

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

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NATHANIEL ALLEN LINDELL,

Petitioner,

v.

JOHN/JANE DOES, J.C. SMITS,  
LINDA ALSUM-O'DONOVAN, MARC  
W. CLEMLENTS, JOHN RAY and CINDY  
O'DONNELL,

Respondents.  
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ORDER

01-C-209-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Nathaniel Lindell, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint

liberally. 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 on three or more previous occasions had a suit 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 seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove 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). See 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 conspired to deprive him of an issue of Pagan Revival, a religious, political and philosophical magazine, because respondents disagreed with the magazine's contents. Petitioner will be denied leave to proceed in forma pauperis because he has failed to allege facts sufficient to suggest that respondents intended to deprive him of his magazine and therefore has failed to state a claim for relief under the First Amendment or the equal protection clause of the Fourteenth Amendment. Petitioner will be denied leave to proceed in forma pauperis on his claims under the Fourth Amendment

and the due process clause of the Fourteenth Amendment because the claims are legally frivolous.

In his complaint, petitioner makes the following allegations of fact.

## ALLEGATIONS OF FACT

### A. Parties

At all relevant times, respondent J.C. Smits was a correctional officer working in the Waupun Correctional Institution mailroom. Respondent John or Jane Doe is a member of the security office at Waupun Correctional Institution. Respondent Linda Alsum-O'Donovan is an institution complaint examiner at Waupun Correctional Institution. Respondent Marc W. Clements is Security Director at Waupun Correctional Institution. Respondent John Ray is a corrections complaint examiner for the Wisconsin Department of Corrections. Respondent Cindy O'Donnell is employed by the Wisconsin Department of Corrections as a reviewer and final decisionmaker on recommendations of correction complaint examiners.

### B. Failure to Deliver *Pagan Revival* Issue #45

On or about October 27, 2000, issue #45 of Pagan Revival magazine arrived at Waupun Correctional Institution. The magazine was delivered through first-class United

States mail in a manilla envelope with petitioner's name and Department of Corrections' number visible. Pagan Revival is a religious, political and philosophical magazine that is Eurocentric and discusses the struggles, thoughts and goals of the Euro-pagan community. Euro-pagans at Waupun Correctional Institution and other Wisconsin prisons are mistreated on the basis of their beliefs. Petitioner has had problems obtaining a previous copy of Pagan Revival. Each respondent dislikes the content of the speech contained in Pagan Revival and would jump at the chance to deny petitioner possession of the magazine. When issue #45 of Pagan Revival arrived at Waupun Correctional Institution, respondent Doe seized it; petitioner was not told that his magazine had been seized for review. The seizure occurred because respondents Doe and Smits disliked the content of the magazine.

Respondent Smits refused to tell petitioner the name of the Department of Corrections employee who seized the magazine. Respondent Alsum-O'Donovan refused to investigate petitioner's complaint to determine who had seized Pagan Revival issue # 45 and why. Respondent Alsum-O'Donovan also failed to summarize accurately petitioner's complaint for the warden and refused to tell petitioner who had seized his magazine and his or her reason for doing so. Respondent Clements refused to reveal who had seized petitioner's magazine, why he or she had seized it or how the magazine could have been lost when petitioner's name and Department of Corrections number were indicated clearly on the envelope. Respondent Ray refused to investigate (or refused to reveal the results of any

investigation) petitioner's complaint in which he alleged a conspiracy to deprive him of Pagan Revival issue #45, refused to say who had seized the magazine, why or how it was lost. Respondent Ray approved defendant Alsum-O'Donovan's misconduct. Respondent O'Donnell approved the actions of respondents Alsum-O'Donovan and Ray and neglected or refused to prevent the violation of petitioner's rights from continuing even though she knew about the conspiracy.

The alleged loss of Pagan Revival # 45 is the first time during the two and a half years that petitioner has been incarcerated at Waupun Correctional Institution that any mail sent to him through the United States Postal Service has been lost. Petitioner has subscribed to Pagan Revival for more than a year. Mailroom records indicate that issue #45 was sent to the security office for review. Petitioner was given \$2.00 for the loss of the magazine, even though he had paid \$5.00 for the magazine. An inmate subscription for four issues of Pagan Revival costs \$8.00; a non-inmate subscription costs \$20.

On November 16, 2000, respondent Clements responded to a letter from petitioner by saying, "I have been unsuccessful in locating [issue #45] and suggest you follow the inmate complaint procedure." In the institution complaint examiner's report responding to petitioner's grievance, respondent Alsum-Donovan wrote, in part, "A response to inmate Lindell from the Mailroom indicates that the magazine was sent to Security for review. After checking with both the Security Director and Program Director it is clear that this magazine

has been lost. I note that this magazine was reviewed for another inmate and was determined to be not allowed.” In a letter dated January 10, 2001, respondent Alsum-O’Donovan wrote to petitioner,

You ask in your correspondence, ‘who was the employee who confiscated issue #45 of Pagan Revival’. The answer to that question is no one. Your publication was received in the Mailroom. Staff was not sure if the publication was appropriate to be delivered and forwarded your publication to the Security Director’s Office to make that determination.

Both the Complaint Department and Mr. Clements have explained that the publication got lost. You have been compensated for the lost magazine.

#### DISCUSSION

I understand petitioner to contend that respondents conspired to deprive him of Pagan Revival issue #45 in violation of his rights to free speech and free exercise of religion under the First Amendment, his right to be protected from unreasonable searches and seizures under the Fourth Amendment and his right to be free from religious and political discrimination under the Fourteenth Amendment. Petitioner contends also that respondent Doe deprived him of procedural due process by seizing his magazine without providing petitioner with notice of the seizure.

It is well established that liability under § 1983 must be based on the defendant’s personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d

555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). In a § 1983 action, there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. See Gentry, 65 F.3d at 561; Del Raine, 32 F.3d at 1047; Wolf-Lillie, 699 F.2d at 869. Respondent Doe, the person who confiscated issue #45, is the only respondent that petitioner has alleged was involved personally in depriving him of his magazine; however, as will be discussed below, it is unlikely that petitioner's magazine was confiscated and therefore unlikely that respondent Doe exists. The remaining respondents were not involved in any loss or confiscation of the magazine; petitioner alleges solely that they failed to resolve his complaints to his satisfaction. Even assuming that the other respondents were involved personally in the loss of the magazine, petitioner has failed to state a claim upon which relief may be granted.

To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Claims of conspiracies to effect

deprivations of civil or constitutional rights may be brought in federal court under § 1983. A bare allegation of conspiracy is insufficient to support a conspiracy claim. See Ryan v. Mary Immaculate Queen Center, 188 F.3d 857, 860 (7th Cir. 1999). Rather, a plaintiff must allege facts to describe the form and scope of the conspiracy and when it was formed. See id. Petitioner has provided no explanation how respondents would have conspired to deny him his magazine or when the conspiracy was formed. Petitioner will be denied leave to proceed in forma pauperis on a conspiracy claim.

Prisoners do not retain a reasonable expectation of privacy in their property. Hudson v. Palmer, 468 U.S. 517, 530, 536 (1984) (“[T]he Fourth Amendment has no applicability to a prison cell.”). Therefore, petitioner’s claim that respondent Doe seized his magazine in violation of the Fourth Amendment is legally frivolous. “An unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.” Id. at 533. A meaningful postdeprivation remedy was available to petitioner and he received \$2.00 for the loss of his magazine. Petitioner will be denied leave to proceed on his claim that respondent Doe denied him procedural due process in violation of the Fourteenth Amendment because the claim is legally frivolous.

Prison actions that affect an inmate's receipt of non-legal mail must be “reasonably



related to legitimate penological interests.” Thornburgh v. Abbott, 490 U.S. 401, 409 (1989); see also Turner v. Safley, 482 U.S. 78, 89-90 (1987) (setting forth four factor test); Bell v. Wolfish, 441 U.S. 520 (1979). The Supreme Court has held that “it [is] important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression.” Turner, 482 U.S. at 90. Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in “censorship of . . . expression of ‘inflammatory political, racial, religious, or other views,’ and matter deemed ‘defamatory’ or ‘otherwise inappropriate.’” Procunier v. Martinez, 416 U.S. 396, 415 (1974). To show that respondents violated the First Amendment by targeting the magazine because of its content, petitioner must show that respondents acted intentionally. Similarly, to show an equal protection violation, a plaintiff must demonstrate intentional or purposeful discrimination. See Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982).

Petitioner has alleged no facts suggesting why this court should not believe respondents’ conclusion during the processing of petitioner’s internal complaints that the magazine was lost inadvertently after it was sent to the security office for review. Petitioner’s allegation that he had never had mail lost before in the two and a half years that he had been in the prison and that he had been receiving his subscription to Pagan Revival for more than a year suggests that respondents were not targeting the magazine or his

religious beliefs. Petitioner's allegation that respondent Alsum-Donovan failed to investigate the "seizure" of the magazine is discredited by respondent's report that she checked with the security director and the program director regarding the magazine's loss. Respondent Alsum-Donovan noted in her report that issue #45 had been reviewed for another inmate and was determined to be not allowed; petitioner suggests no reason why respondents would admit to having kept the issue purposely from another inmate but pretend to have lost petitioner's copy. Petitioner was compensated for the loss of the magazine; had the magazine been confiscated for being inappropriate, the Department of Corrections would have had no obligation to compensate him. Petitioner has failed to state a claim upon which relief may be granted under the First or Fourteenth Amendments because he has not alleged facts sufficient to suggest that the loss of his magazine was intentional. Negligence, such as the inadvertent loss of petitioner's magazine, is not sufficient to state a claim for relief under § 1983. Petitioner will be denied leave to proceed in forma pauperis on his claim that his magazine was taken from him in violation of the First Amendment and the equal protection clause of the Fourteenth Amendment.

#### ORDER

IT IS ORDERED that

1. Petitioner Nathaniel Allen Lindell's request for leave to proceed in forma pauperis

on his claim that respondents conspired to deny him a magazine in violation of the First Amendment and the equal protection clause of the Fourteenth Amendments is DENIED for his failure to state a claim upon which relief may be granted;

2. Petitioner's request for leave to proceed in forma pauperis on his claims under the Fourth Amendment and the due process clause of the Fourteenth Amendment are DENIED because the claims are legally frivolous.

3. A strike will be recorded against petitioner pursuant to § 1915(g);

4. The unpaid balance of petitioner's filing fee is \$146.15; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2); and

5. This action is DISMISSED. The clerk of court is directed to enter judgment and close the file.

Entered this 3rd day of May, 2001.

BY THE COURT:

BARBARA B. CRABB  
District Judge