

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6015

ROBB M. HARKSEN,

Plaintiff - Appellant,

v.

T. PEASE, Mailroom Officer; D. A. BRAXTON; S. SHORTRIDGE,
Operations Officer; R. A. YOUNG, Regional Director; L. HUFFMAN,
Regional Director; S. MULLINS, Treatment Program Supervisor; S.
BUNCH, Mailroom Officer; J. ARMENTROUT, Assistant Warden
Operations; G. DEEL; T. HALE, Corrections Officer; T. WOODS,

Defendants - Appellees.

Appeal from the United States District Court for the Western
District of Virginia, at Roanoke. James C. Turk, Senior District
Judge. (CA-04-243)

Submitted: May 21, 2008

Decided: June 27, 2008

Before WILKINSON and MICHAEL, Circuit Judges, and WILKINS, Senior
Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per
curiam opinion.

Robb M. Harsen, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robb M. Harksen appeals the district court's orders dismissing without prejudice his action filed under 42 U.S.C. § 1983 (2000), and denying his Fed. R. Civ. P. 59(e) motion. Harksen asserted, inter alia, that he was denied free or gift publications in violation of the First Amendment. The district court held that the prison regulation banning receipt of free or gift publications was constitutional. However, the case on which the district court relied to reach that conclusion was reversed on appeal. See Zimmerman v. Simmons, 260 F. Supp. 2d 1077 (D. Kan. 2003) (applying four-part test in Turner v. Safley, 482 U.S. 78 (1987), and concluding that regulation banning receipt of gift publications was constitutional), rev'd sub nom. Jacklovich v. Simmons, 392 F.3d 420, 428-32 (10th Cir. 2004) (finding genuine issues of material fact existed regarding behavior management and security rationales proffered by defendants in support of policy denying access to publications and to remaining Turner factors); see also Prison Legal News v. Lehman, 397 F.3d 692, 698-701 (9th Cir. 2005) (applying Turner and holding that ban on nonsubscription bulk mail and catalogs requested by inmate was unconstitutional). Although we express no view on the merits, we conclude that it is appropriate to vacate the district court's summary dismissal of Harksen's First Amendment claims regarding receipt of free or gift publications. On remand the district court should consider the

state's justification for its regulation and resolve any factual issues relevant to the merits of Harksen's claims.

With regard to Harksen's remaining claims, we have reviewed the record and find no reversible error. Accordingly, we affirm those claims for the reasons stated by the district court. Harksen v. Braxton, No. 7:04-cv-00243 (W.D. Va. Nov. 9, 2004; Dec. 10, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED
IN PART, AND REMANDED