

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

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LUIS A. RAMIREZ,

Plaintiff,

v.

GARY R. McCAUGHTRY,  
MATTHEW FRANK, CURT JANSSEN,  
STEVEN SCHUELER, MARC CLEMENTS  
and STEVEN CASPERSON,

Defendants.  
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OPINION AND  
ORDER

04-C-335-C

In the one claim remaining in this civil action, plaintiff Luis A. Ramirez, an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, contends that defendants Gary R. McCaughtry, Matthew Frank, Curt Janssen, Steven Schueler, Marc Clements and Steven Casperson are violating his rights under the First Amendment by restricting his access to photographs and certain reading materials while in segregation. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court is defendants' second motion for summary judgment regarding plaintiff's First Amendment claim. (I denied both parties' motions for summary

judgment as to this claim in an order dated April 20, 2005. Defendants asked the court for leave to file a second summary judgment motion. I granted defendants' request in an order dated May 16, 2005.)

The issue in this case is whether the prison rule restricting access to newspapers, magazines and photographs to inmates in segregation as part of an incentive system for good behavior serves a legitimate penological interest. I conclude that it does. The undisputed evidence would allow a reasonable jury to conclude that it is reasonable for prisons to have a rule that encourages inmates to improve their behavior in order to earn their way back to the general population where such items are allowed. Therefore, I will grant defendants' motion for summary judgment.

As with the first motion for summary judgment, plaintiff failed to support many of his proposed facts with admissible evidence, as required by this court's Procedure to be Followed on Motions for Summary Judgment I.C.1, a copy of which was sent to the parties with the magistrate judge's October 12, 2004 preliminary pretrial conference order. See, e.g., Dfts.' Reply to Plt.'s Resp. to Dfts.' PFOF, dkt. #91, ¶¶65, 67-70, 73-74, 88-89, 93-96, 105-111, 114-127, 155, 159, 165, 167, 177, 224, 255 and 271. Even if plaintiff had cited admissible evidence, however, it would not have changed the decision on his First Amendment claim.

From the parties' proposed findings of fact and the record, I find the following facts

to be material and undisputed.

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Luis A. Ramirez is an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, where he has been housed in program segregation, adjustment segregation and control status in the health and security complex unit since 2001. The majority of his segregation time has been spent in program segregation status.

At all relevant times to this lawsuit, the defendants held the following positions at the Waupun Correctional Institution: 1) defendant Gary R. McCaughtry was warden and responsible for the overall operation and administration of the institution, including the formation of institution policies applicable to inmates; 2) defendant Steven Schueler was program captain and responsible for overall operation of the segregation unit, including the formation of institution policies applicable to inmates housed in segregation; 3) defendant Matthew Frank was Secretary of the Wisconsin Department of Corrections; 4) defendant Curt Janssen was unit manager of the segregation unit at the institution; 5) defendant Marc Clements was security director at the institution; and 6) defendant Steven Casperson was Administrator of the Wisconsin Department of Corrections' Division of Adult Institutions.

### B. Plaintiff's Past Behavior

In February 2004, plaintiff was serving eight separate dispositions related to eight separate conduct violations concurrently. Three of the offenses included battery charges, four included threats, two involved disorderly conduct and two involved solicitation of staff. In addition, plaintiff had been criminally charged with battery to a law enforcement officer while on leave from Waupun Correctional Institution to attend proceedings in Milwaukee County during February 2003. Plaintiff's prison file shows that he has refused orders and had to be extracted forcibly from his cell on several occasions.

### The Segregation Unit

Each institution may establish policies and procedures for the orderly operation of facilities used for inmates in program segregation and disciplinary separation. Inmates who are in segregation status at the Waupun Correctional Institution are housed in the health and security complex, which consists of one building with three wings: A, B and C. The segregation unit houses up to 180 inmates who are in temporary lock up, disciplinary separation, adjustment segregation, program segregation or administrative confinement statuses. The segregation unit houses inmates who have been charged with a major rule or Wisconsin Administrative Code violation and are waiting for a due process hearing or inmates who have been found guilty of a major rule violation and are serving the disposition

imposed upon them as a result of being found guilty. In addition, the unit houses inmates in administrative confinement whom the security director and supervisors have determined must be separated from the general population because of their continued poor institution conduct, leadership roles in gangs or because they are inmates who would promote violence or threaten a specific group if left in the general population.

Defendants may impose program segregation status on inmates when the disciplinary committee determines that an inmate's conduct warrants extended segregation for punitive reasons. Program segregation time is served concurrently with any other disposition received as the result of the disciplinary process. For example, if an inmate receives 360 days' program segregation and a few days later receives 360 days' program segregation as the result of a new conduct report, the second disposition would override the first and the inmate's 360 days of program segregation would start all over again upon the disposition of the second conduct report. Program segregation and disciplinary separation may not exceed the time periods specified in Wis. Admin. Code § DOC 303.84. Even if an inmate is given a long disposition in segregation, his status is reviewed every 30 days and the warden can remove him from program segregation and place him into the general population at any time in accordance with Wis. Admin. Code § 303.70(12).

Cell searches are more important in the health and security complex than in the general population because of the disruptive behavior of the inmates housed there and

because contraband establishes status and power, allows bartering, aids in violent acts toward staff and inmates and other types of negative behavior. Property allowed for inmates in disciplinary separation and program segregation is limited so as to provide the inmate an incentive to conform his behavior so that he can be transferred back to the general population where he will have access to more property. If a subscription newspaper, magazine or a non-pornographic photograph arrives through the mail for an inmate housed in segregation, it will be stored with his property until he rejoins the general population. Property is removed from program segregation inmates when those inmates abuse their property, as many frequently do. When inmates in segregation are allowed to have more property, they have more opportunities to misuse that property.

The institution permits inmates in program segregation and disciplinary separation visitation and telephone calls in accordance with Wis. Admin. Code § DOC 309. Inmates in program segregation may not leave their cells except as needed for urgent medical or psychological attention, showers, visits, exercise and emergencies endangering their safety in the cell or other reasons as authorized by the warden. However, inmates may receive and send first class mail in accordance with departmental rules relating to mail and they have access to library resources. For example, an inmate may ask the librarian for photocopies of documents allowed in segregation, such as addresses or legal documents, using information request forms. Inmates in segregation are allowed to possess pictures drawn on paper, but

not photographs.

1. Step program

An inmate who is placed into the “pending” or “entry step” upon entering program segregation will not earn time off of his segregation term and will remain in this status until reviewed by the segregation special review team. Currently, the privileges that an inmate earns in the entry step include the following: 1 pair of socks, 1 pair of undershorts, 1 t-shirt, 1 pair of canvas shoes, 1 uniform, 1 wash cloth, 1 hand towel, 2 bed sheets, 2 blankets, 1 pillow, 1 pillowcase, 1 mattress, 1 roll of toilet paper, 1 bar of soap, 1 toothbrush, 1 tube of tooth paste, 1 comb or pick, 1 approved wedding ring (must be married and ring must be worn on finger), 1 pair of prescription eye glasses, denture or partial plate and container, legal materials (limit 2 shopping bags in a cell), first class mail (limit 25 personal letters but no photographs), 1 address book, 1 box acetaminophen tablets 325 milligrams, 1 box antacid tablets, 1 box ibuprofen tablets 200 milligrams, 1 tube of Vaseline, 50 stamps, 2 pads of paper, 1 pack of carbon paper, 1 box of envelopes, 5 legal size manila envelopes, 1 file folder, 1 expanding wallet folder, 1 pocket dictionary, 1 Bible, Quran, Torah, Book of Shadows or equivalent religious book and 1 pair of shower thongs. In addition, inmates in the entry step receive two hours of visitation each month for the first 200 days and four hours each month thereafter.

Waupun Correctional Institution rewards good behavior and seeks to encourage good behavior and has designed its segregation rules and the institution's rules with discipline, security, order and rehabilitation in mind. The program segregation policies are designed to encourage the inmate's positive adjustment while in segregation and to provide an opportunity for the inmate's successful return to the institution's general population, where more property and privileges are allowed. For example, in the general population, inmates are allowed to possess 25 publications total, including newspapers, magazines, pamphlets and recreational reading materials, such as books and approved internet materials (Pocket dictionaries, address books count and the internet materials count against the 25-publication limit.) In addition, inmates in the general population are allowed to possess one photo album.

Inmates in program segregation who follow the rules can earn additional property and privileges as they progress through the health security complex's level system. This level system, or step program series, is designed as an incentive program and provides a controlled increase in privileges and responsibilities in order to promote acceptable behavior. In addition to the entry step, there are three step levels, "step 1," "step 2" and "step 3," with step 1 being the lowest and step 3 being the highest. Step 1 represents a promotion from the entry step. Inmates in step 1 are afforded the same privileges and visitation as inmates in the entry step. Inmates who behave in step 1 earn their way to step 2 and inmates in step



2 can earn their way to step 3, where they can have additional property and privileges, such as increased personal telephone calls and access to a television and radio. Because of space constraints, an inmate at step 1 can be housed next to an inmate in step 2. Inmates in all three steps may obtain two books at a time and prison staff exchange books weekly. If inmates in segregation request something that staff cannot provide to them in segregation but allow in the general population, such as subscription magazines, publications, internet materials or photographs, staff store that item in the property room for the inmate until he rejoins the general population.

An inmate's behavior can change his step program participation status at any time. If an inmate engages in conduct that results in a major conduct report while in program segregation status, he will automatically lose the status he has obtained and will start over. Negative behavior that falls short of a major conduct report may also result in a demotion in step level. Positive behavior may promote an inmate to a higher step level. The segregation special review team recommends demotion or promotion of an inmate in the step series. The team reviews each inmate in the step program at least once every 30 days. An inmate's status and the pace at which he moves through the step levels depend on his time structure in segregation, conduct history, behavior and other factors. All recommendations are forwarded to the security director and warden for final review and approval.

## OPINION

### B. First Amendment

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); Pell v. Procunier, 417 U.S. 817 (1974). In Thornburgh, 490 U.S. at 413, the Court held that “[r]egulations affecting the sending of a ‘publication’ . . . to a prisoner . . . are ‘valid if [they are] reasonably related to legitimate penological interests.’”

To determine whether a prison rule or regulation is overly restrictive so as to infringe an inmate’s First Amendment rights, a court must consider four factors: 1) whether a valid, rational connection exists between the regulation and a legitimate governmental interest, such as prison security; 2) whether the prisoner has available to him alternative means of exercising the right in question; 3) whether accommodation of the asserted right will have negative effects on guards, inmates or prison resources; and 4) whether there are obvious, easy alternatives to the regulation. Turner, 482 U.S. at 89-91. In Turner, “[t]he Court adopted a reasonableness standard, as opposed to a heightened scrutiny, to permit prison administrators ‘to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration’ and thereby prevent unnecessary federal court

involvement in the administration of prisons.” Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991); see also Young v. Lane, 922 F.2d 370, 375 (7th Cir. 1991) (“The standard set out in Turner is not demanding . . . and is driven by a wide-ranging deference to prison officials, especially state prison officials.”).

1. Legitimate governmental interest

In addressing the first summary judgment motion, I noted that defendants had failed to propose any facts to support their argument that allowing inmates in segregation to possess newspapers, magazines and photographs would weaken the institution’s incentive program. In the current motion, defendants propose more facts to support their earlier argument that depriving inmates in segregation of photographs, newspapers and magazines creates incentive for the inmates to progress back into the general population.

Other courts have found “deterrence of future infractions of prison rules” to be a legitimate penological interest, see e.g., Banks v. Beard, 399 F.3d 134, 140 (3d Cir. 2005) (citing Gregory v. Auger, 768 F.2d 287, 290 (8th Cir. 1985) and Daigre v. Maggio, 719 F.2d 1310, 1313 (5th Cir. 1983)). These courts have reasoned that restricting a prisoner’s receipt of certain mail and subscription publications in disciplinary segregation makes segregation less endurable and discourages inmates from committing the rule violations that lead to such placement. Id. It is undisputed that the program segregation policies are designed to

encourage the inmate's positive adjustment while in segregation and to provide an opportunity for his successful return to the institution's general population, where more property and privileges are allowed. It is undisputed also that plaintiff has been housed in program segregation, adjustment segregation and control status in the health and security complex unit since 2001 and that as of February 2004, he was concurrently serving eight separate dispositions related to eight separate conduct violations, including three battery charges, four threats, two disorderly conduct and two solicitation of staff violations.

If defendants allowed plaintiff the same amount of property as inmates in general population, it might reinforce his willingness to violate institution rules. Plaintiff continues to violate prison rules and therefore extends his stay in segregation. He has not adduced any evidence that he is unable to comply with prison rules and therefore progress through the step system into general population where he can obtain newspapers, magazines and photographs that he so desires. Because plaintiff can change his behavior at any time to return to the general population, restricting his access to the materials he wants while in segregation may give him an incentive to modify his behavior. I am persuaded that the means defendants have chosen to try to deter the commission of future rules infractions serves a legitimate governmental interest.

## 2. Alternative means

One obvious alternative means that plaintiff has to exercise his First Amendment right to receive newspapers, magazines and photographs is to change his behavior so that he can return to the general population where these items are more readily accessible. He does not dispute that his behavior could change his step program participation status at any time and that positive behavior may promote an inmate to a higher step level. This is in contrast to the situation in Banks, 399 F.3d at 145, where the Court of Appeals for the Third Circuit found the prison's rule restricting newspaper, magazine and photograph access unconstitutional because, among other reasons, the inmate who entered segregation remained in that status for 90 days no matter how he modified his behavior. Nothing in the current record suggests that defendants would not move plaintiff up the step system and into the general population if his behavior improved. Once there, plaintiff could obtain all the materials that are part of his property and the subject of this lawsuit. Gregory, 768 F.2d at 290 (policies restricting mail access not over-broad or impermissible because they were not aimed at *what* mail inmate could receive but only *when* he could receive it). (Emphasis added).

However, even if plaintiff spends a prolonged period of time within segregation because he continues to violate prison rules, he is not without access to information. While in segregation, he is still allowed limited visits and telephone calls, drawings, the ability to send and receive first class mail and access to library resources. Plaintiff complains that with

the limited resources available to him, he is unable to keep tabs on the troops fighting in the Middle East. However, it is undisputed that plaintiff has been in segregation since 2001, well before the United States sent troops to Iraq. If plaintiff were completely sheltered from current events, he would not have even known that the United States has troops in the Middle East. Therefore, I find that plaintiff has alternative means of exercising his First Amendment right to obtain information.

### 3. Accommodation and easy alternatives

Under Turner's third and fourth factors, a court must determine whether the asserted right will have negative effects on guards, inmates or prison resources and whether there are obvious, easy alternatives to the regulation. As noted above, allowing inmates in segregation the same access to newspapers, magazines and photographs as inmates in the general population might have an adverse impact on the incentive system. It is undisputed that the segregation unit houses inmates who have violated prison rules or pose a threat to prison security. It is undisputed also that property allowed for inmates in disciplinary separation and program segregation is limited to provide inmates an incentive to conform their behavior so that they can be transferred back to the general population where a considerable amount of property is once again allowed. Providing inmates access to all these items in segregation would make segregation more desirable rather than less desirable, undermining the punitive

effect of such status and compromising the prison's rehabilitation efforts. Daigre, 719 F.2d at 1313.

Moreover, there are no obvious, easy alternatives to the restriction on newspapers, magazines and photographs in segregation. Currently, inmates in the step program have access to, among other things, two books that can be exchanged weekly, legal materials (limit 2 shopping bags in a cell), first class mail (limit 25 personal letters but no photographs), 1 address book, photocopies of documents allowed in segregation and pictures drawn on paper. Once an inmate reaches the general population, defendants allow him to possess a total of 25 publications, including newspapers, magazines, pamphlets and recreational reading materials, such as books and approved internet materials, and one photo album. Allowing inmates access to these items before they reach the general population may entice them to prolong their stay in segregation. As long as an inmate has some access to items that otherwise would be allowed in the general population only, he may be less motivated to change his behavior. Id. (narrower restriction on First Amendment interests would likely prove ineffective in maintaining discipline). I conclude that defendants' restriction on newspaper, magazine and photograph access in segregation serves a legitimate penological interest. Therefore, I will grant defendants' motion for summary judgment with respect to plaintiff's First Amendment claim. Because I do not find defendants' segregation policy on publications and photographs unconstitutional, it is unnecessary to address defendants'

qualified immunity defense.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of defendants Gary R. McCaughtry, Matthew Frank, Curt Janssen, Steven Schueler, Marc Clements and Steven Casperson is GRANTED as to plaintiff Luis Ramirez's First Amendment claim;

2. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 22nd day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge