IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM F. WEST,

OPINION and ORDER

Plaintiff,

04-C-173-C

v.

MATTHEW J. FRANK, GERALD A. BERGE,
PETER HUIBREGTSE, KELLY TRUMM,
SANDRA GRONDIN, JUDITH HUIBREGTSE,
JOHN RAY and CINDY O'DONNELL,

Defendants.

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This is a civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff William West, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, contends that defendants Matthew Frank, Gerald Berge, Peter Huibregtse, Kelly Trumm, Sandra Grondin, Judith Huibregtse, John Ray and Cindy O'Donnell violated his First Amendment rights by refusing to deliver his incoming mail pursuant to a Wisconsin Department of Corrections internal management procedure that prohibited inmates from receiving printed material from internet web sites from family or friends. Subject matter jurisdiction is present. 28 U.S.C. § 1331.

This case is before the court on plaintiff's motions for summary judgment and for a temporary restraining order and preliminary injunction. In support of his motion for summary judgment, plaintiff argues that defendants denied his mail pursuant to a policy that is unconstitutional under the standards developed in Turner v. Safley, 482 U.S. 78 (1987) and Thornburgh v. Abbott, 490 U.S. 401 (1989). Defendants make no effort to defend the constitutionality of the internal management procedure. Instead, they argue that (1) plaintiff's request for injunctive relief is moot because the procedure under which his mail was denied has been replaced by a new procedure that allows inmates to possess internet materials; (2) they are entitled to qualified immunity; (3) defendants Ray and Trumm are entitled to absolute immunity; and (4) defendant Frank should be dismissed for lack of personal involvement. Because I conclude that plaintiff's requests for injunctive and declaratory relief have been mooted by the implementation of the revised procedure and that defendants are entitled to qualified immunity from monetary damages, I will deny plaintiff's motions and grant summary judgment for defendants on the court's own motion.

For the purpose of deciding the motion for summary judgment, I find from the parties' proposed findings of fact that there is no genuine issue with respect to the following material facts.

UNDISPUTED FACTS

A. Parties

Plaintiff William West is confined at the Wisconsin Secure Program Facility, a maximum security institution in Boscobel, Wisconsin. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections. His duties include insuring that each Wisconsin prison has lawful policies and practices in place with respect to inmates and their property. Defendant Cindy O'Donnell is the former deputy secretary of the department and defendant John Ray is employed by the department as a corrections complaint examiner.

Defendant Gerald Berge is Warden of the Wisconsin Secure Program Facility, responsible for the administration and operation of the facility, for the implementation of department policies and judicial mandates and for insuring that the facility has lawful policies in place. Defendant Peter Huibregtse is deputy warden at the facility. In defendant Berge's absence, he is responsible for the facility's overall operation and administration. In addition, defendant Huibregtse reviews the recommendations made by the facility's complaint examiners, one of whom is defendant Kelly Trumm. In addition to investigating inmate complaints, defendant Trumm maintains records of inmate complaints, represents the facility in litigation concerning the investigation and disposition of complaints and prepares responses to correspondence directed to wardens and the secretary of the department from inmates, their families and the general public. Defendant Judith Huibregtse is a correctional sergeant and defendant Sandra Grondin is a correctional officer

at the secure program facility; they must interpret and apply the institution's regulations and procedures to inmates in a non-discriminatory manner.

B. Plaintiff's Medical Condition and Access to Medical Information

On the occasions prison officials denied delivery of plaintiff's mail, he was infected with Hepatitis C and diagnosed with grade 2 inflammation of the liver and stage 3 fibrosis of the liver. Although he could obtain information about fibrosis of the liver from the facility's medical staff by submitting a request to the manager of the health services unit, plaintiff was unable to obtain certain information he desired, such as information regarding the liver transplant process. He told family members that he needed information concerning fibrosis of the liver. On three occasions, they tried to mail him information they had downloaded from the internet about the liver.

C. Plaintiff's Complaints Regarding Non-delivery of Mail

At all times relevant to this case, a Department of Corrections internal management procedure, DOC 309 IMP 1, stated that inmates could receive material downloaded from the internet only from the web site directly or through a recognized commercial source. Inmates could not receive downloaded internet materials from family or friends. On February 25, 2004 and May 3, 2004, a revised procedure went into effect that allows an

inmate to possess materials downloaded from the internet regardless of the identity of the sender, provided the materials are printed on standard 8" x 11" paper.

1. WSPF-2003-36155

On August 14, 2003, two envelopes arrived at the facility, addressed to plaintiff and sent by an individual named Vanessa Cole. One contained seven pages of printed material, each having the address http://www.medstudents.com printed at the bottom. Defendant Grondin, who was working in the facility's mailroom, denied delivery of the envelope, citing DOC 309 IMP 1. Plaintiff appealed the non-delivery of his mail to defendant Berge, who upheld the denial on October 27, 2003. Plaintiff filed inmate complaint No. WSPF-2003-36155, dated November 2, 2003, challenging the non-delivery. Defendant Trumm agreed with defendant Grondin's decision to withhold plaintiff's mail and recommended that plaintiff's complaint be dismissed. Defendant Peter Huibregtse accepted her recommendation and dismissed the complaint on November 24, 2003. Plaintiff appealed the dismissal of his complaint to defendant Ray, who reviewed the file and recommended on November 26, 2003 that the appeal be dismissed. Defendant O'Donnell accepted his recommendation and dismissed plaintiff's appeal on February 14, 2004 but noted that the Division of Adult Institutions was revising the applicable rules to allow inmates to have internet materials.

2. WSPF-2003-37167

The second envelope addressed to plaintiff that arrived on August 14, 2003 contained six pages of material printed from http://www.medstudents.com. Defendant Grondin refused delivery of these pages and plaintiff appealed the non-delivery to defendant Berge, who upheld the denial. On November 10, 2003, plaintiff filed inmate complaint No. WSPF-2003-37167 regarding this non-delivery. Defendant Trumm recommended dismissal of the complaint on November 12, 2003. Defendant Peter Huibregtse accepted this recommendation and dismissed the complaint on November 24. Plaintiff appealed the dismissal to defendant Ray, who agreed with defendant Trumm's report and recommended dismissal of the appeal on November 26. Defendant O'Donnell accepted his recommendation and dismissed plaintiff's appeal on February 14, 2004 but noted the pending change in policy regarding internet materials.

3. WSPF-2003-38077

On September 15, 2003, an envelope sent by Nancy West and addressed to plaintiff arrived at the facility. It contained five pages of material downloaded from the internet. Defendant Judith Huibregtse issued plaintiff a notice of non-delivery, citing DOC 309 IMP 1, which plaintiff appealed to defendant Berge on September 16, 2003. After defendant Berge upheld the denial, plaintiff filed inmate complaint No. WSPF-2003-38077, which was

dated November 16, 2003. Defendant Trumm could not determine which web site the pages came from because the bottom half of the pages were cut but she agreed with defendant Judith Huibregtse's assessment in the notice of non-delivery that the pages were likely downloaded from the internet. Because they had been sent to plaintiff by Nancy West, she recommended dismissal of the complaint on November 20, 2003. Defendant Peter Huibregtse accepted the recommendation on November 24, 2003. Plaintiff appealed the dismissal to defendant Ray, who recommended dismissal of the appeal on November 26, 2003. Defendant O'Donnell accepted defendant Ray's recommendation and dismissed the appeal on February 14, 2004, again noting the pending change in policy regarding internet materials.

4. WSPF-2004-1213

On November 18, 2003, an envelope sent by Jenny Schuppel and addressed to plaintiff arrived at the facility. It contained thirteen pages, each of which bore the address http://www.hrw.org/reports/2000. Defendant Judith Huibregtse issued a notice of non-delivery. Plaintiff appealed the non-delivery to defendant Berge, who upheld defendant Huibregtse's decision on January 6, 2004. On or about January 10, 2004, plaintiff filed inmate complaint No. WSPF-2004-1213 regarding the non-delivery of his mail. Because plaintiff had not received the pages directly from the web site, defendant Trumm agreed with

the non-delivery and recommended dismissal of the complaint on January 13, 2004. Defendant Peter Huibregtse accepted defendant Trumm's recommendation and dismissed plaintiff's complaint on January 20. Plaintiff appealed the dismissal to defendant Ray, who agreed with defendant Trumm's decision and recommended dismissal of the appeal on January 26, 2004. Defendant O'Donnell accepted this recommendation and dismissed the complaint on February 14, 2004, noting the pending rules change.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Although defendants did not file their own motion for summary judgment, "a district court can enter summary judgment *sua sponte*, or on its own motion, under certain limited circumstances." Simpson v. Merchants Recovery Bureau, Inc., 171 F.3d 546, 549 (7th Cir. 1999). One such circumstance exists when the undisputed facts reveal that the non-moving party is entitled to judgment and the losing party has had notice and an opportunity to present its evidence. Celotex Corp. v. Catrett, 477 U.S. 317,

326 (1986); Jones v. Union Pacific Railroad Co., 302 F.3d 735, 740 (7th Cir. 2002); Mason v. Melendez, 525 F. Supp. 270, 287 (W.D. Wis. 1981); see also 10A Wright, Miller & Kane, Federal Practice and Procedure 3d § 2720 at 347 (1998) (summary judgment may be entered in favor of non-moving party even though no formal cross motion has been filed). In this case, plaintiff had notice and an opportunity to present arguments in response to defendants' contentions; defendants asserted each argument as an affirmative defense in their amended answer and plaintiff addressed each in his reply brief.

B. Mootness

In screening the complaint, I raised the possibility that plaintiff's request for injunctive relief might be moot because a February 14, 2004 document attached to the complaint indicated that the Department of Adult Institutions was in the process of revising the policy restricting internet materials. Order, Apr. 19, 2004, dkt. #3, at 7. Defendants have expanded on this suggestion. They have advised the court that the revised policy is in effect and that it allows inmates to receive materials downloaded from the internet from friends and family.

A claim becomes moot when the issues presented are no longer live or the parties lack an interest in the outcome that the law recognizes as actionable. Murphy v. Hunt, 455 U.S. 478, 481 (1982); Stotts v. Community Unit School Dist. No. 1, 230 F.3d 989, 990 (7th

Cir. 2000). With respect to plaintiff's request for injunctive relief, the question is whether it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 609 (2001) (internal quotations omitted); see also Global Relief Foundation, Inc. v. O'Neill, 315 F.3d 748, 751 (7th Cir. 2002) (case was not moot "while any possibility remained" that defendant would revert to past conduct). On occasion, the Court of Appeals for the Seventh Circuit has stated that this standard may be relaxed when the defendants are public officials because their acts of self-correction are more trustworthy than those of private parties, e.g., Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 326 F.3d 924, 929-30 (7th Cir. 2003); Magnus v. City of Hickory Hills, 933 F.2d 562, 565 (7th Cir. 1991), but any defendant has the burden of showing that the challenged behavior will not resume. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000).

The policy under which plaintiff's mail was withheld is no longer in effect at the Wisconsin Secure Program Facility. The revised version of DOC 309 IMP 1 took effect on February 25, 2004 and May 3, 2004. It allows inmates to receive materials downloaded from the internet regardless of the identity of the sender. The new policy requires simply that the materials be on standard 8" x 11" paper. (I have not considered plaintiff's arguments that the new policy violates his rights under the First Amendment because he did

not challenge the new policy in his complaint.) The terms of the new policy indicate that plaintiff would be allowed to receive the materials withheld from him under the old policy. Although plaintiff contends that the new policy still prohibits inmates from possessing internet materials depending on the identity of the sender, his contention is contradicted by the terms of the new policy. He offers no evidence that any of the defendants continue to refuse delivery of internet materials sent to him by his family. The change in procedure has been memorialized in written form and made available to plaintiff, making it "unlike an informal promise or assurance . . . that the challenged practice will cease." Burbank v. Twomey, 520 F.2d 744, 748 (7th Cir. 1975). Also, there is no evidence that the policy regarding internet materials has fluctuated between more restrictive and less restrictive alternatives, which might undermine the apparent good faith implementation of the less restrictive policy. Kikumura v. Turner, 28 F.3d 592, 597 (7th Cir. 1994) (requests for injunctive and declaratory relief not moot where prison policies at issue "ebbed and flowed throughout the course of the litigation"). Thus, I conclude that defendants have met their burden of showing that the conduct at issue in this case will not occur again. Because plaintiff can show only past exposure to allegedly unconstitutional conditions, his request for injunctive relief is moot. Higgason v. Farley, 83 F.3d 807, 811 (7th Cir. 1996). See also Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988) (inmates no longer confined in unit where allegedly unconstitutional conditions existed could not seek injunctive relief). The

same analysis applies to moot his request for declaratory relief. Higgason, 83 F.3d at 811.

B. Qualified Immunity

Defendants contend that they are entitled to qualified immunity from monetary damages in this case. Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Saucier v. Katz, 533 U.S. 194, 206 (2001). It is "a judicially created doctrine that stems from the conclusion that few individuals will enter public service if such service entails the risk of personal liability for one's official decisions." Donovan v. City of Milwaukee, 17 F.3d 944, 947 (7th Cir. 1994). The doctrine "gives public officials the benefit of legal doubts," id. at 951 (citation omitted), and protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The qualified immunity analysis involves a two-step inquiry. The "first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question [is] whether the right was clearly established." Saucier, 533 U.S. at 200. The relevant question is whether the state of the law at the time of the challenged acts gave the defendants fair warning that the plaintiff's alleged treatment was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 741 (2002). Although qualified immunity is an affirmative defense, plaintiff bears the burden of establishing a violation of a constitutional right and of showing that the law was

clearly established at the time of the alleged violations. Perry v. Sheahan, 222 F.3d 309, 315 (7th Cir. 2000) (plaintiff bears burden of demonstrating that defendants violated constitutional right that was clearly established at time of occurrence).

1. Violation of a constitutional right

The first question is whether the facts, read in the light most favorable to plaintiff, indicate that defendants' conduct violated plaintiff's constitutional rights. The Supreme Court has recognized that inmates retain a limited constitutional right to receive and read materials that originate outside the prison. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Procunier v. Martinez, 416 U.S. 396 (1974); Pell v. Procunier, 417 U.S. 817 (1974). To be constitutional, a denial of an inmate's incoming mail must be "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89; Lindell v. Frank, 377 F.3d 655, 657 (7th Cir. 2004).

Defendants do not try to defend the constitutionality of the decisions to deny plaintiff the downloaded internet materials sent to him under the old version of DOC 309 IMP 1. They do not argue that any penological interest was furthered by denying plaintiff the materials sent to him by his family and they do not try to show any reasonable relation between their actions and any penological interest. Instead, they argue that plaintiff's right to receive internet materials was not clearly established at the time the original version of

DOC 309 IMP 1 was in effect. Because the policy burdens plaintiff's First Amendment right to receive mail and because there is no record evidence of any legitimate penological interest served by the restriction, I must conclude that the policy violated plaintiff's First Amendment rights. Alston v. DeBruyn, 13 F.3d 1036, 1040 (7th Cir. 1994) (court's finding of of reasonableness of restriction on inmate's First Amendment rights must be based on record evidence). I turn to the question whether those rights were clearly established before August 2003.

2. Clearly established rights

The inquiry into whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. The rights alleged to have been violated must be sufficiently particularized to put potential defendants on notice that their conduct is unlawful. Anderson v. Creighton, 483 U.S. 635, 640 (1987). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" Hope, 536 U.S. at 739 (citations omitted). A plaintiff may satisfy this burden of proof by pointing to

a closely analogous case of controlling authority that has established both the right at issue and its application to the factual situation at hand or by showing that the violation was so obvious that reasonable persons would have been on notice that they were violating plaintiff's statutory or constitutional rights. Denius v. Denlap, 209 F.3d 944, 951 (7th Cir. 2000); Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996) (citations omitted).

Plaintiff frames the right at issue in this case as an inmate's "right to information," which was recognized in Turner. Although that case did not establish or recognize this right explicitly, it did acknowledge implicitly that prison inmates have protected interests in sending and receiving mail. Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). It is reasonable to infer that these interests grow out of an underlying interest inmates have in receiving and sending information. Thus, plaintiff's contention is not an incorrect statement of the law. For the purpose of the "clearly established" inquiry, however, the right identified by plaintiff is too broad because it fails to incorporate the specific factual context of this case. Saucier, 533 U.S. at 201. The fact that an inmate's right to information was clearly established at the time defendants' denied plaintiff's mail would not put defendants on notice that the reason why plaintiff's mail was denied in this case was constitutionally suspect. The proper formulation of the right at issue in this case is an inmate's right to receive and possess materials downloaded from the internet.

To date, neither the United States Supreme Court nor the Court of Appeals for the

Seventh Circuit has held that a prison policy prohibiting inmates from receiving internet materials violates the First Amendment. (In an unpublished decision that has no precedential value, the court of appeals rejected an inmate's challenge to the withholding of mail containing materials printed off the internet. Rogers v. Morris, No. 01-3903, 2002 WL 453706 (7th Cir. Mar. 21, 2002)). The lack of controlling authority in plaintiff's favor does not foreclose the possibility of finding a right clearly established if there is "such a clear trend in the case law that we can say with fair assurance that the recognition of the right by controlling precedent was merely a matter of time." Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000) (quoting Cleveland-Perdue v. Brutsche, 881 F.2d 430, 431 (7th Cir. 1989)).

A ban on inmate receipt of internet materials similar to the one in the present case was struck down in Clement v. California Dept. of Corrections, 220 F. Supp. 2d 1098 (N.D. Cal. 2002). The policy banned inmates from receiving hard copies of material downloaded from the internet through the mail. In striking down the policy, the court rejected the prison officials' arguments that the ban was reasonably related to their interests in reducing the volume of mail and preventing the transmission of coded messages to inmates. Id. at 1110-12. The decision was upheld on appeal. Clement v. California Dept. of Corrections, 364 F.3d 1148 (9th Cir. 2004). But see In re Collins, 86 Cal. App. 4th 1176, 104 Cal. Rptr. 2d 108 (Cal. Ct. App. 2001) (upholding policy struck down in Clement). Other than Clement,

few cases have addressed an inmate's right to access information on the internet. E.g., Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199 (D. Ariz. 2003) (invalidating state statute prohibiting inmates from accessing internet). From August 2003 to February 2004, the time during which defendants denied delivery of plaintiff's mail, Clement was the only case fairly on point. One case does not constitute a clear trend in the law. Given the sometimes extensive curtailment of constitutional rights in the prison setting, the limitation imposed by the earlier version of DOC 309 IMP 1 was not so obviously unconstitutional that reasonable persons in defendants' shoes would have known they were violating plaintiff's First Amendment rights by refusing delivery of his mail.

Plaintiff argues that this court's decision in Lindell v. Frank, No. 02-C-21-C, 2003 WL 23198509 (W.D. Wis. May 5, 2003) put defendants on notice that their denials of plaintiff's mail were unconstitutional. Plt.'s Rep. Br., dkt. #32, at 2. Lindell did not involve an inmate's inability to receive materials downloaded from the internet. That case dealt with a challenge to the Wisconsin Secure Program Facility's policy prohibiting inmates from receiving photocopied materials and materials clipped from magazines except from recognized commercial sources. Admittedly, both Lindell and the present case implicate the constitutional rights of prison inmates with respect to mail. Moreover, Lindell involved a "publisher's only" rule similar to the old version of DOC 309 IMP 1. However, these facial similarities could not have put defendants on notice that a ban on internet materials sent by

friends and family was unconstitutional. In sum, plaintiff has not met his burden of showing that his right to receive mail containing materials downloaded off the internet was clearly established at the time defendants refused to deliver his mail. Accordingly, defendants are entitled to qualified immunity regarding his request for money damages.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment, dkt. #14, is DENIED and plaintiff's motion for a temporary restraining order and preliminary injunction, dkt. #29, is DENIED as moot. FURTHER, IT IS ORDERED that on the court's own motion, defendants' motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 25th day of March, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge