

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEONARD GREGORY, DEE J. RADEKE, SEAN O'GEARY, ZACHARY ZIMPEL, RICHARD CORTEZ, JERRY NEWELL, ROGER SELLERS, MELVIN DENNIS, CHAD WELSH, CLARENCE FENTON, CHICO NEWMAN, and JACK HAYS,

Plaintiffs,

vs.

STATE OF IOWA, IOWA STATE LEGISLATURE, and IOWA DEPARTMENT OF CORRECTIONS,

Defendants.

CASE NO. CVCV057085

RULING AND ORDER ON MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

This matter came before the Court for a hearing on the Defendants' motion to dismiss and the Plaintiffs' request for a temporary injunction. The Defendants appeared by Iowa Assistant Attorney General William Hill. The Plaintiffs appeared via telephone conference call with Plaintiff Jack Hays being the primary spokesman for the pro se Plaintiffs.

The Court has previously denied the Defendants' motion to dismiss. The remaining issue is the request by Plaintiffs for a temporary injunction.

FACTS AND PROCEDURE

Section 904.310A, the Code of Iowa, became effective on July 1, 2018. It reads in full as

follows:

1. Funds appropriated to the department [Iowa Department of Corrections] or other funds made available to the department shall not be used to distribute or make available any commercially published information or material to an inmate when such information or material is sexually explicit or features nudity.
2. The department shall adopt rules pursuant to chapter 17A to administer this section.

The Plaintiffs are all inmates at the Iowa State Penitentiary in Anamosa, Iowa. This action was filed by the inmates alleging that the above statute violates their rights under the Iowa Constitution, Article I, Sections 1, 2, 6, 7, 8, 9, 17, 21, and 25. The Plaintiffs seek a declaratory judgment under Iowa R.Civ. P. 1.1101 and 1.1102. They also claim that the statute allows for cruel and unusual punishment in violation of the United States Constitution. Because of Section 904.310A, the Code of Iowa, the Plaintiffs have been denied by the Defendants or by the Defendants' staff and employees, mail, pictures, magazines, books, newsletters and other "material and information." In addition, The Plaintiffs allege that their mail has been delayed, lost or denied whether it contained nudity or not.

Paragraph 14 of the Plaintiffs' petition states that the Defendants seek to take that from them which the Plaintiffs may consider as meaningful and beautiful. That the "arts" have important meanings to individuals and can perform a "religious or sacred function" and "by conferring meaning, by synthesizing [sic], and welding together and making sense of one's reality and the Universe." Paragraph 14 continues:

There is no disputing taste and "nudity" or something one may consider "sexually explicit" might be beautiful and help bring meaning and Happiness to one man or woman's life, to another it may be obscene.

Plaintiffs state that they “do not find ‘nudity’ or anything that is ‘sexually explicit’ in the context of the arts obscene.” (Plaintiffs’ Petition, paragraph 15).

The Plaintiffs further argue that there is no penological interest in banning such material. Therefore, the Plaintiffs seek a temporary and permanent injunction preventing the Defendants from restricting their access to said material.

The Defendants argue that the statute at issue is constitutionally sound, that the Plaintiffs have no constitutional right to pornography in prison and that there would be potential harm to the prison system if such an injunction were to be issued. Further, the Defendants assert that the application for an injunction fails on its face because of mootness, and that the Plaintiffs cannot meet the requirements of Iowa R.Civ. P. 1.1502 for an injunction to issue. Among the Defendants’ arguments are that the Plaintiffs are not likely to succeed on the merits of their petition, that they will not be irreparably injured and that, rather, it is the Defendants who would be harmed.

The Defendants argue that the distribution of pornography in prison would interfere with rehabilitation efforts and cause harm to psychologically unfit inmates. The Defendants also state that the security of the prison would be compromised. The materials could cause some inmates to act out their sexual aggression toward staff or other inmates.

Interestingly, at the oral argument in this matter, the Plaintiffs adamantly stated that they are opposed to pornography, and are not seeking access to pornography.

The Article I portions of the Iowa Constitution that the Plaintiffs state are being violated are as follows:

Section 1.

All men and women are, by nature, free and equal, and have certain inalienable rights-- among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Iowa Const. art. I, § 1

Section 2.

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.

Iowa Const. art. I, § 2

Section 6.

All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Iowa Const. art. I, § 6

Section 7.

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Iowa Const. art. I, § 7

Section 8.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. art. I, § 8

Section 9.

The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

Iowa Const. art. I, § 9

Section 17.

Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

Iowa Const. art. I, § 17

Section 21.

No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

Iowa Const. art. I, § 21

Section 25.

This enumeration of rights shall not be construed to impair or deny others, retained by the people.

Iowa Const. art. I, § 25

CONCLUSIONS OF LAW

At the outset, it has been clearly established that inmates of a prison or other facility retain their First Amendment rights under the United States Constitution. Article I, Sec. 7 of the Iowa Constitution is similar to the First Amendment of the United States Constitution in its protection of speech and press. *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982). However, the right retained by said inmates must “not be inconsistent with their status as prisoners or with penological objectives of the corrections system.” *Id.* The analysis of the prisoners’ rights must be done “in terms of the legitimate policies and goals” of the corrections agency or department. *Id.* (citing *Storseth v. Spellman*, 654 F.2d 1349, 1355 (9th Cir. 1981)). The “limitations on these

rights should be no greater than necessary to protect the governmental interest involved.” *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974)).

The Court must also examine what exactly is being banned or prohibited from the inmates. The Plaintiffs state that they are not seeking to access to pornography. They state that the statute in question sweeps too broadly and eliminates material that is not pornography. The statute references those materials that are “sexually explicit or features nudity.” Section 904.310A(1), the Code of Iowa. Iowa Administrative Code Section 201-20.2 (904) defines “sexually explicit” as follows:

“*Sexually explicit*” means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation. Sexually explicit material does not include material of a news or information type. Publications concerning research or opinions on sexual, health, or reproductive issues should be admitted unless the publications are otherwise a threat to legitimate institutional interests.

Iowa Admin. Code r. 201-20.2(904)

“Features” is defined as:

“*Features*” means that the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition

Iowa Admin. Code r. 201-20.2(904)

“Nudity” is defined as:

“*Nudity*” means a pictorial depiction where genitalia or female breasts are exposed. When the pictorial depiction of the female breast displays the areola or nipple, this material will be rejected.

Iowa Admin. Code r. 201-20.2(904)

The above definitions apply to the institutions under the control of the Department of Corrections, both the men's and women's facilities listed in Iowa Administrative Code Sec. 201-20.1(904).

There are cases where courts, specifically the United States 8th Circuit Court of Appeals, have found that banning materials depicting nudity alone were overly broad and, therefore, did not pass constitutional muster. *United States v. Thompson*, 653 F.3d 688, 695-96 (8th Cir. 2011); *United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010); *United States v. Simons*, 614 F.3d 475, 483-85 (8th Cir. 2010). Section 904.310A(1) denies funds for providing or making available to inmates "sexually explicit" material or which features "nudity." Either type of material is essentially banned from being distributed to inmates.

It is well settled that correctional institutions and prisons may adopt regulations restricting an inmate's access to publications or materials if they are "reasonably related to legitimate penological interests." *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S.Ct. 1874. 1876. 104 L.Ed.2d 459 (1989). In determining the reasonableness of a prison regulation the court must consider four factors:

- (1) whether a rational connection exists between the regulation and a neutral, legitimate government interest;
- (2) whether alternative means exist for inmates to exercise the constitutional right at issue;
- (3) what impact the accommodation of the right would have on inmates, prison personnel, and allocation of prison resources; and
- (4) whether obvious, easy alternatives exist.

Dawson v. Scurr, 986 F.2d 257, 260 (8th Cir. 1993).

Deference is given to those persons designated to operate prisons because it is considered an “inordinately difficult task.” *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir.1993) (citing *Turner v. Safley*, 482 U.S. 78, 84–85, 107 S.Ct. 2254, 2259–2260, 96 L.Ed.2d 64 (1987); *Procunier v. Martinez*, 416 U.S. 396, 404–05, 94 S.Ct. 1800, 1807–08, 40 L.Ed.2d 224 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989)).

The limitations on the inmates’ rights should be no greater than necessary to protect the governmental interest involved. *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982). In considering the four factors above, the Court agrees with the Defendants that there are legitimate governmental interests in limiting inmates’ access to sexually explicit material. Inmates confined as they are and separated from society and opposite genders may be susceptible to acting out and committing sexual acts or offenses toward other inmates or prison staff by being exposed to such material. Of particular concern would be those inmates serving sentences for sexually related or motivated offenses. Even if there was a prohibition of these particular inmates alone having sexually explicit material the presence of the material in such a confined facility could very well find its way to those offenders. This could and would most likely create a difficult environment and a conflict and detriment to any attempts at rehabilitation such as the Sexual Offender Treatment Program used in these facilities. In addition, the resources necessary to ensure that these materials would not end up in the possession of an inmate particularly susceptible or motivated by such material would be significant. The Defendants would still have to show that there is no other reasonable way to bar or limit the distribution of this material. A legitimate

penological interest must be shown. In regard specifically to “sexually explicit material,” the Court gives deference to the Defendants at this point in this litigation based upon the specific definition of what the prohibited material is.

However, in regard to the prohibition of funds for distributing material that features nudity, the Court finds that this prohibition indeed interferes with the constitutional rights of the inmates. The definition as stated in the Iowa Administrative Code could ban inmates from access to legitimate art, literature and other publications. Under the definition adopted, and the qualifier of “may” included in the definition of “features,” a medical journal depicting the human anatomy could be banned.

The power of the Court to extend injunctive relief in any case is one that should be used carefully, cautiously and reasonably. “The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law.” *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)(citing *Holiday Inns of America, Inc. v. B & B Corporation*, 409 F.2d 614, 618 (3d Cir. 1969).

The Defendants claim that the request for an injunction is moot, apparently for lateness, because Section 904.310A, the Code of Iowa, went into effect on July 1, 2018. The Iowa Rules of Civil Procedure do not set any time limitation on the request by a party for an injunction.

The Defendants further argue that the greater harm will be toward them if an injunction is

imposed and that the failure to issue an injunction would not cause further harm, if any, to the inmates. Iowa R. Civ. P. 1.1502 stating when injunctions can be issued not only involves situations where there is a potential for great or irreparable harm to a party but also when the act sought to be enjoined violates the other party's right respecting the subject of the litigation. The Court considers those rights enumerated and set out in our Iowa Constitution neither trivial or meaningless to any person no matter their state or condition.

The Defendants also argue that the Plaintiffs are not likely to succeed on the merits of their petition and action. The Court has already pointed out but not definitively decided that at least part of the ban that includes material featuring nudity may be overly broad.

The Court finds that there are grounds for the issuance of a limited injunction in this matter to preserve the status quo until this matter can be fully litigated.

Therefore, it is the order of the Court that the Defendants shall not prevent the distribution of materials to the Plaintiffs and other inmates similarly situated that features mere, non-sexually explicit, nudity.

The Court further orders that those materials considered by the Defendants as sexually explicit as defined by the Iowa Administrative Code shall not be distributed to the Plaintiffs or other inmates similarly situated at this time but shall be kept, stored and preserved until this litigation ends by final judgment or otherwise.

The Court further orders that the Plaintiffs need not post a bond at this time as there has

been no evidence presented as to what the probable liability of the Defendants is by such injunction.



State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV057085
Case Title LEONARD GREGORY ET AL VS STATE OF IOWA ET AL

So Ordered

A handwritten signature in cursive script that reads 'Scott D. Rosenberg'. The signature is written in black ink and is positioned above a horizontal line.

**Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa**