

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

MARVIN RHODES,

Plaintiff,

v.

MEMORANDUM and ORDER
05-C-690-S

SGT. MARWITZ,

Defendant.

Plaintiff Marvin Rhodes was allowed to proceed on his First Amendment and equal protection claims against defendant Sgt. Marwitz. In his complaint he alleges that he is an African American inmate at the Fox Lake Correctional Institution, that defendant Marwitz failed to give him pictures sent by ACME Publications and that white inmates received similar pictures.

On March 10, 2006 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff is an inmate at the Fox Lake Correctional Institution, Fox Lake, Wisconsin (FLCI). Defendant Jerry Marwitz is a Correctional Officer at FLCI and works in the mailroom specifically processing inmate mail.

The Wisconsin Department of Corrections has a "publisher-only" rule for newspapers and paperback books. This rule is set forth at Wisconsin Administrative Code DOC 309.05(2)(a) and states as follows: "Inmates may only receive publications directly from publisher or other recognized commercial sources in their packages." DOC 309 IMP further states, "Publications may be received only from commercial publishers, approved retail outlets or sources."

In July 2005 plaintiff ordered pictures from ACME publication and received them. In August 2005 ACME Publication was placed on the "Not Allowed Vendor" list because it was not a legitimate business. On August 9, 2005 plaintiff ordered more pictures from ACME Publications. When the pictures arrived on August 29, 2006 plaintiff was not allowed to receive them because ACME Publications had been placed on the "Not Allowed Vendor" list. He was allowed to send the pictures from the institution with a visitor.

Other inmates were allowed to receive pictures from ACME Publications before it was placed on the "Not Allowed Vendor" list. After Acme Publications was placed on the "Not Allowed Vendor" list an inmate may have received pictures from Acme Publications by mistake due to the sheer volume of mail arriving at the institution.

Limiting publications to those mailed from publishers or approved retail outlets greatly reduces the chance of contraband

being smuggled into the institution. Publishers or approved retail outlets are much less likely to insert contraband into publications than are the inmate's friends or family members. Weapons, such as razor blades and knives, can be hidden between pages and in book bindings. Codes, maps and gang related publications can be hidden in the pages and bindings of books or pasted between newspaper clippings.

MEMORANDUM

Plaintiff claims that his First Amendment rights were violated when he was not allowed to receive pictures from ACME publications on August 29, 2005. Defendant contends that plaintiff's First Amendment rights were not violated because Acme Publications was placed on the "Not Allowed Vendor" list.

Plaintiff was denied his pictures pursuant to DOC 309.05(2)(a) which allows publications only from approved retail outlets or publishers. A prison regulation does not infringe on an inmate's constitutional rights if it is reasonably related to a legitimate penological goal. Turner v. Safely, 482 U.S. 78 (1987). Both security and economic concerns are legitimate penological goals. Al-Alamin v. Gramley, 926 F.680, 686 (7th Cir. 1991).

In Turner the Court identified the following four factors as helpful in determining whether a prison regulation is reasonably related to a legitimate penological goal: 1) a "valid, rational connection" between the regulation and a legitimate government

interest; 2) the existence of alternative methods for the inmate to exercise his constitutional right; 3) the effect the inmate's assertion of that right will have on the operation of the prison and 4) the absence of an alternative method to satisfy the governments's legitimate interest. Turner, 482 at 89-91; Thornburgh v. Abbott, 490 U.S. 401 (1989).

There is a "valid, rational connection" between the rule allowing only publishers and approved retail outlets to mail publications to inmates and the legitimate interests of security. It is common sense that friends and family members would be more likely than publishers or approved retail outlets to place contraband in publications. The existence of contraband in the institution is a legitimate security concern.

In addition, the increased volume of mail, absent this regulation, would cause security concerns because searching the mail for contraband would be more difficult and time-consuming. The increased volume of mail would also cause a significant increase in the expenditure of staff, time and other resources which are legitimate economic concerns. Alternative methods exist for plaintiff to obtain pictures from approved vendors.

Pursuant to the four factors provided in Turner this prison regulation is reasonably related to legitimate penological interests. Accordingly, as a matter of law defendant is entitled to judgment on plaintiff's First Amendment claim.

Plaintiff also claims that his equal protection rights were violated because white inmates received pictures from Acme Publications and he did not. The equal protection clause guarantees that all persons similarly situated should be treated alike. City of Cleburne, Texas v. Cleburne Living Center, 573 U.S. 432, 439 (1985). To prevail on his equal protection claim plaintiff must show intentional discrimination because of his membership in a particular class. Gray v. Lacke, 885 F.2d 399, 414 (7th cir. 1989), cert. denied, 494 U.S. 1029 (1990).

Plaintiff has submitted no evidence that white inmates received pictures from Acme Publications after it was placed on the "Not Allowed Vendor" list. Accordingly, defendant is entitled to judgment as a matter of law on plaintiff's equal protection claim. Defendant's motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claims must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims

contained therein with prejudice and costs except that his claims concerning internet materials and magazines are dismissed without prejudice.

Entered this 30th day of March, 2006.

BY THE COURT:

____s/_____
JOHN C. SHABAZ
District Judge