UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JASON COOK,	:	
	:	
v.	:	
	:	C.A. No. 09- 169-S
A. T. WALL, et al.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS REPLY TO DEFENDANTS' OBJECTION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF SEPTEMBER 17, 2012

The Plaintiff hereby respectfully submits his Memorandum of Law in Support of His Reply to Defendants' Objection to Report and Recommendation ("Defendants' Objection"). Therein, defendants object to the Magistrate Judge's core recommendations of September 17, 2012, made after extensive briefing and argument. Defendants' lengthy and reaching argument hinges on one magical assertion: "The speech at issue was not protected under the First Amendment." Defendants' Objection at 1; Defendants' Memorandum at 7-9.

Outrageously, defendants advocate for the following conclusions regarding plaintiff's three acts of speech:

1. Regarding plaintiff's comments published in the *Providence Journal*, defendants urge that since the subject of the newspaper article, DOC Policy 24.01.5, concerned an "internal policy" (as opposed to a policy requiring public comment under the APA), it follows that the policy "cannot be said to be of public concern," and therefore plaintiff's right to share his opinion of the policy, which affected all inmates, does not deserve to be protected. Defendants' Memorandum at 8.

2. Regarding plaintiff's comments posted on a prison bulletin board, informing prisoners where they may direct complaints arising out of an overly violent, humiliating, and invasive module-wide search, defendants urge that because "[i]nmate and cell searches are so fundamental to the effective administration of prison and to the safety of prisoners and staff that searches should not be second guessed for motivation or arbitrariness," and therefore "inmates cannot possibly enjoy protected speech related thereto." Id. at 8-9.

3. Regarding plaintiff's act of filing the within civil rights lawsuit, defendants admit that "[t]ypically civil rights lawsuits are considered protected speech," but inexplicably

> defendants urge that since plaintiff's "underlying speech is [supposedly] not protected, any lawsuit concerning the same cannot be considered protected." Id. at 9.

These hollow arguments may be "easily dispatched," to use the Magistrate Judge's language. Report and Recommendation at 7. Defendants cannot seriously compare Mr. Cook's speech here – beginning with his opinion statements published in the *Providence Journal* – to the prisoner's thinly veiled threat in Almeida v. Wall, C.A. 08-184S, 2008 WL 5377924 (D.R.I. Dec. 23, 2008) (inmate's memorandum to the warden which concluded with "And I suggest you think before you threaten me again" found not to be protected speech). Here, Tom Mooney from the *Journal* included the following in his article titled "ACI inmate protests new restrictions on publications":

> Now inmates can receive only those publications they order directly from a publisher and pay for in advance.
>
> The change has prompted a crusade by inmate Jason Cook, 32, who is serving years for breaking and entering and argues that the new policy is unconstitutional.
>
> **In a letter last month to Department of Corrections Director A.T. Wall, Cook said: "Come on, these are books. If anything, you should be helping us to find new ways to get them and encouraging the inmate population to start reading more."**

Providence Journal Article, attached as **Exhibit A** (emphasis added).

Clearly the statement in question – as with the bulletin board notice[1] and the filing of this civil rights suit – deals with a matter of public concern. Cf. Cossette v. Poulin, 573 F. Supp. 2d 456, 460 (D.N.H. 2008) (recognizing that "a number of courts have refused to recognize inmates' claims of retaliation for speech that was not on a matter of public concern, at least where the retaliation took the form of adverse action against the inmate's

[1] Given the fact that defendants are attacking plaintiff's protected speech retaliation claim (Count I) on Rule 12(b)(6) grounds, as opposed to Rule 56 grounds, the Magistrate Judge noted that while "the exact content of the bulletin board posting is not quoted in the Complaint", plaintiff's "clear allegations ... must be accepted as true at this stage." Report and Recommendation at 8.

prison job" and citing cases). Of course, the above-quoted comment published in the *Journal* is of the type traditionally and properly protected by the First Amendment. See Hannon v. Beard, 645 F.3d 45, 48 (1st Cir. 2011) (Selya, J.) (decided on summary judgment grounds). In Hannon, the First Circuit provided the following, in relevant part:

> We appreciate that running a prison system is a difficult enterprise, fraught with security concerns. Given that reality, courts must defer broadly to correctional officials' managerial decisions.
>
> This dynamic calls for a delicate balance between the flexibility needed to operate prisons and the constitutional rights that prisoners retain. **In constructing that balance, courts have held that, despite the deference owing to the decisions of prison officials, retaliation against a prisoner's exercise of constitutional rights is actionable.**

Id. (citations omitted and emphasis added). The Hannon Court found that "The plaintiff, in filing his own grievances and legal actions, plainly engaged in protected activity." Id. Here, plaintiff's published comments in the *Journal* – quintessential First Amendment speech – should receive at least the same degree of protection. "Speech about public officials or matters of public concern receives greater protection than speech about other topics." RAV v. City of St. Paul, Minn., 505 U.S. 377, 420-21 (1992) (Stevens, J., concurring). See also, Pell v. Procunier, 417 U.S. 817, 832 (1974), wherein the United States Supreme Court recognized that "the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published."

Under these circumstances, the Magistrate Judge appropriately found that "Plaintiff's allegations are sufficient at this stage to state a claim that he engaged in constitutionally protected behavior." Report and Recommendation at 9.

Defendants make myriad additional arguments, ranging from the "[p]laintiff failed to exhaust his administrative remedies" to "[p]laintiff did not suffer an adverse [retaliatory] action" to "[n]o causal relationship exists between the alleged protected conduct and the

alleged adverse action." See Report and Recommendation at 6-9. The well pled facts of plaintiff's verified complaint, and the supporting exhibits attached thereto, contradict each of defendants' bald conclusions.

First, the affidavit of defendants' own Grievance Coordinator, Robert McCutcheon, indicates that "[f]rom 2007 through 2009 plaintiff had filed **only** three grievances with my office." Affidavit at ¶ 6 (emphasis added). To the extent Mr. McCutcheon's *characterization* of plaintiff's grievances is material, and to the extent his averments are in disagreement with plaintiff's Verified Amended Complaint, then there exists a genuine issue of material fact. There is no question that on at least three occasions, each of which is germane to the instant lawsuit, plaintiff availed himself of the DOC's grievance process, a process which gave him no relief whatsoever. Further, plaintiff made *both* first and second level grievances before filing the instant suit. Id. at ¶¶ 6, 7; Amended Complaint at 9-12 ¶¶ 20, 21, 24, 25, 29, 30, 33, 34, 35, and 37. In one instance, Mr. McCutcheon admits that it took him almost nine months to respond to plaintiff's grievance – and the plaintiff's grievance was in regards to these defendants tossing him in segregation for ***18 days***. Affidavit at ¶ 7; Amended Complaint at 11 ¶ 32. A subsequent investigation found that there was no good cause whatsoever for his 18 days spent in segregation. See id. In any case, defendants simply cannot meet their burden for proving non-exhaustion. Casanova v. Dubois, 304 F.3d 75, 77 n.3 (1st Cir. 2002); Torres Vargas v. Santiago Cummings, 149 F.3d 29, 35 (1st Cir. 1998).

Second, it strains credulity to suppose that the plaintiff did not suffer any adverse retaliatory action by these defendants. Plaintiff's Verified Amended Complaint alleges that Mr. Cook was thrown into segregation – each time in retaliation for specifically pled acts of

protected speech – on five different occasions, for a total of ***more than 70 days***.[2] Amended Complaint at 10-12 ¶ 29, 32, 35, and 36.

In addition to being flung into segregation, the plaintiff specifically alleged that he was on the receiving end of several other retaliatory acts committed by these defendants, including **(1)** being fired from his kitchen job, thereby being stripped of both wages and good time, in retaliation for his opinion being published in the *Providence Journal*; **(2)** being subjected to a violent cell search, in which defendants admittedly destroyed his personal property, in retaliation for Mr. Cook involving the ACLU in this matter; **(3)** being subjected to repeated strip searches, in retaliation for various acts of protected speech; **(4)** and, being moved to a notorious and more dangerous block, in response to the instant lawsuit being filed. See Amended Complaint at 8-15 ¶¶ 18, 19, 22, 24, 28, 32, 35, 36, and 38-52; see also Affidavit at ¶ 6.

Contrary to defendants' objection, the plaintiff wonders how the alleged causal relationship between Mr. Cook's acts of protected speech and defendants' subsequent retaliatory acts could be pled with any greater particularity. At a minimum, the plaintiff has met his pleading burden under the Rules.

Finally, defendants urge the Court to find that plaintiff failed to plead sufficient facts to support his intentional infliction of emotional distress (IIED) claim (Count VI). In each of their two memoranda in support of their motion to dismiss (filed May 20, 2009 and March 16, 2010), defendants devoted a *single* paragraph to this argument (without even a single legal authority) regarding Count VI. Then and now, defendants rely exclusively on the carefully crafted affidavit of Robert McCutcheon, the DOC's Grievance Coordinator.

[2] In the Plaintiff's Objection to the Magistrate Judge's Report and Recommendation, the plaintiff incorrectly tallies the approximate number of days for which Mr. Cook was stuck in segregation at 'over 50', but a closer look at the verified amended complaint suggests that the actual number of Mr. Cook's days in segregation to be over 70.

Defendants conclude that since Mr. McCutcheon's affidavit is absent any mention of the plaintiff suffering emotionally as a result of defendants' alleged retaliatory acts, his IIED claim must fail. It is not surprising that defendants could find no legal support for this assertion. If defendants raised any additional arguments or cited any legal authority at the hearing on their motion to dismiss, then it is their burden to show the same in their instant Objection. Defendants fail to do so.

At a minimum, it is reasonable to infer that Mr. Cook's 70+ days in segregation took an emotional toll on him. While a prisoner's "intentional infliction of emotional distress requires more than mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," the plaintiff's time in segregation alone, under these retaliatory circumstances, cannot be said to be a type of triviality for which IIED cannot lie. Chao v. Ballista, 806 F. Supp. 2d 358, 380 (D. Mass. 2011) (internal quotation/citation omitted). At this stage, Count VI, like Counts I and V, is ripe for discovery, not dismissal or summary judgment.

In sum, while defendants' objection speaks for itself, the plaintiff submits that on each of the points raised by defendants the Magistrate Judge's Recommendation should be adopted by this Honorable Court.

Based on all of the foregoing, including the well pled allegations of plaintiff's Verified Amended Complaint and the supporting exhibits attached thereto, the plaintiff respectfully submits that the Court should adopt the Magistrate Judge's Report and Recommendation in regards to Counts I, V (as related to Article 1, § 21 of the R.I. Constitution), and VI, thereby rejecting defendants' instant objection.

Plaintiff,
By his Attorneys,

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DATED: October 12, 2012

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CERTIFICATION

To:

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I hereby certify that on October 12, 2012, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Amato A. DeLuca

EXHIBIT A

ACI inmate protests new restrictions on publications

The Providence Journal (Rhode Island)
October 22, 2007 Monday
All Editions

SECTION: NEWS; Pg. C-01 **LENGTH:** 830 words

HEADLINE: ACI inmate protests new restrictions on publications

BYLINE: Tom Mooney, Journal Staff Writer

Only items directly ordered from the publisher are allowed, Corrections Director A.T. Wall says, to prevent inmate extortion.

Until earlier this year, state prison inmates could receive paperback books, magazines and newspapers ordered and paid for by friends and relatives.

But corrections officials - saying they want to prevent inmates from extorting items from each other and reduce the time-consuming process of reviewing incoming mail - have changed that long-standing policy.

Now inmates can receive only those publications they order directly from a publisher and pay for in advance.

The change has prompted a crusade by inmate Jason Cook, 32, who is serving seven years for breaking and entering and argues that the new policy is unconstitutional.

In a letter last month to Department of Corrections Director A.T. Wall, Cook said: "Come on, these are books. If anything, you should be helping us to find new ways to get them and encouraging the inmate population to start reading more."

The U.S. Supreme Court has upheld the First Amendment right of inmates to receive publications as long as they don't jeopardize prison safety. For instance, the court has upheld prison policies that restrict hardcover books because of concerns contraband could be concealed in bindings. Commercially produced photographs are also banned in many states, including Rhode Island, on grounds of safety and security.

State prison officials say they are not trying to restrict any appropriate books; inmates can still have anyone who is approved to be on their visitation list deposit money in their prison bank accounts for the specific purpose of buying publications.

But now those books must be ordered and approved ahead of time.

The new policy saves the department time by approving book orders ahead of time rather than pulling inappropriate publications out of the daily mail and then having to explain to relatives and inmates why their books were not acceptable at the prison, said Jake Gadsden,

assistance director of institutions for the Department of Corrections.

In a letter to Cook explaining the reason for the new policy, however, Wall said the intent was to curtail extortion among inmates.

Cook contends in letters to prison officials that the new policy does nothing to prevent extortion.

"This excuse for this amended policy holds no weight whatsoever, as it does not matter who pays for a subscription. If someone wants to take the publication from another who paid for it … it can be taken."

The prison's new policy is just the latest in a "very troubling" trend in recent years of restricting inmates' mail privileges, said Steven Brown, executive director of the Rhode Island Affiliate of the American Civil Liberties Union.

Brown said his organization opposed the new policy when it came up for a public hearing in January - along with another proposed change in the mail policy that now allows prison officials to read incoming inmate mail at any time. The old policy specifically allowed for such inspections only if there was a reasonable belief that it contained contraband.

Brown questions the department's rationale for changing the book-purchasing policy, noting that one inmate could strong-arm another into turning over a magazine or book no matter how it arrives in the mail or who paid for it.

"There are all sorts of ways to address the problem without punishing inmates and making it much more difficult for them to obtain written reading material," Brown said. "But to impose the burden on the person receiving the publication, which is basically First Amendment material, is an inappropriate way of dealing with a problem like that."

Said Brown: "In terms of balancing the burdens, the free-speech activity significantly outweighs the possibility that every once in a while another inmate may do something that [department officials] fear."

In his letter to Wall, Cook said his sister in the last year had sent him vocational training books on construction trades and origami, Sudoku puzzle books and prisoners' rights legal manuals.

Federal courts out West struck down an identical policy that state prison officials in Washington attempted to impose.

The U.S. District Court there found that the State of Washington had failed to show that the prison's blanket prohibition of what it called "gift publications," even publications sent directly by the publisher, was reasonably related "to any valid penological objective."

Washington prison officials appealed to the U.S. 9th Circuit Court of Appeals, but lost.

The appeals court said prison officials had shown "no rational relationship between the policy and the legitimate penological objectives that it has asserted. Under the First Amendment, this is what the state must do to justify the restriction."

In Rhode Island, said Gadsden: "We don't feel we are infringing on First Amendment issues because the types of books they are receiving is no different than what they could receive."

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