IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE WILLIAMS,

OPINION AND ORDER

Plaintiff,

02-C-283-C

v.

WARDEN GERALD BERGE and
C.O. II H. BRAY,

Defendants.

- -

This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Willie Williams, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, alleges that his First Amendment rights were violated when his legal mail was opened outside his presence during a two-week period from March 1, 2002 to March 16, 2002. The case is before the court on the motion of defendants Gerald Berge and C.O. II H. Bray for summary judgment and on plaintiff's second motion for appointment of counsel, "Motion for Either a Protection Order or Physical and Mental Examination" and "Motion for a Protection Order." Because I conclude that the only letters plaintiff has identified that could have been opened outside his presence during the relevant time period are not the type of "legal mail"

entitled to protection under the First Amendment, defendants' motion for summary judgment will be granted. Because plaintiff's second motion for appointment of counsel and motions for protective orders are without merit, they will be denied.

An initial matter must be addressed before reaching the merits of the parties' arguments. On December 17, 2002, plaintiff filed a response to defendants' motion for summary judgment that did not comply with this court's summary judgment procedures. (Plaintiff had been sent a copy of the procedures along with the preliminary pretrial conference order entered in this case on August 13, 2002.) Specifically, plaintiff failed completely to respond to defendants' proposed findings of fact, as required by the procedures. Instead, he filed his own set of proposed facts and failed to cite to admissible evidence in the record supporting those facts. In an order dated December 18, 2002, the magistrate judge explained these deficiencies to plaintiff, extended the schedule for briefing the summary judgment motion so plaintiff could file a revised response and directed him to the specific procedures he should observe in crafting that response. Rather than revising his response, plaintiff filed a document on January 3, 2003, in which he argues that the proposed findings of fact he submitted are "correct and fair" and that they "will have to be simply accepted as is" because he does not understand the court's summary judgment procedures. See dkt. #47. In addition, plaintiff asks for the second time that counsel be appointed to represent him. Id.

Plaintiff's motion for appointment of counsel will be denied. In an order dated June 21, 2002, I denied plaintiff's first motion for appointment of counsel and explained that his case is not complex, as it involves only a single claim that during a two-week period his legal mail was opened outside his presence in violation of the First Amendment. I informed plaintiff that his ability to prevail would rest largely not on complicated issues of law, but on his ability to present basic facts showing which particular pieces of mail were opened outside his presence from March 1, 2002 to March 16, 2002. Nothing has changed to persuade me that plaintiff is incapable of pulling such basic facts together without the assistance of counsel.

Moreover, because plaintiff has declined to file a response to defendants' summary judgment motion in accordance with the court's procedures, I am left with little choice but to accept defendants' proposed findings of fact as undisputed. I recognize that plaintiff is not a lawyer, but I am not convinced that he is incapable of following the straightforward procedures that this court uses to simplify consideration of summary judgment motions. In support of their summary judgment motion, defendants filed only 52 proposed facts, the relatively small number reflecting the uncomplicated nature of this case. Under the heading "Response to Motion for Summary Judgment" in the court's procedures, plaintiff was informed that he must file a response to defendants' proposed findings of fact and that in the response he must "answer each numbered fact proposed by the moving party in separate

paragraphs, *using the same number*" (emphasis in original). In his December 18, 2002 order, the magistrate judge pointed plaintiff to this requirement and noted that plaintiff had "not filed a document answering each numbered fact defendants proposed in separate paragraphs using the same number." Plaintiff's assertion that he is incapable of filing a response that follows these simple instructions is not credible. Accordingly, I will accept defendant's proposed findings of fact as undisputed.

UNDISPUTED FACTS

Plaintiff Willie Williams is a Wisconsin inmate housed at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendant Gerald Berge is the warden at the Wisconsin Secure Program Facility and defendant C.O.II H. Bray is a correctional officer at the prison. Plaintiff was allowed to proceed on a single First Amendment claim: that during a two-week period from March 1, 2002 to March 16, 2002, defendant Bray opened plaintiff's legal mail outside his presence and defendant Berge knew Bray was doing so but failed to intervene.

Defendant Bray served a single production request upon plaintiff on July 11, 2002, seeking production of "[a]ny and all legal correspondence and associated envelopes you claim were opened outside your presence by defendant Bray during the period March 1, 2002, through and including March 16, 2002, that are the subject of this litigation." Plaintiff

responded to the production request with (1) his own affidavit stating that on March 16, 2002, correctional officer Taylor "gave me a lot of legal mail that had been open out of my present for over the period of two week: and there was over 20 other pieces of legal mail — requests slip — inst grievances other misc pieces of mail legal in content that were open — also legal mail pertaining to civil case #01-241-C Williams v. Sgt. T. Ever . . . ."; (2) another affidavit in which plaintiff avers that "on 5-13-02 C.O. Henneman brought over 20 pieces of legal mail too me out of my property box that had been in the property box for over 90 days, most of it pertaining to civil case #NO 01-21 and over 10 different grievances. I was appealing a few other misc piece's of mail also."; (3)copies of a variety of documents from the Wisconsin Department of Corrections inmate compliant review system, all of which pre-dated or post-dated the March 1 through March 16, 2002 period; (4) copies of the first pages from two orders from a case in this court, Williams v. Evers, case no. 01-C-241-C; (5) a copy of a March 28, 2002 letter from attorney Howard B. Eisenberg to plaintiff; and (6) copies of a cover letter and three separate summary judgment documents from case no. 01-C-241-C, sent by assistant attorney general Tom Dawson to Joseph W. Skupniewitz, this court's clerk, on March 8, 2002, copies of which had been sent to plaintiff.

On or about August 29, 2002, defendant Bray sent plaintiff a set of interrogatories requesting a description of "any and all legal correspondence you claim was opened outside your presence by defendant Bray during the period March 1, 2002, through and including

March 16, 2002, that is the subject of this litigation." In response to the interrogatories, plaintiff described (1) a letter from attorney Howard Eisenberg dated "3-uncertain-02" and related to "pro-bono or contingency attorney for my litigation law suits on the civil level (legal)."; (2) the correspondence from assistant attorney general Dawson dated March 8, 2002, consisting of Dawson's "reply brief" and various "response[s]" in case "01-C-0241-C Willie Williams v. Sgt. Evers et al." filed with "Joseph Skupniewitz - Clerk U.S.D.C."; and (3) the inmate complaint review system documents from "Ellen K. Ray and or Kelly Coon both investigative complaint examiner on the first [] step level of I.C.R.'s at S.M.C.I." concerning "IC.R.'s Grievance complaint for lost or destroy-ed personal property and I.C.R.s for Defendant Hendering frustrating my access to the court by opening my legal mail — and I.C.R.'s for falsely charging me with disciplinary frame up of an allege assault and other I.C.E.'s that I was address concerning defendant throwing my milk — etc food ice cream on the floor."

Plaintiff was deposed on October 15, 2002, and was instructed to bring to the deposition "any and all legal correspondence and associated envelopes you claim were opened outside your presence by Defendant Bray during the period March 1, 2002, through and including March 16, 2002, that are the subject of this litigation." At his deposition, plaintiff produced copies of certain documents he had already produced in response to defendant Bray's production request and a March 20, 2002 letter to all prisoners at the

Wisconsin Secure Program Facility from Ed Garvey, with an attached settlement agreement related to a class action suit filed in this court, Jones 'El v. Litscher, case no. 00-C-421-C. Plaintiff also testified that he received two other letters from Howard Eisenberg during the relevant time period. (Garvey and Eisenberg represented the plaintiff class in Jones 'El.) Plaintiff could not describe the content of these two letters, had no copies of the letters and testified that he did not know what he did with the originals.

In a document plaintiff signed on December 5, 2002, he formally waived, for the purpose of this lawsuit, any attorney-client privilege he may have had with Eisenberg. Eisenberg's staff has maintained a file of correspondence received by Eisenberg from plaintiff or sent by Eisenberg to plaintiff. Eisenberg either responded to the letters sent to him by plaintiff or indicated on the letter that no response was necessary. Eisenberg responded to five letters he received from plaintiff. Eisenberg received the first letter on October 1, 2001 and responded on October 8, 2001. The second letter is undated but Eisenberg responded to it on November 3, 2001. The third letter was received on November 7, 2001, and was responded to on November 12, 2001. The fourth letter is undated but file stamped March 28, 2002, and was responded to the same day. Finally, the fifth letter was undated, file stamped April 24, 2002, and responded to the same day. Eisenberg never responded to three other letters from plaintiff. Two of these letters are undated and the third is dated October 10, 2001.

At his deposition, plaintiff testified that defendant Bray "did come to my cell with some mail and he did open some mail outside my presence, because I didn't acknowledge him; and yes, he did take some mail and store it somewhere out of my presence." When plaintiff was asked at his deposition if defendant Bray presented mail to him at the window of his cell during this two-week period, plaintiff responded "I can acknowledge maybe once or twice, but I can acknowledge him working every single day." When asked if defendant Bray had opened the mail at his cell door, plaintiff responded "[y]es, he did, and he did — if it was opened, he did it." When asked what evidence he had to support his claim that defendant Bray opened his mail outside his presence, plaintiff stated "[t]he officer in my face telling me, harassing me, intimidating me, that's how, placing me on paper restriction so I couldn't have any of my legal mail, placing me on paper restriction so he can open the legal mail and then see if there's anything in there that he can assist Sergeant Evers with, and then placing the legal mail in my property box out of my presence." When plaintiff was asked if he had any more evidence that defendant Bray had opened his legal mail outside his presence, plaintiff stated "the assaults, the paper restrictions, the food deprivations, all of the humiliation and deprivation, all of that was the tactics for this officer's actions. And I'll say that again and again and again."

At his deposition, plaintiff alleged that defendant Bray had also opened legal mail that plaintiff first received on May 13, 2002, some 60 days after it had arrived. When asked for

evidence supporting this claim, plaintiff responded

> I know for certain that five days, sometimes six days out of every week, ever since March or February or March of 2001, that I have been specifically — this is no ifs, ands, buts about it — assigned to this one specific officer, point blank, put my life on it, personally assigned to this specific officer. I done did everything imaginable that's up under any type of form of dignity to lay there and beg this administration to remove this officer from harassing me. I done wrote everything in the world about trying to beg this officer to get him off of me. This specific officer has dealt with everything that has anything to do with me on every single shift — or every single day of — of — of the five days and sometimes six days that he's worked, including food, clothing, supplies — and supplies mean like toothpaste, deoderant, soap, writing supplies, anything that has anything to do with me, this particular officer has specifically been assigned to me personally. I'll put my life on that. That's a fact.

The staff at the Wisconsin Secure Program Facility consists of approximately 254 employees.

Defendant Berge is responsible for the overall administration and operation of the Wisconsin Secure Program Facility. Berge has the responsibility at the institutional level for implementing all Department of Corrections' policies and directives and legislative and judicial mandates. He also has general authority pursuant to Wisconsin Department of Corrections internal management procedure DOC 309 IMP 4 to develop and insure compliance with policies and procedures regarding the processing of inmate mail. This role is consistent with his other general supervisory responsibilities as a manager of a maximum security penal institution. Wisconsin Secure Program Facility staff is instructed that legal mail is to be opened only in the presence of the inmate in accordance with Wis. Admin. Code § DOC 309.04(3). Defendant Berge does not have day-to-day responsibility for

overseeing or distributing inmate mail, has never personally opened any mail addressed to plaintiff or any other inmate and has never authorized anyone to open any mail addressed to plaintiff other than as consistent with the practices and procedures established by the Department of Corrections and the Wisconsin Secure Program Facility. Defendant Berge has not received any complaints from inmates at the Wisconsin Secure Program Facility about systemic problems with the handling of inmates' legal mail.

OPINION

Viewed in the light most favorable to plaintiff, the undisputed facts show that the only pieces of mail that could have been opened outside plaintiff's presence from March 1 to March 16, 2002, the two-week period relevant to this lawsuit, are the following: (1) two orders from this court in an earlier case that plaintiff had filed, Williams v. Evers, case no. 01-C-241-C; (2) a cover letter and three separate summary judgment documents from the Evers case, sent by assistant attorney general Tom Dawson to Joseph W. Skupniewitz, this court's clerk, on March 8, 2002, each of which were copied to plaintiff; (3) a letter from Howard Eisenberg dated "3-uncertain-02" and related to "pro-bono or contingency attorney for my litigation law suits on the civil level (legal)"; and (4) two other unidentified letters from Eisenberg. All the other correspondence identified by plaintiff are dated before or after the relevant two-week period, such as the March 28, 2002 letter from Howard Eisenberg to

plaintiff, the March 20, 2002 letter to all prisoners at the Wisconsin Secure Program Facility from Garvey and the documents from the Department of Corrections inmate complaint review system. Because the dates on these materials show that they could not have been opened by defendant Bray between March 1 and March 16, 2002, plaintiff cannot rely on them to defeat defendants' summary judgment motion.

As for the mail identified by plaintiff as having been received during the relevant time period, I conclude that much of that material is not the type of "legal mail" entitled to constitutional protection. Prison officials violate the First Amendment when they open privileged mail from an attorney to an inmate, outside of the inmate's presence. See Antonelli v. Sheahan, 81 F.3d 1422, 1431-32 (7th Cir. 1996). However, the mere fact that a piece of mail is sent to an inmate by a court or a person licensed to practice law is not enough to trigger constitutional protections by itself. For instance, with respect to court mailings to prison inmates, the Court of Appeals for the Seventh Circuit has noted that "with minute and irrelevant exceptions all correspondence from a court to a litigant is a public document, which prison personnel could if they want inspect in the court's files." Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987). Therefore, the court of appeals observed that there was no apparent reason to deem such correspondence constitutionally privileged. Id.; see also Antonelli, 81 F.3d at 1431 ("[P]rison employees can open official mail sent by a court clerk to an inmate without infringing on any privacy right."); Keenan v. Hall, 83

F.3d 1083, 1094 (9th Cir. 1996) ("Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not legal mail."). Therefore, the orders that this court mailed to plaintiff in Williams v. Evers, case no. 01-C-241-C, are not privileged documents entitled to First Amendment protections. For similar reasons, the cover letter and three summary judgment documents from the Evers case that were sent by assistant attorney general Tom Dawson to this court's clerk, with copies to plaintiff, are also not privileged. It would be absurd to conclude that plaintiff is prejudiced when prison officials open mail containing public documents that were prepared by the officials' own attorneys. See Martin, 830 F.2d at 78.

I recognize that in Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306-07 (7th Cir. 1993) (per curiam), the court of appeals noted that the discussion regarding court mail in Martin is dicta. But the decision in Castillo, delivered over a dissent, was concerned with court mail marked clearly with the legend "LEGAL MAIL - OPEN IN PRESENCE OF INMATE." The panel majority held that a complaint could not be dismissed out of hand as frivolous when it alleged that court mail bearing this label was opened outside an inmate's presence. However, the court noted also that it "need not determine whether *unmarked* court mail should receive the benefit of the Martin protections." Id. at 307 (emphasis added). Mail sent from this court to prisoners is not marked as legal mail to be opened only in a prisoner's presence and plaintiff has produced no evidence that the mail he received from assistant attorney general Dawson bore such a marking. Moreover, I find persuasive the

court of appeal's reasoning in Martin regarding the lack of prejudice an inmate suffers when court mail and other public documents are opened outside his presence.

That leaves the letters plaintiff received from Eisenberg. According to plaintiff, one was dated "3-uncertain-02" and related to "pro-bono or contingency attorney for my litigation law suits on the civil level (legal)." Plaintiff is unable to identify the specific dates or contents of two other letters from Eisenberg that were allegedly opened during the relevant two-week time period. Courts require that a party opposing a summary judgment motion "take reasonable steps to provide the district court sufficient evidence to create a genuine issue of material fact." Self-serving, conclusory affidavits do not do the trick. Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001); see also Schactht v. Wisconsin Department of Corrections, 175 F.3d 497, 504 (7th. Cir. 1999) (Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier to accept its version of events"). Plaintiff's evidence, which consists of conclusory statements regarding unproduced letters bearing uncertain dates, simply does not show that mail was opened outside his presence between March 1 and 16, 2002. This conclusion is bolstered by the undisputed fact that Eisenberg's files contain no record of correspondence with plaintiff during that time. Moreover, I have examined the documents plaintiff submitted with his proposed findings of fact and have read the entire transcript of his deposition, but have had little luck in finding competent evidence

to support his claim. Accordingly, I will grant defendants' motion for summary judgment.

Finally, plaintiff has filed documents titled "Motion for Either a Protection Order — Or Physical and Mental Exam," dkt. #48, and "Motion for a Protection Order," dkt. #55. In the first, plaintiff alleges that when he was "bang[ing] on the toilet in" his cell, he discovered "a long clear tube with an clear liquid within it with a tube running from it up to the drinking water of my sink." Plaintiff believes that various prison officials are using this tube to poison him or at least to conduct experiments on him. In the second, plaintiff repeats his allegation about the tube, complains that his cell isn't adequately heated, objects to being fed segregation loaf and asks to be transferred to another prison. These motions are similar to plaintiff's earlier motion seeking a transfer because prison guards made him demonstrate that he "had his dentures in his mouth" and with plaintiff's general insistence on filing motions and affidavits concerning claims that are not in his complaint and have nothing to do with the pending lawsuit. As plaintiff should already be aware, this lawsuit is not a vehicle for bringing to the court's attention any and all grievances he has with prison officials. Moreover, this approach to litigation does not help plaintiff. If he has any potentially meritorious claims, he runs the risk of burying them under the mountain of unrelated motions that he routinely files with the court. Plaintiff's motions for protective orders will be denied.

ORDER

IT IS ORDERED that

1. The motion for summary judgement of defendants Warden Gerald Berge and C.O. II H. Bray is GRANTED;

2. Plaintiff Willie Williams' motion for appointment of counsel, "Motion for Either a Protection Order — Or Physical and Mental Exam" and "Motion for a Protection Order" are DENIED;

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 28th day of January, 2003.

BY THE COURT:

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BARBARA B. CRABB
District Judge