

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JACKIE CARTER,

Plaintiff,

v.

OPINION AND ORDER

10-cv-520-wmc

DYLAN RADTKE, GREGORY GRAMS,
JANEL NICKEL, RICK RAEMISCH,
TIM DOUMA, ANTHONY ASHWORTH,
DAVID LIPINSKI, JOANNE LANE,
MARY LIESER, LT. SCHOENBERG,
LT. KELLER, DALIA SULIENE,
STEVE HELGERSON, LORI ALSUM,
DARCI BURRESON, SGT. BASS and C.O. SHIMPACH,

Defendants.

In this action, plaintiff Jackie Carter is suing prison administrators, correctional officers, medical staff and complaint examiners for a variety of constitutional violations. Carter requests leave to proceed *in forma pauperis*, seeks appointment of counsel and has moved for preliminary injunctive relief. This case is still pending before the court for screening pursuant to 28 U.S.C. § 1915A. Under this statute, the court must dismiss the complaint if it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune. *Id.*

For reasons set forth briefly below, the court concludes that Carter may proceed on his claims regarding the denial of use of the telephone to call his family. The remainder of Carter's claims will be dismissed. The court will also deny his motions for preliminary injunctive relief and appointment of counsel.

ALLEGATIONS OF FACT

In addressing any *pro se* litigant's complaint, the court reads the allegations generously, holding the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). The court assumes for purposes of this screening order, the following alleged facts.

- Plaintiff Jackie Carter is currently confined at the Columbia Correctional Institution.
- Carter has open sores but he is not allowed to clean them or bathe.
- Carter is not allowed to shave.
- He is being denied his medically authorized shoes, soap, mattress and prescriptions.
- Defendants Schoenberg, Bass and Shimpach stop all of Carter's incoming and outgoing mail. Defendant Keller took Carter's paperwork, address book and envelopes.
- Defendants Radtke and Lipinski have blocked Carter's ability to place phone calls to his family.
- Carter is being given false conduct reports.
- Each time Carter reports defendant Suliene's misconduct, she reduces his pain medication.
- Defendant complaint examiners Lieser, Lipinski and Lane do not properly process Carter's grievances.
- Carter is being retaliated against because he tries to inform people about the abuses at the prison.

OPINION

I. First Amendment Denial of Telephone Use

Carter alleges that defendants Radtke and Lipinski have completely barred him from using the telephone to contact his family. Unreasonable restrictions on a prisoner's telephone access may violate the First Amendment. *E.g.*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976). The determination whether restrictions on a prisoner's right satisfy *Turner* involves weighing: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the effect that accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Id.* at 89-90.

As the court of appeals has explained, district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest because an assessment under *Turner* requires a district court to evaluate the prison officials' particular reasons for the restriction. *E.g.*, *Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); *Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004) (same).

At this stage of the proceedings, therefore, the court will assume that the new restrictions are significant enough to implicate plaintiff's constitutional rights. At summary judgment or trial, if Carter can prove that his constitutional rights have been

impinged, defendants will have to show that the restrictions are reasonably related to a legitimate penological interest.

II. Complaint Examiners

Carter states that defendant complaint examiners Lieser, Lipinski and Millard would not process his grievances about telephone use for invalid reasons. At this point in the proceedings, Carter's allegations are sufficient to state First Amendment claims against these defendants. As the case proceeds, however, he will also have to show that each defendant had a responsibility to respond to his complaints, yet failed to help him. *See Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting "contention that any public employee who knows (or should know) about a wrong must do something to fix it").

III. Other Claims/Defendants

Carter raises several other claims on which he will not be allowed to proceed. For instance, Carter states that "prison staff" is not giving him soap, not allowing him to bathe or otherwise clean his open sores and not allowing him to shave. He does not, however, explain which defendants are denying him this treatment. Under Fed. R. Civ. P. 8, Carter's complaint is required to contain "a short and plain statement" of each claim showing that he is entitled to relief. "The primary purpose of [Rule 8] is to give defendants fair notice of the claims against them and the grounds supporting the claims."

Stanard v. Nygren, 658 F.3d 792, 797 (7th Cir. 2011) (citations omitted). Carter's complaint does not do this.

Carter alleges that defendant Keller took his paperwork, address book and envelopes. To the extent that Carter is saying that Keller deprived him of his ability to send mail, he is already proceeding on mail claims in case no. 10-cv-510-wmc and thus should pursue any claim against Keller on this basis in that case. To the extent that he wishes to pursue a due process claim, the Supreme Court has held that such claims do not rise to a constitutional violation as long as the government provides adequate post-deprivation procedures to remedy the loss of the property. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The state of Wisconsin provides several post-deprivation procedures for challenging the alleged wrongful taking of property. In particular, Wis. Stat. § 810.01 provides a remedy for the retrieval of wrongfully taken or detained property, and chapter 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because Carter has post-deprivation procedures available to him in state court, he cannot claim that the county deprived him of due process.

Finally, Carter raises allegations regarding the denial of medically-authorized shoes, prescriptions and mattress, the reduction of his pain medication, blockage of his mail and retaliatory false conduct reports, but those claims have been or are being

litigated in case nos. 09-cv-437-wmc, 10-cv-280-wmc and 10-cv-510-wmc. Thus, those issues do not need to be addressed in this case.¹

IV. Initial Partial Payment

Because Carter has not submitted the \$350 filing fee for this case, the court construes his complaint as including a request for leave to proceed *in forma pauperis*. From the trust fund account statements Carter has previously submitted to the court, his initial partial payment has been calculated to be \$11.30. If Carter does not have the money to make the initial partial payment in his regular account, he will have to arrange with prison authorities to pay some or all of the assessment from his release account.

This does not mean that Carter is free to ask prison authorities to pay all of his filing fees from his release account. The only amount Carter must pay at this time is the \$11.30 initial partial payment.

Before prison officials take any portion of that amount from Carter's release account, they may first take from Carter's regular account whatever amount up to the full amount he owes. Carter should show a copy of this order to prison officials to insure that they are aware they should send his initial partial payment to this court. If Carter fails to submit the initial partial payment by the deadline set by the court, the clerk of court will be directed to close this case without prejudice to Carter refiling his case at a later date.

¹ Except for other claims against the defendants involved in Carter's First Amendment claims going forward in this case, all of the other claims are also subject to dismissal as not sufficiently related to be part of a single lawsuit. *See* Fed. R. Civ. P. 20.

V. Other Motions

Carter has filed a motion for preliminary injunctive relief regarding his claims, but in it he addresses only claims that are being dismissed from this case, such as his medically authorized shoes or blockage of his mail. His motion will, therefore, be denied as moot.

Carter has also filed two motions for appointment of counsel. As discussed in Carter's previous cases, the court recruited counsel for the purpose of consulting with him about similar claims raised in several of his pending cases, as well as held a hearing about his various claims. Ultimately, the court concluded that it was appropriate for Carter to proceed *pro se* in each of his lawsuits. See *Carter v. Radtke*, Case No. 09-cv-437-wmc, slip op. (Dec. 2, 2011). For the same reasons, the court will deny his motions for appointment of counsel.

VI. Status Conference

Pursuant to the June 6, 2013 order entered in each of Carter's remaining cases (dkt. #28), this case has been consolidated with case no. 10-cv-510-wmc and will be set for a preliminary pretrial conference.

ORDER

IT IS ORDERED that:

- (1) Plaintiff Jackie Carter is GRANTED leave to proceed on his First Amendment claims that defendants Radtke and Lipinski have blocked Carter's ability to place phone calls to his family, and that defendant complaint examiners Lieser, Lipinski and Millard would not process his grievances about telephone use for invalid reasons.

- (2) Plaintiff is DENIED leave to proceed on the remainder of claims he brings in this lawsuit. Defendants Grams, Nickel, Raemisch, Douma, Ashworth, Schoenberg, Keller, Suliene, Helgerson, Alsum, Burreson, Bass and Shimpach are DISMISSED from the case.
- (3) Plaintiff's motion for preliminary injunctive relief (dkt. #27) is DENIED.
- (4) Plaintiff's motions for appointment of counsel (dkt. #20, 26) are DENIED.
- (5) A telephonic scheduling conference will be held on June 27, 2013 at 10 a.m. before Judge Conley. Defendant shall initiate the call to the court.
- (6) Plaintiff is assessed \$11.30 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$11.30 on or before June 24, 2013.
- (7) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's supplemental complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.
- (8) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- (9) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 7th day of June, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge