IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WARREN G. LILLY, JR.,

Petitioner, ORDER

v. 05-C-490-C

CATHY JESS, MATTHEW FRANK, CHARLES PEARCE, CHARLES OLESON, ANN KRUEGER, SUSAN WALLINTIN, WILLIAM HESSION, ANNETTE WILLIAMS and JOANNE BOVEE,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Dodge Correctional Institution in Waupun, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack

of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Petitioner contends that respondents violated his rights (1) to equal protection under the Fourteenth Amendment; (2) to access the courts under the Sixth Amendment; (3) to receive mail under the First Amendment; and (4) to a fair inmate complaint process under Wis. Admin. Code § DOC 310. Petitioner will be denied leave to proceed in forma pauperis on all of his claims against respondents.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Warren Lilly is a Wisconsin state inmate housed at the Dodge Correctional Institution in Waupun, Wisconsin. Respondent Matthew Frank is the Secretary of the

Department of Corrections. The remaining respondents hold the following positions at the Dodge Correctional Institution: respondent Charles Pearce is a program supervisor; respondent Charles Oleson is a security liaison; respondent Ann Krueger is a corrections program director; respondent Susan Wallintin is the legal loan supervisor; respondent William Hession is a law librarian; respondent Annette Williams is a security liaison; respondent Joanne Bovee is a complaint examiner; and respondent Cathy Jess is the warden.

A. Legal Work

While petitioner was housed in the segregation unit at the Dodge Correctional Institution, he wanted to use the law library that was available to the general prison population. Respondents Pearce, Krueger and Hession told petitioner he could only use the starter law library in the segregation unit, even though they knew it had been trashed.

In addition to being denied the ability to physically visit the main law library, other library services were unavailable to petitioner because he was in segregation. For example, petitioner could request some, but not all of the books in the law library. Petitioner had to wait anywhere from three days to two weeks to receive the books he requested and this large turn-around time interfered with his legal research. In the segregation unit petitioner could not use the inter-library loan program.

The starter library in the segregation unit is woefully inadequate. There are no

computers to conduct legal research and no assistance from persons with legal training. The few books that are available are old and decrepit. Petitioner was allowed to use the starter library for three hours a week, which was not enough time for him to conduct his research. Sometimes when petitioner asked respondent Hession for legal materials Hession ignored his request. Respondent Hession also interfered with petitioner's ability to obtain information about the prison and certain prison staff.

Respondent Williams repeatedly denied petitioner a copy of Wis. Admin. Code § DOC 303. On April 29, 2005, petitioner filed an offender complaint about this matter. Respondent Bovee was the examiner in charge of his complaint. She instructed petitioner to contact the security director regarding the document he wanted.

Because petitioner could not conduct all of his research in an adequate starter law library, he had to send written requests for help to the librarians, who were not interested in helping him. Petitioner would ask the librarians to conduct searches using words or phrases he specified and to send him a printout of the search results. The printout petitioner received in response to these requests was so poorly formatted that petitioner ended up having to wade through large amounts of irrelevant and useless information.

The main law library at Dodge Correctional Institution also is inadequate. The books are old. Some of the materials have not been updated in years. The self-help materials in the law library are outdated and useless and misdirected petitioner's research. The law

library does not meet the minimum standards set by the American Association of Law Libraries.

Staff at the Dodge facility continuously directed petitioner to seek legal aid from LAIP (Legal Aid for Imprisoned Persons) but petitioner discovered that this program does not provide assistance or resources to inmates like him.

On May 29, June 18 and July 7, 2005, petitioner filed offender complaints alleging that the inadequacy of the law library was effectively denying him access to the courts. In addressing each of his complaints, respondents Bovee and Jess either dismissed it or returned it for failure to meet filing requirements.

Also, petitioner was unable to obtain the writing and typing supplies he needed from respondent Wallintin to conduct his legal work. On one occasion he had to wait over twenty days to receive supplies. On July 14 and 20, 2005, petitioner filed offender complaints because he was denied supplies. Respondent Bovee returned the complaints for failure to meet filing requirements.

After petitioner had already sent out eleven "attorney search" letters, respondents would not allow him to use legal loan funds to mail another ten such letters to lawyers out of state. All ten letters were returned to him marked "deemed excessive." Respondent Wallintin refused to mail the letters unless petitioner justified why he needed to mail each one. Her actions hampered petitioner's search for an attorney.

On June 1, 2005, petitioner filed an offender complaint because respondent Wallintin failed to mail his ten letters. Respondent Bovee examined the complaint and found that respondent Wallintin's request that petitioner justify the need to mail each letter was reasonable and recommended dismissing his complaint. Respondent Jess dismissed the complaint.

B. Interference with Mail

Prison officials tampered with petitioner's mail. Respondent Oleson delayed and mismanaged petitioner's personal and legal mail and read petitioner's mail "without initiating proper procedures." On June 7, 2005, petitioner received a letter from an inmate complaint examiner in another institution. The letter was postmarked May 19, 2005 and had been opened outside petitioner's presence. Petitioner filed an inmate complaint about the matter. Respondent Bovee recommended dismissing his complaint and respondent Jess did so. Respondent Bovee found that the envelope was not clearly "identif[ied] as legal or being sent from an attorney or any of the exempt parties listed in DOC 309.04(3)." In addition, she noted that "inmate's contention that he received this letter on June 7, 2005 . . . was unverifiable."

DISCUSSION

A. Access to Law Library, Paper Supplies and Postage

Petitioner contends that respondents Pearce, Krueger and Hession violated his constitutional rights when they denied him access to the main law library and directed him to the starter law library in the segregation unit. I understand petitioner to be alleging that respondents violated the equal protection clause of the Fourteenth Amendment and his Sixth Amendment right of access to the courts.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). However, segregation inmates and general population inmates are not similarly situated. Segregated confinement is designed as a punitive environment in which inmates are granted fewer privileges than inmates in the general prison population. The purpose of segregation is to make certain that particular prisoners are not "similarly situated." The Fourteenth Amendment "does not require things which are different in fact or opinion to be treated as though they were the same." Tigner v. Texas, 146 U.S. 141, 147 (1940).

Because petitioner is not similarly situated to inmates in the general prisoner population when he is in segregation status, his request for leave to proceed in forma pauperis on his claim that respondents Pearce, Krueger and Hession violated his equal

protection rights when they denied him access to the main law library will be denied as legally meritless.

Petitioner contends as well that an inadequate law library deprives him of his right of access to the courts. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225, n.14 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); see also Wolff v. McDonnell, 418 U.S. 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. Murray v. Giarratano, 492 U.S. 1, 6 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828. The fundamental right of access to the courts is not diminished when a prisoner is held in segregation. Alston v. DeBruyn, 13 F.3d 1036, 1041 (7th Cir. 1994) (citing Peterkin v. Jeffes, 855 F.2d 1021, 1038 & n.20 (3d Cir. 1988)).

To have standing to bring a claim of denial of access to the courts, a petitioner must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). The petitioner must have suffered injury "over and above the denial." Walters v. Edgar, 163 F. 3d 430, 433-34 (7th Cir. 1998) (citing Lewis, 518 U.S. at 343).

At a minimum, petitioner must allege facts suggesting that the "blockage prevented him from litigating a nonfrivolous case." Id. at 434; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff may sustain burden of establishing standing through factual allegations of complaint). Petitioner has alleged no facts from which an inference may be drawn that the limitation on his access to legal materials prevented him from litigating a non-frivolous suit. Accordingly, I will deny petitioner leave to proceed on his claim that respondents denied him access to the courts by providing him with an inadequate library.

Petitioner alleges that when respondents Bovee, Jess and Frank denied him relief in response to his offender complaints about the inadequacy of the library they personally participated in violating his right to access the courts. Because I have concluded that the allegedly inadequate library did not deny petitioner access to the courts, petitioner's claims against respondents Bovee, Jess and Frank are also legally meritless.

Next, petitioner contends that respondent Wallintin violated his constitutional right of access to the courts when she denied him writing and mailing supplies. He asserts that on at least two occasions he requested blank paper but did not receive any and that he asked to mail ten letters to different attorneys but that respondent Wallintin refused to approve the disbursement of legal loan funds for that purpose unless he justified the need to send each letter.

Although prison officials must furnish indigent inmates free of charge with basic

materials they need to draft legal documents, Bounds, 430 U.S. at 824; Gaines v. Lane, 790 F.2d 1299, 1308 (7th Cir. 1986), for budgetary and security reasons, prison officials may restrict the amount of free writing materials a prisoner is able to receive or keep in his cell. Gaines, 790 F.2d at 1308; Campbell, 787 F.2d at 227.

Also, "it is indisputable that indigent inmates must be provided at state expense" with the basic material necessary to draft legal documents and with stamps to mail them. Gaines, 790 F. 2d at 1308 (quoting Bounds, 430 U.S. at 824). "However, although prisoners have a right of access to the courts, they do not have a right to unlimited free postage. . . . Prison authorities are able to make a 'reasonable attempt to balance the right of prisoners to use the mails with prison budgetary considerations." Id. (citing Bach, 508 F.2d 307-08). In Gaines, the Court of Appeals for the Seventh Circuit approved state prison regulations which allowed inmates to send three first class letters per week. Other courts are even more strict. See, e.g., Hoppins v. Wallace, 751 F.2d 1161 (11th Cir. 1985) (furnishing two free stamps a week to indigent prisoners is adequate to allow exercise of the right to access to the courts).

Petitioner believes that because he is requesting these items under the legal loan program he is necessarily entitled to these materials. However, the legal loan program does not confer any federal rights on petitioner. In fact, in Lindell v. McCallum, 352 F.3d 1107, 1111 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit made it clear that prisoners have no constitutional entitlement to a subsidy to prosecute their lawsuits.

More important, petitioner has not shown that he suffered any injury over and above the denial of the supplies. Therefore, respondent Wallintin's actions in response to petitioner's requests for writing and mailing supplies did not violate his constitutional rights and I will deny him leave to proceed on his claims against respondent Wallintin.

Petitioner alleges that when respondents Bovee, Jess and Frank denied him relief in response to his offender complaints about writing and mailing materials they personally participated in violating his right to access the courts. Because I have concluded that the alleged denial of writing supplies and unlimited postage did not deny petitioner access to the courts, petitioner's claims against respondents Bovee, Jess and Frank are also legally meritless.

Finally, petitioner contends that respondent Wallintin's actions regarding his mail violated Wis. Admin. Code § DOC 309.51. Because I am denying plaintiff leave to proceed on his federal claim regarding his mail I will decline to exercise supplemental jurisdiction over his state law claim. If petitioner wishes to pursue this claim, he may do so in state court.

B. First Amendment

Petitioner contends that respondent Oleson "delayed and mismanaged [his] personal and legal mail, and read [his] mail without initiating the proper procedures." I understand petitioner to be alleging that respondent Oleson violated his First Amendment rights.

Prisoners have a limited liberty interest in their mail under the First and Fourteenth Amendments. Procunier, 416 U.S. at 413-14. The inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines, 790 F.2d at 1304; see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship). Further interference with an inmate's personal mail must be reasonably related to legitimate prison interests in security and order. Turner v. Safley, 482 U.S. 78, 89 (1987).

Legal mail is subject to somewhat greater protection than personal mail, in part because the right of access to the courts is involved and must be zealously and solicitously safeguarded. Campbell, 787 F.2d at 225, n.14; see also Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973) (all other rights of an inmate are illusory without right of access). To guard against the chilling of an inmate's access to the courts that could result if prison staff were able to read legal mail, legal mail may be inspected only in the presence of the inmate to ensure that it is not read by prison officials. Wolff, 418 U.S. at 577; see also Gaines, 790 F.2d at 1306; see also Bach v. People of the State of Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974) (opportunity to communicate privately is a vital ingredient of access to the courts). However, "isolated incidents of interference with legal mail . . . (do) not show a systematic pattern or practice of interference" and do not violate the constitution. Bruscino v. Carlson,

654 F. Supp. 609, 618 (S.D. Ill. 1987), aff'd, 854 F. 2d 162 (7th Cir. 1988).

Additionally, not all inspection of legal mail necessarily implicates either the right of access to the courts or the concern that such access could be chilled by improper inspection. Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987); see also Harrod v. Halford, 773 F.2d 234 (8th Cir. 1985). For example, most correspondence from a court to a litigant consists of public documents, which prison personnel could inspect in the court's files. Martin, 830 F.2d at 78. The inspection or reading of such correspondence would not chill a litigant's communication with either the court or his attorney or otherwise inhibit the prosecution of his cases and so would not deprive the inmate of his rights. Hossman v. Spradlin, 812 F.2d 1019, 1022 (7th Cir. 1987).

The extra protections afforded legal mail are generally reserved for privileged correspondence between inmates and their attorneys. Wolff, 418 U.S. at 574; Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1995). Furthermore, prisons can adopt administrative procedures for identifying protected mail that provide that only mail bearing specific markings will be opened in front of the inmate. Even correspondence from lawyers can be opened outside an inmate's presence if it is not marked as required by the policy. Martin, 830 F.2d at 78.

Petitioner asserts that respondent Oleson interfered with his mail. However, he has alleged no facts about Oleson's involvement with his mail except to refer to an inmate

complaint attached to his complaint in which he complained that a prison official had opened and delayed delivery of a letter from an institution complaint examiner at another institution. This is insufficient to suggest that respondent Oleson was personally involved in the alleged wrongdoing. If the prison official in the inmate complaint was respondent Oleson and the incident about which petitioner is complaining in this lawsuit is the incident about which he complained in his inmate complaint, then he has plead himself out of court on this claim. Respondent Oleson's alleged actions do not amount to a constitutional violation of petitioner's rights. The response to the inmate complaint shows that the correspondence that respondent Oleson allegedly opened and delayed was not clearly marked as privileged. Accordingly, I will deny petitioner leave to proceed on his claim against respondent Oleson.

Petitioner alleges that when respondents Bovee, Jess and Frank denied him relief in response to his offender complaints about respondent Oleson's actions they personally participated in violating his First Amendment rights. Because I have concluded that respondent Oleson did not violate petitioner's rights, petitioner's claims against respondents Bovee, Jess and Frank are also legally meritless.

C. Inmate Complaints

In addition to contending that respondents Bovee, Jess and Frank personally

participated in denying him his constitutional rights, petitioner appears to be suing these respondents on the ground that the inmate complaint review system established under Wis. Admin. Code § DOC 310 is operating unlawfully. Petitioner argues that the corrections complaint examiner does not conduct independent and neutral reviews of his complaints, instead mindlessly approving the findings of the institution complaint examiner. However, these allegations fail to state a federal cause of action because petitioner does not have a constitutional right to an inmate complaint system, let alone a system that functions to his liking. If petitioner believes that prison officials are violating regulations governing the inmate complaint review system, he will have to pursue that claim in state court.

ORDER

IT IS ORDERED that

1. Petitioner Warren G. Lilly, Jr.'s request for leave to proceed in forma pauperis on his claims against respondents is DENIED because his claims of constitutional wrongdoing are legally meritless.

2. I decline to exercise supplemental jurisdiction over petitioner's state law claims;

3. The unpaid balance of petitioner's filing fee is $249.63; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

4. A strike will not be recorded against petitioner because I am declining to exercise

supplemental jurisdiction over his state law claims; thus I did not dismiss the action for one of the reasons set forth in 28 U. S.C. § 1915(g); and

5. The clerk of court is directed to close the file.

Entered this 20th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge