

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALLEN JOLLY, MARK KIRK,	:	
VINCENT WARREN, THOMAS	:	
MANGER, JUAN GARCIA, and	:	
JOHN SCHMITZ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 00-041-JJF
	:	
ROBERT SNYDER, STAN TAYLOR,	:	
ELIZABETH BURRISS, LARRY	:	
McGUIGAN, FRANCENE KOBUS,	:	
RON HOSTERMAN, and THOMAS	:	
CARROLL,	:	
	:	
Defendants.	:	

Allen Jolly, Mark Kirk, Vincent Warren, Thomas Manger, Juan Garcia and John Schmitz.
Pro Se Plaintiffs.

Stuart B. Drowos, Esquire, Deputy Attorney General, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Defendants.

MEMORANDUM OPINION

March 22, 2003
Wilmington, Delaware

FARNAN, District Judge

Pending before the Court is Defendants' Motion to Dismiss (D.I. 35). For the reasons discussed below, Defendants' Motion to Dismiss will be granted.

BACKGROUND

1. Facts

This is a civil rights case filed by Plaintiffs, inmates at the Delaware Correctional Center ("DCC"), against Defendants, Department of Corrections ("DOC") employees. See Complaint, D.I.

2. Plaintiffs seek compensatory and punitive damages for a prison policy that allegedly denies Plaintiffs their First Amendment right of free expression and Fourteenth Amendment right of due process. See Complaint, D.I. 2 at 3a; Motion to Supplement Complaint, D.I. 12. The prison policy in question forbids prisoners from receiving through the mail any materials that exhibit, either through photographic or written representation, sexually explicit acts or nudity (the "policy"). See Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss, D.I. 36, Exhibit A4. There is an exception in the policy for material containing nudity "illustrative of medical, educational, and anthropological content and material of a news information type." See id. Plaintiffs complain that (1) their right to free expression under the First Amendment has been violated; (2) the policy is

overbroad because it prohibits receipt of materials that do not contain sexually explicit representations; and (3) that they are not notified of the rejection of magazines or other materials and do not have an opportunity to appeal rejection decisions, thereby violating the Plaintiffs' right to due process under the Fourteenth Amendment. See Complaint, D.I. 2 at 3a; Motion to Supplement Complaint, D.I. 9 at 1-2; Motion to Supplement Complaint, D.I. 12. Defendants move to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

2. Legal Standard

The instant Motion to Dismiss is brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of a complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Strum v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In reviewing a motion to dismiss for failure to state a claim, "all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party." Strum, 835 F.2d at 1011; see also Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). This is especially true when the complaint is made pro se. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). A court may dismiss a complaint for failure to

state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Jordan, 20 F.3d at 1261.

DISCUSSION

1. Contentions

By their motion, Defendants contend that the Complaint should be dismissed for a number of reasons. First, Defendants contend that Plaintiffs' First Amendment claim should be dismissed because Defendants' policy is reasonably related to a legitimate and neutral penological interest and thus complies with Turner v. Safley, 482 U.S. 78 (1987). Second, Defendants contend that Plaintiffs' Due Process claim should be dismissed because Defendants have provided adequate safeguards by providing notice of confiscation of publications and by affording an opportunity to appeal such decisions. Additionally, Defendants assert various immunity defenses: (1) Defendants cannot be sued in their official capacities under the doctrine of sovereign immunity and the Eleventh Amendment; and (2) Defendants cannot be sued in their individual capacities under the doctrine of qualified immunity unless Plaintiffs can show that Defendants should have been aware that their actions violated clearly established constitutional rights. Finally, Defendants contend that the Section 1983 claim is invalid because (1) State

officials acting in their official capacities are not "persons" for the purpose of Section 1983 claims and therefore are not subject to liability under it; (2) the doctrine of respondeat superior is not available in Section 1983 claims and therefore Plaintiffs have no claim against Defendants in their supervisory capacities unless they can show that Defendants acted with deliberate indifference and that their actions were causally related to the injury; and (3) Plaintiffs have failed to show personal involvement or knowing acquiescence of the alleged constitutional deprivation and negligence alone is not a cognizable claim under Section 1983.¹

Plaintiffs respond that (1) the Turner v. Safley requirements are not met because Defendants have failed to show that the policy is reasonably related to a legitimate penological interest; (2) the policy is overbroad as written and in its application, resulting in confiscation of materials that are not sexually explicit and resulting in the receipt of these publications by some inmates and not by others; and (3) the procedural safeguards that are in place do not provide adequate notice or an opportunity to be heard. Finally, in response to

¹ Although Plaintiffs have not asserted a pendent state claim, Defendants in their Memorandum in Support of their Motion to Dismiss (D.I. 36, ¶ 17) contend that this would also fail because the State Tort Claims Act, 10 Del. C. § 4001(3), shields Defendants from personal liability for acts done in good faith and without gross or wanton negligence arising out of the performance of their official discretionary duties.

the immunity defenses, Plaintiffs argue that (1) the Eleventh Amendment does not bar law suits against Defendants in their individual capacities under Section 1983; and (2) the qualified immunity defense is unavailable as Defendants should have been aware that they were violating Plaintiffs' right to due process under the Fourteenth Amendment and to free expression under the First Amendment.

2. First Amendment Claim

Plaintiffs' First Amendment claim asserts that Defendants' policy of excluding certain materials from the prison does not meet the "reasonably related to legitimate penological interests" test of Turner v. Safely, 482 U.S. 78 (1987). To determine whether a prison regulation is "reasonably related to legitimate penological objectives," courts weigh four factors: (1) whether there is a valid, rational connection between the prison regulation and a neutral and legitimate government interest; (2) whether there are alternative means of exercising the right in question; (3) the impact that accommodation of the asserted constitutional right would have on guards and other inmates; and (4) whether there are adequate alternatives to meet the prison's objectives. See id. at 89-91. In Turner, the Supreme Court upheld a policy prohibiting inmate to inmate correspondence unless those inmates were family members or were corresponding concerning legal matters. See id. at 81-82. In so holding, the

Supreme Court took notice of two important principles. First, that federal courts should consider valid constitutional claims of prison inmates, and second, that courts should accord substantial deference to administrators who are in a better position to deal with the problems of prison administration. See id. at 84-85.

A. Valid, Rational Connection

Defendants argue that the policy is necessary to maintain prison security and to further rehabilitative goals. Specifically, Defendants urge that possession of pornographic materials by prisoners, especially sex offenders, can lead to sexual harassment of female officers and can undermine the safety of both prison guards and other inmates. Courts have held that these security and rehabilitation concerns are legitimate penological interests. See Thornburgh v. Abbott, 490 U.S. 401, 415 (1989); Turner, 482 U.S. at 91-92; Mauro v. Arpaio, 188 F.3d 1054, 1059 (9th Cir. 1999). Accordingly, in the instant case, the Court concludes that the security and rehabilitative goals advanced by Defendants are legitimate penological interests.

The interest must also be neutral. See Turner, 482 U.S. at 89-90. Neutrality in the Turner context differs in meaning from the content-neutral requirement of the First Amendment. See Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998). Neutrality in the Turner context means that the purpose of limiting access

to certain material is not the suppression of expression but some other legitimate purpose. See id. In the instant case, censorship of materials containing sexually explicit content is certainly not content-neutral in a First Amendment sense; however, the Court concludes it appears neutral and for the legitimate purpose of security and rehabilitation.

Plaintiffs argue that the policy cannot be legitimate as there is no evidence that incidents of sexual harassment directed toward female prison guards have occurred at the prison. Nevertheless, a prison policy, such as the one in the instant case, need not be made following a determination that possible risks associated with the prohibited materials have already come to fruition, or even that such risks are likely to happen. Rather, an administrator of penal institution need only ascertain that admitting the materials would create an "intolerable risk of disorder" in the prison. See Thornburgh, 490 U.S. at 416; Mauro, 188 F.3d at 1060. In the Court's view, Defendants are in a better position to ascertain whether the materials at issue in the instant case create an intolerable risk of disorder, and thus, the Court finds Plaintiffs' argument unpersuasive.

Plaintiffs also argue that the prison policy is overbroad because it excludes more material than needed to adequately meet

the prison objectives.² Plaintiffs argue that magazines, such as issues of Maxim and Stuff, that do not contain sexually explicit material or nudity have been excluded for some prisoners but allowed for others. Courts have held that the discretion necessarily afforded prison administrators may result in inconsistencies in the application of a policy due to the variability within an institution, and therefore such inconsistencies alone are not necessarily signs of arbitrariness or irrationality. See Thornburgh, 490 U.S. at 417 n.15. Also, the Court notes that true consistency could be obtained only through a more restrictive policy that would exclude publications by title rather than on a case-by-case basis. See id. Further, it may be that a broader exclusion would fail the “alternative means” prong of the Turner test and be vulnerable to an overbreadth attack. See id.

Plaintiffs also argue that Aiello v. Litscher, 104 F. Supp. 2d 1068 (W.D. Wis. 2000), in which a policy restricting sexually

² Overbreadth analysis occurs under both the first and fourth prongs of the Turner test. Under the first prong, an overbreadth argument is used to cast doubt upon the purported legitimate interest at stake. Thus, a policy that excludes material far beyond what is needed to further the purported goals may belie the true, perhaps non-legitimate, policy. Under the fourth prong, overbreadth arguments are used to show that there are alternative means to combat the legitimate goals. Thus, if the policy operates to exclude materials beyond which the policy was meant to exclude, this may be evidence that the policy was not written narrowly enough and that there are alternative means to reach the same goal.

explicit material and material containing nudity was struck down, supports their overbreadth argument. The policy in Aiello failed because it was so broad that materials such as a representation of Michelangelo's Sistine Chapel were excluded. See id. at 1079. The court concluded that a policy that led to exclusion of works of art and literature could not possibly be related to security and rehabilitation interests. See id. at 1080. In the instant case, there is no such allegation that works of art have been excluded. Rather, the prison policy at issue exempts from exclusion any materials that, despite containing sexually explicit content or nudity, have some independent scientific, artistic or anthropological worth. Therefore, the Court concludes that the Aiello decision is inapposite to the instant case. For these reasons, and because policies very similar to the one at issue have been found to have a valid, rational connection to a legitimate government interest, the Court concludes that the policy satisfies the first prong of the Turner test. See Thornburgh, 490 U.S. at 404; Mauro, 188 F.3d at 1058; Amatel, 156 F.3d at 201; Smith v. Donohue, 1992 U.S. App. LEXIS 25066 (7th Cir. 1982); Trapnell v. Riggsby, 622 F.2d 290 (7th Cir. 1980).

B. Alternatives for Exercising Right

The second prong of the Turner test is whether the prisoners have alternative means of expression. See Turner, 482 U.S. at

92. Whether there are other means of expression should be viewed "sensibly and expansively." See Thornburgh, 490 U.S. at 417. In Turner, the Court did not require that the prisoners be afforded other means of communicating with prisoners, but that they be afforded the means of communicating in general beyond the narrow prohibition. Turner, 482 U.S. at 92. In the instant case, the question is not whether the prisoners have other opportunities to read pornographic materials, but whether they have the opportunity to read in general. Plaintiffs have not complained that they are denied all opportunities to read other materials. Therefore, the Court concludes that the policy satisfies the second prong of the Turner test.

C. Impact

In analyzing the impact that accommodation of the right would have on third parties such as prison guards and other inmates, courts must consider possible "ripple effect[s]." Turner, 482 U.S. at 92. In the prison context, it may be impossible to exclude materials based, for example, on whether the prisoner is a sex offender or not because the ease of passing materials from one prisoner to another makes segregation of these materials impossible. In the instant case, Defendants point out that, although sex offenders are housed separately, sex offenders integrate with the general prison population during meals, exercise, library hours and other recreational activities.

Authorizing receipt of materials by some prisoners yet prohibiting receipt by others on an individualized basis would not solve the "ripple effect" problem and would come at the high cost of significantly less liberty and safety for prison guards and other prisoners. See id. Therefore, the Court concludes that the policy satisfies the third prong of the Turner test.

D. Alternative Means

Plaintiffs have the burden of proving that an adequate alternative of reaching the prison's objective exists. See Mauro, 188 F.3d at 1062. The prison need not have adopted the least restrictive alternative to achieve its objective. See Turner, 482 U.S. at 90, 93 n.*. Plaintiffs claim that the policy excludes certain magazines, such as Stuff and Maxim, which do not contain sexually explicit materials or nudity. However, in Amatel, the court noted that overbreadth claims on the "margin of pornography" have fared poorly. See Amatel, 156 F.3d at 201. Amatel relied on Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 61 (1976), which stated, "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between porn and artistic expression than in the free dissemination of ideas of social and political significance." Id. In Amatel, the court held that, in order for the scope of the regulation of expression to render it unconstitutional, the overbreadth must be real and substantial. See Amatel, 156 F.3d

at 201 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)). In the instant case, Plaintiffs have not presented an adequate alternative that would have a narrower application. Defendants' policy of reviewing each publication individually is the narrowest application of the policy available. Plaintiffs' contention that the policy is applied inconsistently could be remedied only by wholesale exclusion of certain publications by title, which would lead to exclusion of individual issues that would otherwise have been acceptable under the policy. For these reasons, the Court concludes that the policy satisfies the fourth prong of the Turner test.

Because Defendants' policy clearly lies within the boundaries of what the Supreme Court and other courts have deemed legitimate policies, and because Plaintiffs have failed to demonstrate an adequate alternative, the Court will dismiss Plaintiffs' First Amendment claim.

3. Due Process Claim

Plaintiffs contend that their right of due process has been violated, because they receive no notice of the exclusion of pre-paid magazines and because they have no means to appeal. In response, Defendants point to the language of the prison policy, in existence since since 1987, that provides for written notice and procedures for appeal. D.I. 38, C-4. Defendants also point to exhibits submitted by Plaintiffs that show both notice to

Plaintiffs and correspondence between Plaintiffs and the Warden regarding an appeal.

In Procunier v. Martinez, 416 U.S. 396 (1974), the Supreme Court held that decisions by prison officials to withhold delivery of letters required minimum procedural safeguards, including notification to the inmate of the confiscation and a reasonable opportunity to protest the decision. See id. at 418-19. The Supreme Court recognized that the interest in uncensored communication by letter was a liberty interest, grounded in the First Amendment, protected by the Fourteenth Amendment despite the obvious qualifications of necessity due to prison circumstances. See id. Thus, the liberty interest is protected from arbitrary government invasion. See id. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of pendency of action." See Sullivan v. Barnett, 139 F.3d 158, 172 (3d Cir. 1998). Additionally, the right to be heard must "be granted at a meaningful time and in a meaningful manner to comply with the due process clause." See id. at 174. In the instant case, notice is provided to prisoners immediately after any negative evaluation of materials received through the mail, and prisoners have the option to send the publication to an outside source or donate it. (D.I. 37, Ex. R-10). Additionally, within five days of receipt of the notification, prisoners may appeal the decision. Id. Plaintiffs

argue that the notification letter does not contain the option to appeal and therefore does not provide a reasonable opportunity to be heard. Although the notification letter does not expressly explain the option to appeal, the prison policy explicitly lays out the appeal procedure. (D.I. 38, Ex. C-1 to 4).

Additionally, Plaintiffs have utilized the appeal process in the past and have engaged in dialogue with prison officials regarding specific decisions to exclude materials. (D.I. 40, Ex. D-2; D.I. 37, Ex. R-1 to 4).

Because Plaintiffs are notified of confiscation in a timely manner, have a right to appeal, and have actually utilized the appeal process, the Court concludes there is no due process violation, and accordingly will dismiss the Plaintiffs' due process claim.

4. Affirmative Defenses

Plaintiffs have brought this action against Defendants in both their official capacities and in their individual capacities. All Defendants are employees of the State of Delaware and are state actors. Defendants assert affirmative defenses to Plaintiffs' claims in both their individual capacities and their official capacities.

A. Sovereign Immunity Under the Eleventh Amendment

Under the Eleventh Amendment, a state may not be sued in a federal court without its consent. U.S. Const., amend. 11. When

an individual who works for the state is sued in their official capacity, the reality is that it is the state that will pay damages. Therefore, when an individual who works for the state is sued in their official capacity, it is the state, not the individual, being sued. See Pagano v. Hadley, 535 F. Supp. 92, 97 (D. Del. 1982). The Eleventh Amendment thus bars lawsuits against state actors in their official capacities in a federal court. In the instant case, the Court concludes that Plaintiffs' cause of action against Defendants in their official capacities violates the Eleventh Amendment and must be dismissed.

B. Qualified Immunity

Under the doctrine of qualified immunity, state officials may not be sued in their individual capacities for actions made during the performance of their official duties unless the conduct violated "clearly established" rights. See Anderson v. Creighton, 483 U.S. 635, 639 (1987). In analyzing whether an official is protected by qualified immunity, liability for allegedly unlawful actions turns on the "objective reasonableness" of the action "assessed in light of legal rules that were clearly established at the time action was taken." See id. The contours of the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." See id. at 640. This does not mean that the prison official must know that a general right under the

First Amendment exists or that a general right to due process exists, but that the right is clearly established in a "more particularized . . . and more relevant sense." See id. In the instant case, the prison officials, in order to be liable, must have known that their particular actions, confiscating magazines containing sexually explicit material and nudity, violated the First or Fourteenth Amendment. The Court concludes that Defendants could not have known that their policy violated Plaintiffs' rights, because similar policies had been upheld by the United States Supreme Court and other courts in the past.

Because the Court has decided that Plaintiffs' rights were not in fact violated, and because, even if Plaintiffs' rights were violated, Defendants could not have known in light of precedent that they were violating Plaintiffs' rights, the Court concludes that the doctrine of qualified immunity shields Defendants from liability in their individual capacities for action taken during the performance of their official duties.

CONCLUSION

For the reasons discussed, Defendants' Motion to Dismiss will be granted.

An appropriate Order will be entered.

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CARROLL,	:	
	:	
Defendants.	:	

ORDER

At Wilmington this 22nd day of March 2003, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (D.I. 35) is **GRANTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE