IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM F. WEST,

ORDER

Plaintiff,

06-C-269-C

v.

MATTHEW FRANK, RICHARD SCHNEITER[1], GERALD BERGE and VICKI SEBASTIAN,

Defendants.

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This civil action for declaratory, injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983 and Wisconsin law, was removed to this court from the Circuit Court for Dane County on May 16, 2006, pursuant to 28 U.S.C. § 1441. Plaintiff William West is presently confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. His case has arrived in this court in an unusual procedural posture. Plaintiff filed a complaint in the Circuit Court for Dane County on March 19, 2004, when he was incarcerated at the

[1] Because Richard Schneiter has replaced Gerald Berge as Warden at the Secure Program Facility, I am substituting him as a defendant solely with respect to plaintiff's claim for injunctive relief concerning the facility's publications ban for inmates on levels 1 and 2. Fed. R. Civ. P. 25(d)(1). Plaintiff's claim for monetary relief continues against Berge.

Wisconsin Secure Program Facility in Boscobel, Wisconsin. He named as defendants Matthew Frank, Secretary of the Department of Corrections; Gerald Berge, who was warden at the Secure Program Facility at the time; and Vicki Sebastian, who was the facility's program director. He alleged that the defendants violated the First Amendment and the Wisconsin Administrative Code by denying him access to newspapers pursuant to the facility's "level system." He alleged further that defendants violated the Wisconsin Administrative Code by failing to provide him notices of non-delivery and by failing to save his newspapers until after his grievances concerning non-delivery were resolved. Finally, plaintiff alleged that the facility violated the First Amendment and the Wisconsin constitution by making available to inmates a "Christian" television channel.

In an order dated March 4, 2004, the circuit court screened plaintiff's complaint pursuant to Wis. Stat. § 802.05(4) and dismissed it for failure to state a claim. Judgment dismissing the case was entered on March 26, 2004. On April 6, 2004, plaintiff filed a motion for reconsideration. On May 10, 2004, while the motion for reconsideration was still under advisement, plaintiff filed a motion for leave to file "a First Amended and Supplemented Complaint." On June 1, 2004, plaintiff filed a notice of appeal concerning the circuit court's dismissal of his original complaint. The Wisconsin Court of Appeals reversed the circuit court's decision in an unpublished opinion dated August 25, 2005. State ex rel. West v. Frank, 2005 WI App 214, 287 Wis.2d 507, 704 N.W.2d 423.

When the case returned to the circuit court, it appears that the parties agreed that the case would proceed with the amended complaint serving as the operative pleading. Defendants were served with copies of plaintiff's amended complaint on April 30, May 1 and May 2, 2006, respectively. They filed a timely notice of removal in this court on May 16, 2006. 28 U.S.C. § 1446(b).

Defendants have filed a motion asking the court to screen plaintiff's amended complaint pursuant to 28 U.S.C. § 1915A. Plaintiff has filed a motion opposing screening by this court and requesting that his case be remanded to state court. He argues that the Wisconsin Court of Appeals has determined that his original complaint stated a claim and that defendants are not entitled to "a second kick at the can" in this court. Plaintiff is incorrect on two points. First, this case was properly removed to federal court. A case is removable if it falls within the original jurisdiction of the federal courts. 28 U.S.C. § 1441(a). Plaintiff's amended complaint satisfies this standard because he alleges that defendants violated his rights under the federal Constitution. Cases that arise under federal law are within the original jurisdiction of the federal courts. 28 U.S.C. § 1331. Second, defendants are not asking for a "second kick at the can" in this court. There is no indication in the record that the circuit court screened plaintiff's amended complaint before defendants removed the case. This court owes no deference to the decision of the Wisconsin Court of Appeals because that decision concerned only plaintiff's original complaint. Moreover, this

court has an independent obligation to screen any complaint filed by a prisoner seeking redress from a governmental entity or employee. § 1915A. Accordingly, I will deny plaintiff's motion to remand and grant defendants' motion for screening.

In screening the amended complaint, the court must read the allegations generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, because plaintiff is a prisoner, § 1915A requires dismissal of the amended complaint if plaintiff's allegations are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. (The question of assessing a partial filing fee against plaintiff does not arise in a removed case. As the removing party, defendants are obligated to pay the fee.)

From the allegations in the amended complaint, I understand plaintiff to be alleging the following.

ALLEGATIONS OF FACT

A. Parties

At the time he filed his amended complaint, plaintiff William West was incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections. At the time plaintiff filed his amended complaint, defendant Gerald Berge was Warden at the Wisconsin Secure

Program Facility and defendant Vicki Sebastian was the facility's program director.

B. Denial of Publications

Before being transferred to the Secure Program Facility, plaintiff was incarcerated at the Kettle Moraine Correctional Institution. On July 26, 2002, plaintiff was convicted of a disciplinary infraction. His security classification was changed and he was placed in segregation. On August 7, 2002, staff at Kettle Moraine allowed plaintiff to purchase a subscription to USA Today. Plaintiff received his newspaper when he was detained in segregation at Kettle Moraine. At some point in August or September 2002, plaintiff was transferred to the Secure Program Facility.

At the Secure Program Facility, defendants Frank and Berge have enacted a policy whereby inmates assigned to Levels 1 and 2 are not allowed to receive publications. On September 26, 2002, plaintiff was denied two copies of USA Today by correctional officer Aspenson, who did not give plaintiff a notice of non-delivery as required by Wis. Admin. Code § DOC 309.05(3). Plaintiff filed an inmate complaint and asked that his publications be held until the complaint was resolved. On October 30, 2002, plaintiff learned that facility staff were not saving his copies of USA Today as he had requested. Instead, they were discarding them without giving plaintiff notices of non-delivery. On one occasion, plaintiff observed officer Laxton discard a USA Today publication. He asked officer Laxton

to save his publications until his inmate complaint was resolved and Laxton told him he "should not even be allowed a subscription." On November 4, 2002, plaintiff's inmate complaint was resolved against him and in favor of the policy of denying publications. Plaintiff was awarded $0.43 for the newspapers that had been withheld and destroyed. Plaintiff learned from officer Wetter that none of his publications had been saved pending the resolution of his inmate complaint. Plaintiff was denied 51 publications from September 24, 2002 until December 4, 2002.

Defendants Frank, Berge and Sebastian have enacted a policy at the Secure Program Facility whereby inmates may store books and other publications they are not allowed to possess in the facility's property room. They have a practice of allowing inmates not allowed certain books and magazines to place those items in a personal unit property tote, but plaintiff was not afforded this opportunity with his newspapers. Defendants did not provide plaintiff any "due process protections" in denying him his publications but have provided other inmates "due process protections" when denying them publications.

C. Christian Television Programming

Defendants provide televisions to inmates on Level 1 at the facility. Plaintiff received a television on October 16, 2002. The Secure Program Facility purchases television broadcasting services through a private satellite program provider. Defendants "censor" the

broadcasts that are available to inmates. They "force a perpetual Christian broadcast" on plaintiff and "disallow[] choice television." Defendants do not provide any other religious television programming for inmates and do not provide access to local news programs.

DISCUSSION

A. First Amendment

1. Denial of newspapers

I understand plaintiff to allege that his First Amendment rights were violated when prison officials at the Secure Program Facility denied him copies of USA Today, a newspaper for which he had purchased a subscription. Plaintiff alleges that he was denied copies of USA Today pursuant to the Secure Program Facility's "level system." Plaintiff alleges that respondents Frank and Berge have implemented a policy whereby inmates on levels 1 and 2 are prohibited from receiving publications. This policy is part of the level system.

Prison actions that affect an inmate's receipt of non-legal mail must be "reasonably related to legitimate penological interests." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989). In Turner v. Safely, 482 U.S. 78 (1987), the Supreme Court set out four factors to be used in determining the reasonableness of prison regulations. Those factors are: 1) whether a "valid, rational connection" between the regulation and a legitimate, neutral 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 government's legitimate interest. Id. at 89-90.

On many occasions, I have denied inmates at the Secure Program Facility leave to proceed on claims challenging various aspects of the level system, including its restrictions on reading materials. However, two recent cases have convinced me that it is not appropriate to dismiss these claims at this early stage. The first is Lindell v. Frank, 377 F.3d 655 (7th Cir. 2004), in which the court of appeals held that this court erred in denying an inmate at the Secure Program Facility leave to proceed on a claim challenging the facility's policy of allowing inmates to have only five postcards in their cells at once. The court of appeals stated that this court had erred in presuming that the seizure of the inmate's postcards was related to the legitimate interest in prison security. Id. at 657-58. The court noted further that there was a question of fact as to whether a policy limiting inmates to five postcards existed because the inmate had alleged that the seizure of his postcards was arbitrary. Id. at 658.

In the present case, plaintiff does not contend that the denial of his newspapers was arbitrary in the sense that it was not done according to a rule or regulation of the facility. To the contrary, he alleges that respondents Berge and Frank have enacted a policy that denies publications to inmates on levels 1 and 2. The question, then, is whether that policy

is reasonably related to a legitimate penological interest. I have learned from other cases litigated in this court that the purpose of level system policies is to provide inmates with an incentive for rehabilitation by offering rewards for improved behavior. However, it would be inappropriate at this point to conclude that the publication policy bears a reasonable relation to the facility's interest in rehabilitation without giving plaintiff the opportunity to show the lack of a reasonable relationship.

This conclusion is buttressed by a recent Supreme Court decision, Beard v. Banks, --- S. Ct. ----, 2006 WL 1749604 (June 28, 2006). In that case, an inmate brought a First Amendment challenge to a Pennsylvania prison policy that denied newspapers and magazines to inmates who, because of behavioral problems, are housed in a long-term segregation unit. The Court held that summary judgment in favor of the policy's validity was appropriate because prison officials had presented facts to the district court that established several justifications for the policy, including "that of providing increased incentives for better prison behavior," id. at *7, and had established a reasonable relation between the policy and a legitimate penological objective, id. at *9. Also, the Court emphasized that the inmate had not introduced any evidence showing the existence of a genuine issue for trial, as required by Fed. R. Civ. P. 56(e). However, the Court left open the possibility that a challenge to a complete ban on publications might succeed if a prisoner could "marshal substantial evidence that, given the importance of the interest, the [p]olicy

is not a reasonable one." Id. at *10.

Lindell and Beard indicate that the proper stage to resolve the question whether the facility's ban on publications violates the First Amendment is the summary judgment stage. Therefore, I will allow plaintiff to proceed on this claim.

2. Christian television programming

Plaintiff alleges that defendants have violated the establishment clause of the First Amendment because they have "forced" a "perpetual Christian broadcast" on him. He alleges that the facility purchases television programming for inmates through a private satellite provider and that one of the channels offered broadcasts Christian programming. I have already determined that the facility is not violating the establishment clause by making Christian programming available to inmates. Henderson v. Berge, 362 F. Supp. 2d 1030 (W.D. Wis. 2005). In Henderson, I granted summary judgment to prison officials on a claim identical to the one asserted by plaintiff in the present case. The facts adduced in that case showed that the facility merely made the programming available to inmates. It did not require them to watch it or participate in any other religious activities to progress through the level system. In addition, the facility offers non-religious television programming to inmates. Finally, inmates have the ability to change the channels on their televisions or turn them off. Id. at 1032. It would serve no purpose to allow plaintiff to re-

litigate this claim. Therefore, I will deny him leave to proceed on it.

B. Equal Protection

Although plaintiff does not identify defendants' failure to save his newspapers as a separate count in his amended complaint, plaintiff alleges that this failure violated his right to equal protection of the laws. According to plaintiff, his newspapers were not saved pending the outcome of his inmate complaint regarding their non-delivery but other inmates at the facility are allowed to retain property they cannot have in their cells in the facility's property room. Plaintiff alleges further that he asked prison officials at least twice to save his newspapers to no avail.

Although lawful imprisonment deprives prisoners of many rights, it does not strip them of the right to equal protection of the laws. Williams v. Lane, 851 F.2d 867, 881 (7th Cir. 1990) ("Prisoners do not surrender their rights to equal protection at the prison gate."). "In the prison context, the Equal Protection Clause of the Fourteenth Amendment requires inmates to be treated equally, unless unequal treatment bears a rational relation to a legitimate penal interest." May v. Sheahan, 226 F.3d 876, 882 (7th Cir. 2000). Plaintiff's allegations indicate that his newspapers may have been handled differently than the property of other inmates. Because no reason for the difference in treatment is apparent, I will allow plaintiff to proceed on this claim. However, plaintiff should be aware that to prevail on this

claim, he will have to show that defendants were personally involved in the destruction of his newspapers, that is, that there is "some causal connection or affirmative link" between their destruction and defendants. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Also, plaintiff will have to prove that his property was intentionally handled differently from that of other inmates. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982) (plaintiff must show intentional or purposeful discrimination to establish equal protection violation).

C. Due Process

Plaintiff contends that he had a property interest in his newspapers that defendants deprived him of without "due process protections." This allegation is insufficient to state a due process claim, however. In the prison context, an inmate is not deprived of property without due process unless the state fails to make available a suitable post-deprivation remedy. Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). As long as state remedies are available, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. Plaintiff has not alleged that there is no complaint system available to inmates at the facility. On the contrary, he alleges that he filed an inmate complaint which prison officials rejected. However, they did reimburse him for his newspapers in the amount of $0.43. This indicates that a remedy was available to plaintiff after his newspapers were destroyed. Plaintiff's dissatisfaction with the remedy he

received does not furnish the basis for a due process claim. Accordingly, I will deny him leave to proceed on this claim.

D. State Law Claims

Plaintiff alleges several violations of state law. First, he alleges that the Secure Program Facility's policy of denying publications to inmates on levels 1 and 2 is invalid because it was not the product of a formal rule-making process. He contends that publications may be denied only for the reasons set out in Wis. Admin. Code § DOC 309.05. Plaintiff is incorrect. Policies and regulations applicable only to the Secure Program Facility need not be adopted through a formal rule-making process to be enforceable. Also, plaintiff is simply incorrect in his belief that publications may be rejected only for the reasons set out in § DOC 309.05. The facility's internal regulations may lawfully furnish additional grounds for denying inmates publications. In fact, the Wisconsin Administrative Code contemplates that the warden at each institution will promulgate regulations governing inmate property at that institution. Wis. Admin. Code § DOC 30.20(1) (inmates may possess property "subject to this section and the policies and procedures established under this section by the administrator *or by the warden*, relating to the acquisition, possession, use and disposal of inmate property") (emphasis added).

Second, plaintiff contends that officer Aspenson failed to give him a notice of non-

delivery, as required by § DOC 309.05(3). That provision states that an inmate must be notified when a publication is not delivered for one of the reasons set out in § DOC 309.04(2). Plaintiff's newspapers were not withheld because they violated § DOC 309.04(2); they were withheld because plaintiff was on level 1.

ORDER

IT IS ORDERED that

1. The motion for screening filed by defendants Matthew Frank, Gerald Berge and Vicki Sebastian is GRANTED;

2. Plaintiff William West's motion to remand is DENIED;

3. Plaintiff is GRANTED leave to proceed on the following claims:

   a. Defendants violated plaintiff's rights under the First Amendment by denying him newspapers pursuant to a policy at the Secure Program Facility that denies publications to inmates on levels 1 and 2; and

   b. Defendants violated plaintiff's rights to equal protection of the laws by destroying the newspapers withheld from him;

4. Plaintiff is DENIED leave to proceed on the following claims:

   a. Defendants violated the establishment clause of the First Amendment by making Christian television programming available to him; and

b. Defendants denied him due process of law before destroying his newspapers;

c. The Secure Program Facility's policy of denying publications to inmates on levels 1 and 2 is invalid because it was not adopted through Wisconsin's formal rule-making process; and

d. Plaintiff did not receive notices of non-delivery for his withheld newspapers.

5. Defendants may have until August 7, 2006 in which to file their answer.

Entered this 17th day of July, 2006.

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