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

ROY COLLINS,

Plaintiff,

v.

MICHAEL MEISNER, BERGLAND,
L. WOGERNESE, JOHN DOES, and
EDWARD WALL,

Defendants.

OPINION AND ORDER

13-cv-762-wmc

Pro se plaintiff Roy Collins alleges that the defendants (1) violated certain administrative requirements in terminating his prison employment, and (2) violated his First Amendment right to send outgoing mail. Plaintiff filed his complaint in Dane County Circuit Court on September 11, 2013, and defendants timely removed this action pursuant to 28 U.S.C. § 1441 and § 1446, on November 6, 2013. Because Collins is incarcerated at Columbia Correctional Institution ("CCI") and is seeking redress from a governmental employee, the Prison Litigation Reform Act ("PLRA") requires the court to screen his complaint and dismiss any portion that is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. In addition to screening his complaint, the court will also address plaintiff's motion to sever his federal claims and related state law claims from his other state law claim concerning violation of administrative requirements in terminating his employment. (Dkt. #4.)

For the reasons that follow, the court will grant Collins' motion to sever and remand his state law claim against defendants Meisner, Wogernese, Doe and Wall for violating certain provisions in the Wisconsin Administrative Code by failing to properly retain and tag alleged contraband. As for Collins' First Amendment and related state law claims concerning defendants' treatment of outgoing mail, Collins will be allowed to proceed and defendants required to respond.

ALLEGATIONS OF FACT[1]

A. The Parties

All of Plaintiff Roy Collins' claims relate to events occurring at CCI. Defendant Michael Meisner is the Warden of CCI. Defendant Bergland (first name unknown) is a Third Shift Unit Staff Member at CCI. Defendant L. Wogernese (first name also unknown) is a Security Supervisory Staff Member at CCI. Defendant Edward Wall is the current Secretary of the Department of Corrections ("DOC").[2] Finally, the "John Doe" defendant is a staff member within the DOC responsible for making the initial determination to terminate the plaintiff from his job assignment.[3]

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[1] In addressing any *pro se* litigant's complaint, the court must read the allegations of the complaint generously, resolving ambiguities and making reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Collins alleges, and the court assumes for purposes of this screening order, the following facts.

[2] Wall was substituted as a defendant for Gary Hamblin, who was the secretary during the period relevant to Collins' claims.

[3] Collins indicates that he will need discovery to determine the identity of this defendant.

B. Improper Termination from Job Assignment

On September 4, 2010, Collins was informed that his job assignment at the Badger State Industries ("BSI") Print Shop had been terminated. On or about September 19, 2010, Collins received a short note from BSI Print Shop Supervisor Ed Sawyer explaining:

> You were terminated from employment here at the print shop due to security removed you from here for having laminated pornographic material. Found during shakedown. Per security you were terminated.

(Compl. (dkt. #1-2) ¶ 12.) Collins further alleges that (1) John Doe made a determination to terminate his employment and (2) defendant Wogernese approved and authorized that termination.

Collins contends that he was never issued a conduct report for the alleged pornography and was given no opportunity to contest the allegations. Collins alleges that Meisner, Wogernese, Doe and Wall are all aware that staff were required to issue a conduct report for alleged contraband and to properly tag it (rather than destroy it). Collins claims that the staff's failure to do both runs counter to established provisions in the Wisconsin Administrative Code and constitutes negligence.

C. Refusal to Mail Letters

On January 30, 2012, Collins placed an outgoing First Class letter in the institution's mailbox, to be mailed to a female friend incarcerated in a different state. Collins contends that in the letter, he "shared some of his previous personal sexual

experiences." (Compl. (dkt. #1-2) ¶ 25.) Consistent with DOC policy governing inmate-to-inmate mail, Collins left the letter open for staff review of the contents of the letter.

Defendant Bergland determined that Collins' letter constituted "written pornography" in violation of DOC rules and refused to mail it out. (*Id.* at ¶ 26.) Collins contends that the letter neither described sexual behavior in a patently offensive way, nor did it lack educational value. "The sexual content of the letter was no more graphic than the sex scenes permitted in an R-rated movie." (*Id.* at ¶ 28.) Allegedly, contrary to DOC policy requiring staff to submit a notice of non-delivery of mail, Bergland left the letter wedged between the crack of his cell door with a post-it-note explaining that the letter was not permitted.

On or about February 22, 2012, Collins attempted to mail another outgoing First Class letter to a female friend incarcerated in Louisiana. In this letter, "Collins wrote a short fiction love-story/romantic fantasy (which the female friend requested)." (*Id.* at ¶ 32.) On February 23, 2012, Collins found this letter left wedged in a crack of his cell door with a warning slip and post-it note from Bergland indicating that the content of the letter constituted written pornography in violation of DOC rules.[4] Again, in doing so, Collins alleges that Bergland failed to complete a notice of non-delivery of mail as required by DOC regulations.

[4] Collins explains that a "warning slip" is a "written warning to the inmate that future alleged misconduct will result in severe disciplinary action," and that these slips "are kept on record and are utilized by staff to evaluate an inmate's overall conduct." (Compl. (dkt. #1-2) ¶ 34.)

A Unit Manager read the second letter and determined that Bergland erred in refusing to mail it. Although Collins does not allege it expressly, this letter was apparently then mailed. Even so, Collins claims that Meisner "still approved, authorized and permitted" Bergland's conduct, and that Bergland "still continues to assert that it is a violation of DOC rules for inmates to include any kind of sexual conduct in outgoing letters" and "threatened disciplinary action for protected conduct." (*Id.* at ¶¶ 37-38, 40.)

OPINION

I. Motion to Sever and Remand

While defendants properly removed this action pursuant to 28 U.S.C. § 1441 and § 1446 given Collins First Amendment claim with respect to his outgoing mail, plaintiff seeks to remand his state law claims for declaratory judgment and negligence concerning his alleged improper termination. Section 1441(c) provides in pertinent part:

> (c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes--
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> (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
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> (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
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> (2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph

> (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

As far as the court can discern, Collins seeks to bring state law claims that defendants confiscated alleged contraband negligently and in violation of certain provisions of the Wisconsin Administrative Code, for which he was then improperly terminated. Having disavowed any federal claim associated with these allegations (Compl. (dkt. #1-2) ¶¶ 10-23, 44-48), and the court being unable to discern any relationship that would justify the exercise of supplemental jurisdiction, these claims (first and second causes of action) will be severed and remanded to state court as required by § 1441(c)(2).

II. Screening of Claims Concerning Treatment of Outgoing Mail

Collins alleges that defendant Bergland violated his First Amendment rights by (1) refusing to send out his mail, and (2) retaliating against him with threats of disciplinary action. Although prisoners have a First Amendment right to send and receive mail, that right is not unqualified. *See Van den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011); *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999). Moreover, prison officials may inspect mail for contraband. *See Wolff v. McDonnell*, 418 U.S. 539, 575-77 (1974); Wis. Admin. Code § DOC 309.04 (prison personnel may open and inspect incoming and outgoing mail for contraband). Finally, if a prisoner's correspondence is found to contain contraband or matters deemed a threat to institutional safety and security, that piece of mail may not be delivered. *See Koutnik v. Brown*, 456 F.3d 777, 784–86 (7th Cir. 2006)

(upholding an outgoing mail restriction on an inmate attempting to send mail containing gang-related symbols and swastikas); *see also* Wis. Admin. Code § DOC 309.04.

In the case of non-legal, outgoing mail, the court must determine whether the censorship furthers "one or more of the substantial governmental interests of security, order, and rehabilitation" and is "no greater than . . . necessary or essential to the protection of the particular governmental interest involved." *See Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

While the state has an interest in prohibiting incoming and outgoing mail containing pornography, *see, e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678, 685 (7th Cir. 2005) ("Prison officials in Wisconsin may not deliver mail that falls into any of several prohibited categories, including pornography."), Collins alleges that the letters did not constitute pornography. *See* Wis. Admin. Code § DOC 309.02(16) (defining written materials "pornography" if it: "1. Appeals to the prurient interest. 2. Describes human sexual behavior in a patently offensive way. [and] 3. Lacks serious literary, artistic, political, educational, or scientific value.").

Construing the allegations in favor of plaintiff -- as the court is required to do at the pleading stage -- Collins will be granted leave to proceed on his First Amendment claim against defendant Bergland for refusing to mail two letters that purportedly contained pornography, but in fact did not. While Collins may proceed on this claim, the court notes that "courts are required to give considerable deference to prison officials . . . in regulat[ing] relations between prisoners and the outside world." *Lindell v. McCaughtry*, No. 01-C-209-C, 2003 WL 23218012, at *6 (W.D. Wis. Oct. 7, 2003)

(citing *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989)); *see also Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1075 (W.D. Wis. 2000).

In addition to this claim arising under the United States Constitution, Collins also asserts (1) a claim for declaratory judgment under state law against Meisner and Bergland for blocking his mail without notice required by related DOC policies; and (2) a common law negligence claim based on defendants' alleged breach of ministerial duties to comply with the same DOC policies. While these claims sound in state law, if they sound at all, they are "so related" to the First Amendment claims that this court will exercise its supplemental jurisdiction over them at this time, and will also grant Collins leave to proceed on these two state law claims.

Finally, Collins seeks to bring a claim for First Amendment retaliation against Bergland based on her threats of disciplinary action. To state a claim for retaliation, a plaintiff must identify (1) the constitutionally protected activity in which he was engaged; (2) one or more retaliatory actions taken by each defendant that would deter a person of "ordinary firmness" from engaging in the protected activity; and (3) sufficient facts to make it plausible to infer that the plaintiff's protected activity was one of the reasons defendants took the action they did against him. *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009).

The court has already found that Collins' allegations are sufficient to find that he was engaging in First Amendment-protected conduct in seeking to send outgoing letters. Moreover, Collins has sufficiently alleged that Bergland's threats of disciplinary action were because of -- or at least were motivated by -- his seeking to mail these letters. The

only remaining question, therefore, is whether Collins' allegations that Bergland threatened disciplinary action is sufficient at the pleading stage to allege the second element -- that the retaliatory action would deter one from engaging in protected activity. While the court is skeptical that a threat of disciplinary action would rise to that level, the Seventh Circuit has advised otherwise, at least at the screening stage. *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir.2009). ("The first amendment protects speakers from threats of punishment that are designed to discourage future speech."); *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009) ("[W]hether Bridges's allegations are in fact true or whether the alleged harassment would actually deter a person of ordinary firmness are not questions that we address at the pleading stage."). As such, the court will also grant Collins leave to proceed on his First Amendment retaliation claim against defendant Bergland.

Although Collins' allegations pass muster under the court's lower standard for screening as to defendants Bergland and Meisner, the court expresses no opinion as to whether some or all of his remaining claims will survive a motion to dismiss. Moreover, even if they do, Collins will have to present admissible evidence permitting the court to conclude that defendants' actions constituted a clear violation of the First Amendment. Finally, Collins should be aware that even if able to prove a clear violation of First Amendment rights, his actual damages appear to be nominal at best, making any monetary award unlikely.

ORDER

IT IS ORDERED that:

1) Plaintiff Ray Collins' request to proceed against defendant Bergland on First Amendment claims for interference with his right to send mail and for retaliation is GRANTED. Plaintiff's request to proceed against defendant Bergland and Michael Meisner on related state law declaratory judgment and negligence claims is also GRANTED.

2) Plaintiff's motion to sever and remand the first and second causes of action to state court (dkt. #4) is GRANTED. The clerk of the court is directed to sever these cases and remand them to the Dane County Circuit Court.

3) For the time being, plaintiff must send defendants Bergland and Meisner a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5) 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 defendants. 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 it accepts service for defendants.

Entered this 21st day of August, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge