendment could recover damages without pointing to case law in which court concluded that defendants' form of retaliation was unconstitutional). Plaintiff has done this.

Defendants do not argue that despite the clear state of the law, they "neither knew nor should have known of the relevant legal standard," Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982), so I do not consider that issue. Accordingly, I conclude that defendants are not

entitled to qualified immunity.

ORDER

IT IS ORDERED that

1. Plaintiff Joseph Koutnik's claim that defendants Matthew Frank, Jon Litscher, Gerald Berge, Gary Blackbourn and Kurt Linjer are violating his First Amendment rights by requiring him to leave his outgoing mail unsealed is DISMISSED as legally frivolous.

2. Plaintiff's motion for summary judgment is GRANTED on his claim that defendants violated his First Amendment rights by prohibiting him from using the name "Kujo" in an outgoing letter. It is DECLARED that defendants violated plaintiff's First Amendment right to free speech when they refused to mail his letter and disciplined him for signing a letter with the name "Kujo." Defendants are ENJOINED from prohibiting plaintiff from using this name in outgoing correspondence, so long as he does not display the correspondence to other inmates.

3. Defendants' motion for summary judgment is DENIED.

4. Plaintiff's motion to strike the expert report of Kurt Linjer is DENIED as unnecessary.

5. The case will proceed to trial on the issue of damages.

Entered this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge