IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RONALD STEWART,

OPINION and ORDER

Plaintiff,

10-cv-409-bbc

v.

JOHN EASTERDAY, Administrator,
State of Wisconsin;
STEVE WATTERS, Former Director,
Sand Ridge Secure Treatment Center;
and DEB McCULLOCH, Director,
Sand Ridge Secure Treatment Center;

Defendants.

- -

Beginning in July 2005, patients at Sand Ridge Secure Treatment Center were no longer allowed to purchase new video games or video game systems. Pro se plaintiff Ronald Stewart is a patient at the center, where he has been civilly committed since 2002 as a "sexually violent person" under Chapter 980 of the Wisconsin Statutes. He is proceeding on claims that defendants John Easterday, Steve Watters and Deb McCulloch are violating his rights under the First Amendment and Wis. Stat. § 51.61 by prohibiting him from owning video games and video game systems.

Defendants' motion for summary judgment is ready for decision. They argue that (1) the First Amendment is not implicated by the prohibition on video games and video game systems; (2) the prohibition is reasonably related to legitimate institutional interests; and (3) they are entitled to qualified immunity with respect to plaintiff's claim for money damages. Neither side has proposed an argument on plaintiff's state law claim.

I conclude that defendants are entitled to summary judgment on plaintiff's federal claim because the ban on video games is reasonably related to defendants' interests in preventing patients from both focusing on playing video games to the detriment of their treatment needs and using video games to groom potential victims. This makes it unnecessary to decide whether defendants have qualified immunity. Under 28 U.S.C. § 1367(c)(3), I decline to exercise supplemental jurisdiction over plaintiff's state law claim.

OPINION

Two preliminary matters require resolution. First, much of plaintiff's summary judgment brief is devoted to arguments about the due process clause and the equal protection clause. I have disregarded these arguments. When I screened plaintiff's amended complaint as required by 28 U.S.C. § 1915, I did not allow plaintiff to proceed on a claim under either clause and plaintiff did not seek reconsideration of that decision.

Second, plaintiff has filed a motion to "strike" many portions of the affidavits

submitted by defendants on the ground that they are "irrelevant and immaterial," do not support defendants' proposed findings of fact or are inadmissible because they are conclusory. Dkt. #72. Unfortunately, plaintiff has not heeded the repeated admonishments by the Court of Appeals for the Seventh Circuit that motions to "strike" are not the appropriate vehicle for challenging another party's submissions. E.g., Wiesmueller v. Kosobucki, 547 F.3d 740, 741 (7th Cir. 2008); Redwood v. Dobson, 476 F.3d 462, 470-71 (7th Cir. 2007); Custom Vehicles, Inc. v. Forest River, Inc., 464 F.3d 725 (7th Cir. 2006). "If [a party] believe[s] any of the averments in [an] affidavit [a]re inadmissible, the proper response [i]s not to move to strike the affidavits themselves, but to dispute each of the facts proposed by [the other party] that relied on those affidavits, on the ground that the proposed facts [a]re not supported by admissible evidence." Stocker v. Kalahari Development, LLC, 2007 WL 1140246, *1 (W.D. Wis. 2007). In this case, plaintiff repeated his objections in his responses to defendants' proposed findings of fact, so his motion serves no purpose. I am denying it as unnecessary.

Defendants' initial argument on plaintiff's free speech claim is that the First Amendment simply is not implicated by the prohibition on video games and video games systems. In the early days of video games, some district courts questioned whether they were protected by the First Amendment, e.g., Malden Amusement Co. v. City of Malden, 582 F. Supp. 297 (D. Mass. 1983); America's Best Family Showplace Corp. v. City of New York,

536 F. Supp. 170 (E.D.N.Y.1982), but that view has long been discredited. Entertainment Software Association v. Blagojevich, 469 F.3d 641, 645-46 (7th Cir. 2006) (describing restriction on video games as "a content-based restriction on speech" and applying strict scrutiny); American Amusement Machine Association v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001) (relying on First Amendment to grant preliminary injunction against enforcement of law restricting minors' access to violent video games). The Supreme Court resolved any doubt when it stated recently that "video games qualify for First Amendment protection." Brown v. Entertainment Merchants Association, 131 S. Ct. 2729, 2733 (2011). The Court explained:

> The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510 (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears.

Id. at 2733-34.

Defendants do not argue directly that video games are outside the purview of the First Amendment, but they say that patients and prisoners do not have a right to possess them. To the extent defendants mean to argue that video games are categorically unprotected in the institutional setting, I disagree. Although certain kinds of speech such as obscenity and threats are not protected by the First Amendment, Brown, 131 S. Ct. at 2733, those exceptions apply to everyone, not just certain groups. If speech is protected generally, the *standard of review* may change depending on the context of the speech, including the type of speaker or the setting. E,g,, Borough of Duryea, Pennsylvania v. Guarnieri, 131 S. Ct. 2488, 2494 (2011) ("Restraints [on the First Amendment rights of public employees] are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest."); Morse v. Frederick, 551 U.S. 393, 397 (2007) ("[T]he rights of students must be applied in light of the special characteristics of the school environment."); Turner v. Safley, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."). However, even when the context of the speech requires greater deference to the government, the court still must determine whether restrictions on that speech are adequately justified. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)("[D]eference does not imply abandonment or abdication of judicial review."). The

burden on the government may be lighter with respect to some groups, but this does not mean that the court is relieved of its duty to apply the appropriate standard to the restriction at issue, whether the speech at issue is in a publication or another medium. E.g., Wolf v. Ashcroft, 297 F.3d 305, 307 (3d Cir. 2002) (applying Turner standard to prison restriction on movies rated "R" and "NC-17"); Belton v. Singer, 2011 WL 2690595, *12 (D.N.J. 2011) (applying Turner standard to First Amendment claim brought by civilly committed sex offender regarding restrictions on electronic devices, including video game systems); Golden v. McCaughtry, 937 F. Supp. 818 (E.D. Wis. 1996) (applying Turner standard to prison restriction on music that advocates violence).

In the alternative, defendants argue that the appropriate standard of review is whether the restriction is reasonably related to a legitimate institutional interest. This is the standard applied by Magistrate Judge Stephen Crocker in Hedgespeth v. Bartow, Case No. 09-cv-246-slc, 2010 WL 2990897, *7 (W.D. Wis. Jul. 27, 2010), another case in which a patient challenged the ban on video games and video game systems. The magistrate judge noted that the Supreme Court had adopted a similar standard with respect to pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 538-539 (1979) ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"). In addition, he cited Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003), in which the court relied on Bell for the proposition that a

civilly committed sex offender "may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others, even though they may not be punished." Numerous other courts have concluded that the relevant standard for First Amendment claims brought by civilly committed detainees is whether the restriction is reasonably related to a legitimate interest. E.g., Rivera v. Rogers, 224 Fed. Appx. 148, 150-51, 2007 WL 934413, *2 (3d Cir. 2007); Belton, 2011 WL 2690595, at *12; Semler v. Ludeman, 2010 WL 145275, *9–16 (D. Minn. 2010); Hunter v. Risenck, 2008 WL 725033, *1 (E.D. Wash. 2008); Bradford v. Meade, 2008 WL 510387, *2 (E.D. Mo. 2008); Willis v. Smith, 2005 WL 550528, *10 (N.D. Iowa 2005); Zigmund v. Foster, 106 F. Supp. 2d 352, 359 (D. Conn. 2000); Martyr v. Mazur-Hart, 789 F. Supp. 1081, 1085 (D. Or. 1992).

It is true that the standard applied in Hedgespeth and the other cases is similar to the standard applied to prison regulations under Turner. Although one could argue that restrictions on patients should receive greater scrutiny than restrictions on prisoners, one could make the same argument with respect to pretrial detainees. Further, "[a]lthough an involuntarily committed patient of a state hospital is not a prisoner per se, his confinement is subject to the same safety and security concerns as that of a prisoner." Revels v. Vincenz, 382 F.3d 870, 874 (8th Cir. 2004). In other words, greater deference is required in *any* institutionalized setting, not just those involving convicted prisoners, so that staff can perform their jobs safely and effectively. Banks v. Ludeman, 2010 WL 4822892, *9 (D.

Minn. 2010). Like "[r]unning a prison," running a facility for civilly committed patients "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Turner, 482 U.S. at 85. Finally, although the Court of Appeals for the Seventh Circuit has stated that patients and pretrial detainees are entitled to "at least" the same constitutional protection as prisoners, Henderson v. Sheahan, 196 F.3d 839, 854 (7th Cir. 1999); Payne v. Churchich, 161 F.3d 1030, 1040 (7th Cir.1998), generally the court has declined to make a distinction between prisoners and others in custody in the context of determining the appropriate standard of review. E.g., Williams v. Rodriguez, 509 F.3d 392, 401 (7th Cir. 2007) ("Although the Eighth Amendment only applies to convicted prisoners, this court has previously stated that the same standard applies to pretrial detainees under the Fourteenth Amendment's due process clause."); Thielman v. Leean, 282 F.3d 478, 483-84 (7th Cir. 2002) ("[E]ven though [a 980 patient] is not formally a prisoner, his confinement has deprived him (legally) of a substantial measure of his physical liberty").

Plaintiff assumes in his brief that strict scrutiny applies to his claim, but he cites no authority in support of that view. He cites Davis v. Balson, 461 F. Supp. 842, 864-65 (D.C. Ohio 1978), for the proposition that defendants have the burden "to demonstrate that restrictions imposed on patients' First Amendment rights are in furtherance of [a] substantial interest of administration and are no greater than essential to further that interest," Plt.'s Br.,

dkt. #71, at 39, but in the portion of the opinion plaintiff cites, the court was considering the validity of a restriction on outgoing mail, which is governed by a different standard from those applicable to other limitations on speech. Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989).

Accordingly, I conclude that the appropriate standard is whether the restriction on video games and video game systems is reasonably related to a legitimate institutional interest. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the plaintiff; what impact accommodation of the right will have on administration; and whether there are other ways that officials can achieve the same goals without encroaching on the right. Turner, 482 U.S. at 89.

Defendants identify several reasons for the ban: (1) video games are a tool that offenders can use to groom victims; (2) in the past, patients have become "obsess[ed]" with video games to the point that they were "not able to function in treatment," Sinclair Aff. ¶ 18, dkt. #66; (3) video games may foster isolation at the expense of community involvement within the facility; and (4) video games and game systems may present various security concerns, such as the risk that patients will bribe or coerce others to play their games.

In Hedgespeth, the defendants asserted the same interests and the magistrate judge

concluded that they were legitimate and rationally related to the ban. In addition, he concluded that the plaintiff had many alternatives for exercising his right to free speech, that allowing possession of video games "would interfere with the efforts to treat the patients" and that the plaintiff had failed to identify any less restrictive ways that the defendants could achieve the same goals. See also Belton, 2011 WL 2690595, at *12-13 (rejecting First Amendment claim against policy banning civilly committed patients from possessing video games); Semler, 2010 WL 145275, at *9–16 (same).

Plaintiff does not challenge the legitimacy of these interests and he does not challenge the policy on the ground that it is underinclusive because it allows patients to keep any video games or video game systems if they acquired them before 2005. The court of appeals has suggested in some cases that inconsistent applications of a rule may show that the rule is not a reasonable one. E.g., George v. Smith, 507 F.3d 605 (7th Cir. 2007) ("A prison could not invoke security as a reason to exclude publications that prisoners may read in the library, and which they may copy out for use in their cells."). However, in other cases, the court has stated that some inconsistency is permitted. Mays v. Springborn, 575 F.3d 643, 649 (7th Cir. 2009) ("Mays's only argument that the prison's censorship was unreasonable is that he had access to other writings and to television shows about prison riots, but the deference we afford prisons permits such seeming inconsistences."); Azeez v. Fairman, 795 F.2d 1296, 1299 (7th Cir. 1986) ("The failure to enforce a rule consistently does not make the rule

unconstitutional."). See also Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("Nor must a State choose between attacking every aspect of a problem or not attacking the problem at all.") (internal quotations omitted). Because plaintiff did not raise this issue, defendants did not have occasion to articulate any reasons for the difference, so I do not consider it.

Plaintiff does challenge defendants' reasons on other grounds, but they are not persuasive. With respect to defendants' concern that video games could be used as a tool to groom victims, plaintiff does not argue that it is irrational to conclude that video games could be used this way. In his response to defendants' proposed findings of fact, he objects to the fact on the ground that it is "irrelevant and immaterial," but he does not explain that objection. Because the fact relates to defendants' reasons for enforcing the ban, it is obviously relevant to plaintiff's claim.

In his brief, plaintiff takes a different tack, but it is equally unsuccessful. First, he suggests that defendants are relying on a "stereotype." To the extent he is arguing that defendants' concern does not apply to *him*, this is a repeat of an argument the plaintiff made in Hedgespeth and was rejected by the magistrate judge: "[D]efendants have a legitimate interest in making uniform rules regarding property ownership and media restrictions to prevent discord, extortion and unauthorized property exchanges among patients. Hedgespeth, 2010 WL 2990897, at *8. I agree. Further, I have stated that "officials are not required to create a separate set of rules for plaintiff simply because he represents that

he is trustworthy." Akright v. Hepp, 2010 WL 4294314, *6 (W.D. Wis. 2010). Plaintiff does not identify an easy way that defendants could determine which patients are likely to misuse video games in the future and which ones are not.

Second, plaintiff argues that video games can aid in rehabilitation in various ways, such as "teaching [patients] how to think and solve problems" and "reshap[ing] [patients'] concept of pleasure in a socially positive and productive manner." Plt.'s Br., dkt. #71, at 33. But even if plaintiff is correct that video games may have benefits for sexually violent persons, that would not undermine defendants' conclusion that the games could have harmful effects as well or that the negatives outweigh the positives. The Supreme Court has upheld restrictions in institutional settings in other instances in which the plaintiffs argued that the banned behavior had rehabilitative effects. E.g., Beard v. Banks, 548 U.S. 521, 534 (2006) (upholding ban on news). Even more on point is Singer v. Raemisch, 593 F.3d 529, 537 (7th Cir. 2010), in which the court rejected an argument that role-playing games "can have positive rehabilitative effects on prisoners":

> Singer's evidence again misses the mark, however. While Cardwell and his other affiants, including a literacy tutor and a role-playing game analyst, testified to a positive relationship between D & D and rehabilitation, none disputed or even acknowledged the prison officials' assertions that there are valid reasons to fear a relationship running in the opposite direction.

It is the same in this case. Regardless of the ways that patients *could* use video games to better themselves, plaintiff fails to challenge defendants' "assertions that there are valid

reasons to fear a relationship running in the opposite direction."

With respect to defendants' concern that video games could inhibit treatment because patients may devote too much time to the games and become antisocial, plaintiff objects to this proposed fact on the ground that the "evidentiary materials cited do not sufficiently establish" it. Plaintiff's reasons for objecting to the fact are unclear because he admits that video games are "intensive and time consuming." Plt.'s Br., dkt. #71, at 40. In any event, his objection is unfounded because defendants rely on the affidavit of the facility's associate treatment director, who avers that she is personally aware of patients who have had this problem.

In his brief, plaintiff argues again that defendants should not restrict the rights of "a majority of . . . patients who have not misused video games," id., but, as I noted above, defendants do not have to show that their concerns apply to each prisoner. In Singer, 593 F.3d at 537, the court upheld a ban on role-playing games while crediting the defendants' concerns that "games like [Dungeons & Dragons] can impede rehabilitation, lead to escapist tendencies, or result in more dire consequences," even though the officials not only failed to adduce any evidence that the plaintiffs had misused role-playing games, but also could not point to *any* examples in which they encountered problems in the past. It was enough that defendants had a rational fear of potential misuse in the future.

With respect to defendants' asserted security concerns, plaintiff cites an affidavit from

a supervising officer at the facility, who avers that "[t]here are minimal security concerns with the possession of video games and game systems within secure institutions. [P]atients currently possess video games and systems thus the buying of new games is more of a treatment concern." Dkt. #76-13, exh. 126. Defendants do not dispute this proposed fact, dkt. #85, at ¶ 25, so I must accept it as true. However, even if I assume that video games do not present a serious security concern, that does not undermine defendants' other concerns regarding potential adverse effects on patients' treatment.

I agree with Magistrate Judge Crocker that the remaining factors favor defendants as well. Plaintiff does not deny that he retains many alternatives to exercise his First Amendment rights, so I need not consider that factor. With respect to the third and fourth factors, plaintiff outlines a proposed policy under which defendants would allow patients to purchase games that are rated "E for everyone and "T" for teen. In addition, patients' game privileges could be restricted if they missed appointments because they were playing games, if they used games to "exploit" another person or if they participated in the "unauthorized transfer of gaming products." Finally, plaintiff says that patients who suffer from "sleep deprivation and poor hygiene" because of too much gaming can be referred "for specialized treatment and monitoring." Plt.'s Br., dkt. #71, at 44-45.

Plaintiff's suggestion about the rating system is a red herring because defendants do not rely on the potential difficulty of screening the content of the video games as a

justification for banning them. Plaintiff's other suggestions could be one way to address problems that arise from possessing video games, but plaintiff has not shown that they "go so far toward accommodating the asserted right with so little cost to penological goals that they meet Turner's high standard." Overton v. Bazzetta, 539 U.S. 126, 136 (2003).

To begin with, plaintiff has failed to show that it would be feasible administratively to track the video game usage of each patient and to determine whether a particular patient is misusing the games in some way. Further, under plaintiff's proposed policy, defendants are required to wait until a problem has occurred before they can do anything about it, but that is not the law. Jackson v. Raemisch, 726 F. Supp. 2d 991, 1003 (W.D. Wis. 2010) ("[P]rison officials do not have to rely on past problems to justify a rule. Rather, they are entitled to 'anticipate security problems' before they occur.") (quoting Turner, 482 U.S. at 89).

It is clear from plaintiff's summary judgment materials that he believes the video game ban is nothing but an attempt by administrators to make patients' lives as miserable as possible by taking away one of the few enjoyable distractions that they have. However, defendants have articulated rational, legitimate concerns about the potential negative effects that video games could have on patient treatment. Plaintiff may be correct that video games are beneficial for *him* and even for most patients, but that is not enough to prevail on this claim. The Supreme Court and the court of appeals have made it clear that the role of courts

in reviewing restrictions on institutionalized persons is a limited one. I am obligated to "accord substantial deference to the professional judgment of [institution] administrators, who bear a significant responsibility for defining the legitimate goals of a [facility] and for determining the most appropriate means to accomplish them." Overton, 539 U.S. at 132. Thus, "[p]laintiff's disagreement with defendant[s'] assessment is insufficient to establish that [the ban on video games] was not reasonably related to legitimate penological interests." Van den Bosch v. Raemisch, No. 09-4112, — F.3d —, 2011 WL 4089590, *8 (7th Cir. Sept. 15, 2011). Defendants are entitled to summary judgment on plaintiff's First Amendment claim.

With respect to plaintiff's claim under Wis. Stat. § 51.61, the general rule is that state law claims should be dismissed without prejudice to their refiling in state court if all federal claims are resolved before trial. 28 U.S.C. § 1367(c)(3); Cadleway Properties, Inc. v. Ossian State Bank, 478 F.3d 767 (7th Cir. 2007); Redwood v. Dobson, 476 F.3d 462, 467 (7th Cir. 2007). In this case, the parties do not identify any reason for retaining jurisdiction over the state law claim. In fact, neither side has even argued the merits or lack of merits of the state law claim or even its scope. It would not be a wise use of judicial resources to resolve a claim of unclear scope without developed arguments from the parties. Accordingly, I will dismiss this claim without prejudice to plaintiff's refiling it in state court.

ORDER

IT IS ORDERED that

1. Plaintiff Ronald Stewart's motion to strike, dkt. #72, is DENIED.

2. The motion for summary judgment filed by defendants Deb McCulloch, Steve Watters and John Easterday, dkt. #62, is GRANTED with respect to plaintiff's First Amendment claim.

3. I decline to exercise supplemental jurisdiction over plaintiff's state law claim. That claim is DISMISSED WITHOUT PREJUDICE to plaintiff's refiling it in state court.

4. The clerk of court is directed to enter judgment accordingly.

Entered this 19th day of September, 2011.

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