IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SAMUEL UPTHEGROVE,

ORDER

Plaintiff,

10-cv-469-slc[1]

v.

ALLEN PULVER,

Defendant.

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Plaintiff Samuel Upthegrove has filed a complaint under 42 U.S.C. § 1983 in which he contends that defendant Allen Pulver violated his right to free speech under the First Amendment by refusing to deliver two catalogs plaintiff ordered from outside the Columbia Correctional Institution, where plaintiff is incarcerated. Plaintiff seeks nominal, compensatory and punitive damages. In a previous order, dkt. #4, I concluded that plaintiff was indigent and assessed an initial partial payment in accordance with 28 U.S.C. § 1915(b)(1), which the court has received. Because plaintiff is a prisoner, I am required under the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any claims

[1] I am assuming jurisdiction over the case for the purpose of this order.

that 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. 28 U.S.C. § 1915A.

Having reviewed plaintiff's complaint, I conclude that he has stated a claim upon which relief may be granted under the First Amendment. Plaintiff's claim is governed by the standard set forth in Turner v. Safley, 482 U.S. 78 (1987), which is whether the restriction on the publication is reasonably related to a legitimate penological 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 prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89.

Any censorship of a prisoner's written materials may violate the First Amendment unless there is adequate justification for it. King v. Federal Bureau of Prisons, 415 F.3d 634, 638 (7th Cir. 2005) (reversing dismissal of prisoner's claim that defendants refused to allow plaintiff to purchase book on computer programming because defendants had not shown justification for decision). Because an assessment under Turner requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh

Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same).

I give plaintiff a few words of caution. First, plaintiff should be aware that courts "must accord substantial deference to the professional judgment of prison administrators," Overton v. Bazzetta, 539 U.S. 126, 132 (2003), particularly on matters of security. E.g., Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding regulation that prohibited prisoners from receiving publications "detrimental to the security, good order, or discipline of the institution"); Singer v. Raemisch, 593 F.3d 529 (7th Cir. 2010) (deferring to prison staff's assessment that role playing games were detrimental to security); Koutnik v. Brown, 456 F.3d 777 (7th Cir. 2006) (deferring to prison staff's assessment regarding gang symbols). Thus, if defendant comes forward with "a plausible explanation" for his actions, Singer, 593 F.3d at 536, plaintiff may be required to come forward with evidence showing that it would be unreasonable to believe that the publication poses a threat to security or other legitimate penological interest. Beard v. Banks, 548 U.S. 521 (2006) (concluding that prisoner failed to meet burden on summary judgment, because he failed to "offer any fact-based or expert-based refutation" of defendants' opinion).

On the other hand, defendant should be aware that deference does not imply abdication. Miller El v. Cockrell, 537 U.S. 322, 340 (2003). Even under the deferential Turner standard, courts have a duty to insure that a restriction on the constitutional rights of prisoners is not an exaggerated response to legitimate concerns. As the Supreme Court held recently in Beard, 548 U.S at 535, "Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."

In his complaint, plaintiff alleges that defendant violated a prison policy when he refused to deliver the catalogs. It is not clear whether plaintiff intends to bring a separate claim about that alleged violation or whether the allegation serves as background information. In any event, plaintiff cannot sue defendant for damages under a prison policy because only the legislature can create a cause of action. Kranzush v. Badger State Mutual Insurance Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature). Even if the prison policy would serve as a basis for injunctive relief through a writ of certiorari, Outagamie County v. Smith, 38 Wis. 2d 24, 34, 155 N.W.2d 639, 645 (1968), principles of sovereign immunity prevent this court from granting that relief. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (holding that state sovereign immunity prohibits federal courts from ordering state officials to conform their conduct to state law).

ORDER

IT IS ORDERED that

1. Plaintiff Samuel Upthegrove may proceed on his claim that defendant Allen Pulver violated his First Amendment rights by refusing to deliver two catalogs plaintiff ordered from outside the prison.

2. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

3. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if the department accepts service on behalf of defendant.

5. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

Entered this 27th day of August, 2010.

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