UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER, Plaintiff, v. SULLIVAN COUNTY, TENNESSEE SULLIVAN COUNTY SHERIFF'S OFFICE, and J. WAYNE ANDERSON, in his official and individual capacity, Defendants.	)	No. 2:13-CV-266

ORDER

The plaintiff, Prison Legal News ("PLN"), filed this section 1983 action and alleged violations under the First and Fourteenth Amendments. It seeks damages and declaratory and injunctive relief. [Doc. 1]. PLN also filed its first Motion for Preliminary Injunction, [Doc. 4], and sought to enjoin the defendants from enforcing their October 14, 2011 postcards-only mail policy and order them "to afford Plaintiff, prisoners, and correspondents due process notice and an opportunity to challenge Defendants' censorship decisions." [Doc. 5 at 2]. The Court denied this motion and held that the First Amendment issue regarding the postcards-only mail policy was moot, [Doc. 24]. Because the Fourteenth Amendment Due Process issue was not properly before the Court, the Court gave the plaintiff ten days to amend its Complaint. The Court further stated that once filed, the plaintiff could move for a preliminary injunction on the Fourteenth Amendment issue. The plaintiff filed such motion, [Doc. 26], and a renewed motion, [Doc. 36].

For the reasons that follow, the motion, [Doc. 26], is GRANTED. The Court will elaborate on those reasons after addressing several preliminary issues.

I. BACKGROUND

The facts of the case are set forth in this Court's March 26, 2015 Order, [Doc. 24]. The additional facts are as follows. The Court decided in the prior Order (1) whether to enjoin the postcards-only portion of Policy I because it violates the First Amendment; and (2) whether to enjoin the jail to establish due process procedures regarding censorship because Policy I's procedures violate the Fourteenth Amendment. The Court determined that the first issue was moot for the defendants changed Policy I to Policy II prior to receiving a summons in the case, effectively and unambiguously abandoning the postcards-only policy after substantial deliberation and sworn statements affirming there would be no return to the postcards-only policy. As to the second issue, the Court allowed the plaintiff ten days to amend its Complaint to properly bring the Fourteenth Amendment issue of Policy II before the Court.

On March 26, 2016, the plaintiff filed a Motion to Amend the Complaint, [Doc. 25], and the instant Motion for Preliminary Injunction, [Doc. 26]. The next day, the Court granted the Motion to Amend, [Doc. 28], and the Amended Complaint was filed, [Doc. 29]. The defendants filed an Answer, [Doc. 30], and a Response to the Motion for Preliminary Injunction, [Doc. 31], on April 10, 2015. In the Answer and Response, the defendants gave notice that they had since changed Policy II and implemented Policy III on April 9, 2015. Policy III addressed the plaintiff's remaining concerns. The plaintiff filed a Reply on April 16, 2015, [Doc. 34], and a supplemental brief on June 4, 2015, [Doc. 35]. Then, on June 19, 2015, the plaintiff filed a "Renewed Motion for Preliminary Injunction," [Doc. 36]. The plaintiff moves for a preliminary injunction as to Policy II essentially on the same grounds previously raised and does not claim

that Policy III violates its constitutional rights. The defendants responded and also moved to strike this motion on June 24, 2015, [Doc. 38].

II. Analysis

First, the plaintiff argues that the defendants' response was filed too late. The defendants respond that the plaintiff's motion was actually filed prematurely and, thus, their response was on time. It is true that the plaintiff filed the motion prior to the Court granting their request to file the Amended Complaint. It is also true that the defendants filed their response to the motion on the 15th day instead of the 14th. However, because of what is commonly referred to as the mailbox rule, the motion is not untimely. *See* Fed. R. Civ. P. 6(d).

Second, the defendants have moved to strike the "Renewed Motion for Preliminary Injunction," [Doc. 36], for it does not comport to the Local Rules and unfairly imposes on the time and resources of the defendants. *See* E.D. Tenn. L.R. 7.1. The plaintiff argues that it is proper because the defendants enacted Policy III, and the defendants have not satisfied their burden in moving to strike. The Court agrees with the defendants. The plaintiff already had the motion properly before the Court. To be sure, the renewed motion raises essentially the same arguments; some sections of the memorandum in support contain exact language that was filed previously. It never argues that Policy III violates its constitutional rights. Instead, it argues that Policy II is not moot because of the filing of Policy III. This issue was already before the Court. The Motion to Strike is GRANTED.

Third, the defendants argue that the plaintiff does not have standing to sue on behalf of prisoners. Similarly, the defendants argue that it is alleged that only two subscriber inmates failed to receive publications to which they subscribed. Thus, they argue that the Sixth Circuit

has not found a constitutional right of a publisher to mail unsolicited publications to prison inmates.

The Amended Complaint only names PLN as the plaintiff. It does, however, give examples of specific inmates and alleges that the specific inmate did not receive certain publications. Further, it alleges that the defendants did not provide the prisoners due process or an opportunity to appeal any alleged censorship decisions. In addition, the plaintiff alleges in the Amended Complaint that the facts described in the Amended Complaint constitute violations of the plaintiff's rights, the rights of correspondents who have attempted or who intend to correspond with prisoners, and the rights of the prisoners under the First and Fourteenth Amendments.

Standing is a threshold issue that must be determined before the Court may consider any substantive issues. *Planned Parenthood Assoc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir.1987). Article III standing requires that (1) plaintiff suffered an "injury in fact, which is both concrete and particularized, and actual or imminent;" (2) there is a causal connection between the injury and complained of activity such that it is fairly traceable to the defendant's actions; and (3) it is likely, not speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The party seeking to be heard in federal court must prove each element of standing with specificity. *Coyne ex rel. Ohio v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999).

Publishers and inmates have a First Amendment interest in communicating with one another subject to regulation that furthers legitimate penological interests. *See Thornburgh v. Abbott*, 490 U.S. 401, 407 (1987). "The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a

'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." *Procunier v. Martinez*, 416 U.S. 396, 418 (1974). This liberty interest applies to both senders and receivers. *Id*. at 408-08. Moreover, the Sixth Circuit has determined that prison officials must provide minimal procedural safeguards for confiscation of inmate mail. *Martin v. Kelley*, 803 F.2d 236, 241-42 (6th cir. 1986). Finally, "[c]ommunication between inmates and non-inmates is protected regardless of who initiates the communication." *Prison Legal News v. Bezott*, No. 11-CV-13460, 2014 WL 1405214, at *3 (E.D. Mich. Apr. 11, 2014); *see also Prison Legal News v. Livingston*, 683 F.3d 201, 212–13 (5th Cir. 2012).

PLN alleges that the defendants censored its attempted communications with the inmates in violation of the First and Fourteenth Amendments. Based on the allegations contained in the Amended Complaint, this Court finds that PLN has carried its burden and concludes PLN has standing. *See id*.

Fourth, the defendants argue that the Court should not issue a preliminary injunction on this alleged Fourteenth Amendment violation issue because it is moot. They claim that the filing of Policy III, which satisfies Fourteenth Amendment procedural due process, renders claims over Policy II moot. The plaintiff argues the issue is not moot because this situation fits within the voluntary cessation exception to the mootness doctrine.

At the time a federal court decides a case, there must be a live case or controversy, *Burke v. Barnes*, 479 U.S. 361, 363 (1987); otherwise, the mootness doctrine applies. *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). "The mootness doctrine [is] a subset of the Article III justiciability requirements." *Id*. "Claims become moot when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome." *Brandywine, Inc. v.*

City of Richmond, Ky., 359 F.3d 830, 836 (6th Cir. 2004). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Bowman v. Corrections Corp. of America*, 350 F.3d 537, 549-550 (6th Cir. 2003) (quoting *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)) (internal quotations and citations omitted). Moreover, a federal court "can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." *Brandywine*, 359 F.3d at 836 (plaintiffs' claims for declaratory and injunctive relief mooted when city repealed allegedly unconstitutional provision of ordinance); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974 (6th Cir. 2012) (plaintiff's claims for injunctive and declaratory relief mooted by amended code sections to ordinance).

Under the voluntary cessation exception, a case may be mooted only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)), and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The heavy burden of demonstrating mootness rests on the party claiming mootness. *Friends of the Earth*, 528 U.S. at 189. However, "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (quoting *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir.1990) (internal quotation marks omitted)).

As this Court stated in its previous Order, a court considers three factors in determining whether the defendants have carried their burden of mootness: (1) unambiguous change, (2)

change as a result of substantial deliberation, and (3) consistent application of new policy or adherence to new conduct. *See Prison Legal News v. Chapman*, -- F.Supp.2d --, No. 3:12-CV-00125, 2014 WL 4247772, at *11 (M.D. Ga. Aug. 26, 2014) (citing *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014). The Court previously ruled that the defendants met this burden in relation to the postcards-only portion of Policy II, rending that issue moot. The facts on this issue, however, differ.

The defendants made an unambiguous change and brought their policy, Policy III, into compliance with the principles set forth in *Martin v. Kelley*, 803 F.2d at 236, and the Due Process Clause. The plaintiff does not argue otherwise. However, this change was made during the heat of litigation. This differs from the first change on the postcards-only policy which was made prior to the defendants being served with the summons and Complaint. Here, unlike before, there is no evidence of substantial deliberation. There are no affidavits from the jail administrators affirming there is no intention of returning to the prior policy or one that does not adequately provide the minimum procedural safeguards.

It is true that there have been no complaints that Policy III has not been consistently applied. Nonetheless, the facts mentioned above, which differ from the facts surrounding this Court's previous decision, do not satisfy the defendants' heavy burden of demonstrating mootness. As such, the Court will address the merits of the plaintiff's arguments.[1]

[1] This Court notes the defendants' arguments that neither the plaintiff nor any inmates have ever filed a complaint with the jail for censorship or not receiving PLN's publications. It appears from the facts that PLN was aware of returned mail from the defendants as early as February 2012. The defendants argue that despite this knowledge, PLN never complained to the defendants to try to remedy the situation. Instead, PLN resorted to filing this lawsuit on October 10, 2013. This Court further notes the defendants' good faith efforts in amending its policies to address all of the plaintiff's grievances. This Court finds that the defendants' did so in a timely manner, despite the plaintiff's arguments to the contrary.

To be sure, violations of constitutional rights are extremely serious. Nonetheless, it appears to the Court that this litigation could have been avoided entirely by communication between the two parties prior to filing any suit. This could have saved tremendous time and resources for both parties, especially considering the condition of county budgets in this day and time. The inmates, whose interests PLN asserts it seeks to protect, may have been

PLN moves the Court "to enter a preliminary injunction enjoining Defendants from failing to provide Plaintiff and others corresponding with prisoners procedural safeguards that comply with due process." [Doc. 26].

Policy II states in pertinent part:

> . . . .
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> B. A prisoner will be notified in writing if any mail is rejected.
>
> C. The inmate will have a chance to appeal this rejection; by filing a grievance with the commissary officer.
>
> D. If the inmate is no longer in our custody the officer will mark out our address, mark "not at this address" and stamp "return to sender" and place back in the mail.

[Doc. 15-3, pg. 2]. This Court previously concluded that this policy was facially deficient and stated that the defendants could choose to implement a new policy which complies with *Martin*. The defendants did so, and the plaintiff does not raise an issue with Policy III. However, the focus must be on Policy II.

The Court must consider four factors in determining whether to grant a preliminary injunction:

> (1) whether the plaintiffs have a strong likelihood of success on the merits;
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> (2) whether, without the injunction, the plaintiffs will suffer irreparable harm;
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> (3) whether issuance of the injunction will cause substantial harm to the defendant or others; and

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better off if the resources of the County were spent on their care instead of spent on litigation expenses on a case which could have been avoided, considering the defendants' efforts to comply with and remedy all of plaintiff's grievances. That being said, this Court notes these arguments but, of course, confines its decision strictly to the applicable law. Perhaps common sense, cooperation and communication prior to filing suit are practices of a by-gone era.

> (4) whether the public interest would be served by the issuance of a preliminary injunction.

United Food and Commercial Workers Union v. Southwest Ohio Regional Transit Authority, 163 F.3d 341, 347 (6th Cir. 1998). These factors are not prerequisites to the issuance of an injunction but are factors to be balanced in considering whether to grant the injunction. *Id*. The Court finds that the factors weigh in favor of the plaintiff. In so doing, the Court finds the reasoning in *Prison Legal News v. County of San Diego*, No. 3:14-cv-2417-L-NLS, (S.D. Cal. May 7, 2015), and *Lane v. Lombardi*, No. 2:12-cv-4219-NKL, 2012 WL 5873577, at * 2-6 (W.D. Mo. Nov. 15, 2012), persuasive.

For the reasons stated above, the motion to strike the renewed motion, [Doc. 36], is GRANTED. In addition, the Motion for Preliminary Injunction, [Doc. 26], is GRANTED. That being said, it appears that Policy III satisfies the requirements, and it has already been enacted and is being followed. The parties shall file a Rule 26(f) report with this Court within 10 days from the entry of this Order, and then the matter will be set for trial.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE