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United States District Court,
W.D. Wisconsin.

Nathaniel Allen LINDELL, Plaintiff,
v.
Matthew J. FRANK, Secretary of the Wisconsin Department of Corrections, Jon E. Litscher, former Secretary of the Wisconsin Department of Corrections; Cindy O'Donnell, Deputy Secretary to Litscher; John Ray, Corrections Complaint Examiner ("C.C.E."); Gerald Berge, Warden at Supermax Correctional Institution; Peter Huibregtse, Deputy Warden of Supermax; Lieutenant Julie Biggar, a Lt. at Supermax; Ellen Ray, I.C.E.; Sgt. Jantzen; C.O. Wetter; C.O. S. Grondin; C.O. Mueller; C.O. Clark, all guards at Supermax; John Sharpe, Manager Foxtrot Unit at Supermax, Defendants.

No. 02–C–21–C. | May 30, 2003.

Attorneys and Law Firms

Nathaniel Lindell, for Plaintiff.

Jody J. Schmelzer, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

ORDER

CRABB, J.

***1** In an opinion and order entered in this case on May 5, 2003, I granted plaintiff summary judgment on his request for an injunction prohibiting defendants from enforcing their publishers' only rule to the extent that it prohibits inmates from receiving any newspaper and magazine clippings and photocopies in the mail from any source other than a publisher or recognized commercial source. The injunction makes clear that defendants are not prohibited from crafting rules or regulations limiting the quantity of such materials that inmates may receive in incoming correspondence. In the same order, I granted defendants' motion for summary judgment on all of plaintiff's other claims. Judgment was entered on May 8, 2003. Presently before the court is defendants' timely-filed motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend the court's judgment. For the following reasons, defendants' motion will be denied.

Defendants argue that I erred in granting plaintiff's request for injunctive relief. They contend that the publishers' only rule does not violate the First Amendment rights of prisoners because it is reasonably related to a legitimate penological interest in that it "is part and parcel of [the Wisconsin Secure Program Facility's] incentive Level System." Defendants note that this court has found previously that an incentive system that conditions access to reading material on good behavior is reasonably related to a legitimate penological purpose. Therefore, defendants argue, the publishers' only rule should have been upheld pursuant to the test established in *Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (prison regulation that impinges on a prisoner's constitutional rights must be reasonably related to legitimate penological interest). Defendants' argument fails for a number of reasons. First, defendants never raised this argument when the parties briefed their cross motions for summary judgment. Instead, defendants argued that the publisher's only rule furthered legitimate penological interests in (1) preventing hidden messages from reaching prisoners and (2) controlling the volume of mail prison staff must carefully scrutinize. I rejected defendants' arguments, concluding that the publisher's only rule was not reasonably related to these asserted interests. In arguing that the challenged regulation is supported by an interest in encouraging appropriate inmate behavior, defendants are trying on for size an entirely new argument in their motion for reconsideration. This they cannot do. *See Pohl v. United Airlines, Inc.,* 213 F.3d 336, 340 (7th Cir.2000) ("[A]rguments raised in the district court may be waived if not presented in a timely manner, such as those raised for the first time in a motion for reconsideration."); *Cochran v. Quest Software, Inc.,* 328 F.3d 1, 7 (1st Cir.2003) ("Litigation is not a game of hopscotch. It is generally accepted that a party may not, on a motion for reconsideration, advance a new argument that could (and should) have been presented prior to the district court's original ruling.").

***2** Defendants should not lose much sleep over the waiver of this argument, however, because even if they had asserted it in a timely fashion, it would not have gotten them far. Defendants cannot plausibly argue that their policy of withholding newspaper clippings and photocopies not received from a publisher is part of an incentive program. Where is the incentive? There are no facts in this record to suggest that once a prisoner reaches a certain level he is allowed to receive newspaper clippings or photocopies from persons other than publishers. Indeed, Wis. Admin. Code § DOC 309.05(2)(a) indicates that the publishers' only rule applies across the board to all inmates. Thus, the argument that the rule is part and parcel of the level

incentive system is unavailing.

To be clear, plaintiff was allowed to proceed in this case on a claim that his First Amendment rights were violated when defendants refused to deliver mail to him that contained articles and pictures clipped from magazines or newspapers because of a prison policy prohibiting inmates from receiving such materials (or photocopies of such materials) from anyone but a publisher or a recognized commercial source. The parties then proceeded to litigate the issue whether the denial of these materials *pursuant to the publisher's only rule* violated the First Amendment. I concluded that it did. Therefore, the injunction entered in this case prohibits defendants "from *enforcing the publisher's only rule* to the extent that it prohibits inmates from receiving any newspaper and magazine clippings and photocopies in the mail from any source other than the publisher or a recognized commercial source." Opinion & Order dated May 5, 2003, dkt. # 106, at 57 (emphasis added). This case did not raise the issue whether it is constitutional for defendants to withhold reading materials, such as newspaper or magazine clippings, from prisoners as a way of inducing good behavior. Defendants did not raise that issue, brief it or put in any factual evidence to support it. Accordingly, I had no cause to address it.

As defendants note, in screening inmate complaints pursuant to 28 U.S.C. § 1915A, I have in the past denied inmates leave to proceed on claims that they were prohibited from possessing certain reading materials as a result of the Wisconsin Secure Program Facility's incentive level system. *See, e.g., Freeman v. Litscher,* case no. 02–C–24–C, unpublished opinion and order dated March 12, 2002, at 12–13 (plaintiff denied leave to proceed on claim he was allowed no more than three books and two magazines in cell at same time). However, defendants have not attempted to address the distinctions between the findings of fact in this case and the facts alleged in the complaints screened in those earlier cases. The same is true of defendants' belated reliance on *Pearson v. Berge,* case no. 01–C–364–C, unpublished opinion and order dated Aug. 27, 2002, in which I held that the publisher's only rule was compatible with the First Amendment. Mere reference to *Pearson* is entirely inadequate, particularly given my observation in that case that a "future case may reveal that the Department of Corrections has exaggerated the security risk posed by non-publisher material or that inmates have no alternative means of obtaining certain publications." *Id.*

***3** The rest of defendants' arguments in support of their Rule 59 motion either rehash arguments I rejected in granting plaintiff's request for an injunction or are raised for the first time in support of the reconsideration motion and are therefore untimely. Accordingly, I will deny defendants' motion to alter or amend the judgment in this case.

A final matter needs to be addressed. Defendants have called the court's attention to a letter plaintiff sent to Assistant Attorney General Jody J. Schmelzer, one of defendants' lawyers, in the wake of the court's summary judgment order. In the letter, plaintiff asked Schmelzer to answer several questions, including: "did you feel comfortable during you [sic] litigation of this case?"; "after litigating against me, did you have a bad taste in your mouth?"; "why did you resist in the first place"; and "do you feel dirty or used? Afterwards that is." Plaintiff's protestations to the contrary notwithstanding, it is obvious that the only purpose of this juvenile missive was to harass and degrade Schmelzer. Plaintiff is on notice: if in the future he sends a similar communication to a party or an attorney involved in litigation before this court, he will be subject to severe sanctions, including the possible loss of his ability to file civil suits *in forma pauperis* in this court.

ORDER

IT IS ORDERED that defendants' motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend the judgment in this case is DENIED.