

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

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TONY WALKER, individually and on behalf  
of all prisoners similarly situated or will be  
similarly situated in the correctional  
institutions and facilities of the Wisconsin  
Department of Corrections,

Petitioner,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS;  
JON E. LITSCHER; CINDY O'DONNELL;  
STEVEN CASPERSON; JOHN RAY;  
DANIEL R. BERTRAND; FRANCIS LARDINOIS;  
WENDY BRUNS,

Respondents.

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ORDER

02-C-0430-C

This is a proposed civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. §1983. Petitioner Tony Walker is an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin. He alleges that respondents violated his rights under the First and Fourteenth Amendments by curtailing his ability to communicate with his family and others.

In an order dated August 1, 2002, I concluded that petitioner had no means with

which to make an initial partial payment of the fee for filing his case. Accordingly, I will review petitioner's request for leave to proceed in forma pauperis without first requiring payment of an initial partial filing fee. 28 U.S.C. § 1915(b)(4).

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).

In his proposed complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner is an inmate at the Green Bay Correctional Institution in Green Bay, Wisconsin. Respondent Wisconsin Department of Corrections is a state agency. Respondent Jon Litscher is Secretary of the Wisconsin Department of Corrections. Respondent Cindy O'Donnell is Deputy Secretary of the Wisconsin Department of Corrections. Respondent Steven Casperson is the administrator of adult institutions. Respondent Daniel Bertrand is the warden of Green Bay Correctional Institution. Respondent John Ray is a corrections complaint examiner. Respondent Wendy Bruns is an inmate complaint examiner. Respondent Francis Lardinois is a corrections officer at Green Bay Correctional Institution.

In mid-March 2002, respondent Lardinois refused to deliver to petitioner twenty-five embossed envelopes sent by petitioner's sister. Respondent Lardinois told petitioner that a prison policy revised in December 2001, requires prisoners to get stamps and embossed envelopes from the prison canteen and forbids them from obtaining these items from outside the prison. Respondents O'Donnell, Ray, Casperson, Bruns and Bertrand all upheld the rejection by relying on the policy. Respondent Litscher did not respond to petitioner's grievance concerning the rejection.

Petitioner also sent several letters to respondent Bertrand that were addressed to petitioner's family and he asked respondent Bertrand to apply postage to the letters and mail them. Respondent Bertrand returned the letters to petitioner with a response refusing to mail the letters.

Petitioner has accumulated \$4700 in legal loans. He has no funds with which to purchase stamps or stamped envelopes from the institution. Money sent to the institution by his family for the purpose of buying stamps or embossed envelopes would be used by the institution to repay that loan. Petitioner is permitted to make telephone calls during his recreation time, but members of his family cannot or will not accept collect calls.

#### DISCUSSION

As an initial matter, I note that petitioner seeks to bring this action on behalf of himself and other similarly situated inmates in Wisconsin. In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons.

First, petitioner is not represented by an attorney, and it appears from the complaint and from the circumstances that the named petitioner is not an attorney. Since absent class members are bound by a judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512,

51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even lawyers may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. See, e.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, class certification will be denied.

Also, petitioner has named as a respondent the Wisconsin Department of Corrections. Under Rule 17(b) of the Federal Rules of Civil Procedure, capacity to sue or be sued is determined by the law of a party's domicile. In Wisconsin, a governmental unit is considered to be an independent body politic and thus sui juris only if it possesses independent proprietary functions and powers such as the power to levy taxes, to incur liability beyond an amount appropriated by the legislature, to hold title to property in its own name, or to dispose of real and personal property without express authority from the state. Majerus v. Milwaukee County, 39 Wis. 2d 311, 314-15, 159 N.W. 2d 86 (1968); Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242, 244, 244 N.W.2d 563

(1932). Plaintiff does not allege that the Wisconsin Department of Corrections, has such independent powers. Therefore, this entity will be dismissed from this case pursuant to 28 U.S.C. § 1915A.

I understand petitioner to allege that respondents are depriving him of his right to free expression because they require him to purchase stamps and embossed envelopes from the prison canteen rather than receive them from outside the prison and they will not provide postage for him even though he is indigent and cannot buy his own.

The Supreme Court has recognized in a number of cases that prisoners have a First Amendment right to communicate with those outside the prison, even for non-legal purposes. See Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987); Procunier v. Martinez, 416 U.S. 396 (1974). In Turner the Court held: “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to penological interests.” Turner, 482 U.S. at 89.

Initially I note that there are two ways of analyzing petitioner’s claim. First, petitioner could be contending that the institution’s policy places an unconstitutional restriction on mail *others* send *to him*. He could also mean to argue that the policy violates the First Amendment because it burdens *his* ability to send mail *to others*.

With respect to the first contention, the prison’s policy of prohibiting outsiders from sending stamps or embossed envelopes to inmates does not impede petitioner’s family or

anyone else from communicating with petitioner any more than a restriction on receiving food or clothing through the mail would. The policy does not restrict words or ideas; it restricts stamps and embossed envelopes. Therefore, the policy does not implicate the First Amendment with respect to the ability of those outside the prison to communicate with petitioner.

The policy also does not censor or prohibit petitioner from initiating communication with his family or others. However, by refusing to pay for petitioner's postage or to allow petitioner's family to send him stamps or embossed envelopes, respondents have restricted petitioner's ability to communicate through the mail.

Respondents' refusal to pay for postage for letters to petitioner's family does not violate petitioner's First Amendment rights. Although the state must pay for postage necessary to insure an inmate's access to courts, see Bounds v. Smith, 430 U.S. 817, 824 (1977), there is generally "no constitutional entitlement to subsidy." Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002); see also Hershberger v. Scaletta, 33 F.3d 955, 956-57 (8th Cir. 1994) (indigent inmates do not have a right to free postage for personal mail); Van Poyck v. Singletary, 106 F.3d 1558 (11th Cir. 1997) (same); Gaines v. Lane, 790 F.2d 1299, 1308 (7th Cir. 1985) (holding that prisoners "do not have a right to unlimited free postage"). Petitioner does not allege that respondents have refused to provide him with reasonable postage for legal mail. Thus, petitioner has no claim that his right of access to

courts has been denied.

Although respondents are not constitutionally required to *provide* postage to petitioner, it does not necessarily follow that respondents may arbitrarily *prevent others* from assisting petitioner in communicating with those outside the prison. To state a claim under the First Amendment, it is not necessary to allege that prison officials have explicitly prohibited communication if their actions are making communication more difficult. See Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (holding that prisoner stated a First Amendment claim when he alleged that officials delayed mail delivery “for an inordinate amount of time”). If the prison had a policy requiring inmates to send their letters in blue envelopes that had to be purchased at the prison canteen for \$100 each, it would be difficult to argue that prisoners’ First Amendment right to communicate was not implicated. Although the policy petitioner is challenging is not so severe, it nevertheless has the same effect of making communication through the mail almost impossible for him.

I conclude that the prison’s policy of requiring petitioner to purchase stamps or embossed envelopes through the prison canteen “impinges on inmates’ constitutional right[.]” to communicate with those outside the prison. Turner, 482 U.S. at 89. To pass constitutional muster, respondents will have to show that the policy is supported by a legitimate penological interest. Petitioner will be granted leave to proceed on a claim under the First Amendment that he has been deprived of his right to communicate with persons



outside the prison.

Petitioner will be granted leave to proceed on this claim against both respondent Lardinois, who allegedly refused to give petitioner the embossed envelopes that were mailed to him, and against the remaining respondents, who were all allegedly involved in rejecting petitioner's inmate complaints regarding the refusal to give him the embossed envelopes. See Verser v. Elyea, 113 F. Supp 2d 1211, 1215-16 ( N.D. Ill. 2000) ("[P]ersonally denying or concurring in the denial of a grievance or appeal is personal responsibility" for purposes of § 1983) (citing Black v. Lane, 22 F.3d 1395, 1401 (7th Cir. 1994)). (Although respondent Litscher did not respond to petitioner, petitioner alleges that he sent Litscher a letter regarding his complaint. Thus, I will presume at this stage that respondent Litscher had knowledge of petitioner's alleged constitutional violations and declined to intervene to correct the alleged harm.)

#### ORDER

IT IS ORDERED that

1. Respondent Wisconsin Department of Corrections is DISMISSED.
2. Petitioner Tony Walker's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that his First Amendment right to communicate with others has been violated.
3. For the remainder of this lawsuit, petitioner must send respondents a copy of every

paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. The unpaid balance of petitioner's filing fee is \$150; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when funds become available.

Entered this 27th day of August 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge