IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

ORDER

Petitioner,

03-C-27-C

v.

MATTHEW FRANK, JON E. LITSCHER, GARY R. McCAUGHTRY, MARC W. CLEMENTS, SGT. McCARTHY, JAMES MUENCHOW, RENEE RONZANI, SANDY HAUTAMAKI, JOHN RAY, CYNTHIA L. O'DONNELL, DARILYN J. MARTHALER and JAMYI WITCH,

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 Jackson Correctional Institution in Black River Falls, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

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). 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 complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner James J. Kaufman is a Wisconsin prisoner currently incarcerated at the Jackson Correctional Institution in Black River Falls, Wisconsin. At all times relevant to his complaint, petitioner was incarcerated at the Waupun Correctional Institution in Waupun,

Wisconsin.

Respondent Matthew Frank is the secretary of the Wisconsin Department of Corrections. Respondent Jon E. Litscher is the former secretary of the Wisconsin Department of Corrections. Respondent Gary R. McCaughtry is the warden at Waupun Correctional Institution, where respondent Marc W. Clements is the security director, respondent Sgt. McCarthy is a sergeant, respondent Darilyn Marthaler is a secretary in the business office, respondent Jamyi Witch is a chaplain and respondents James Muenchow and Renee Ronzani are inmate complaint examiners. Respondents Sandy Hautamaki and John Ray are corrections complaint examiners for the Department of Corrections. Respondent Cynthia O'Donnell is the deputy secretary of the Department of Corrections.

B. Legal Mail

On March 15, 2002, petitioner attempted to send legal correspondence to the United States Civil Rights Commission. On March 18, 2002, respondent Marthaler returned the correspondence to petitioner because he had not paid for it to be posted and she determined that the letter did not qualify for free postage under a Wisconsin regulation providing free stamps to indigent inmates.

On or about April 5, 2002, petitioner attempted to send legal correspondence and court documents to Jon Sullivan, who is petitioner's "legal representative," holds a power of

attorney for petitioner and has been appearing before the Eau Claire County Circuit Court in a civil matter on petitioner's behalf. Respondent Marthaler again refused to provide petitioner with postage even though he is indigent.

On April 5, 2002, petitioner received legal mail from attorney David Steele of Steele Legal Services in Augusta, Wisconsin. The mail was opened by respondent McCarthy before it was delivered to petitioner. Petitioner filed an inmate complaint regarding this incident, which respondent Muenchow recommended be affirmed, noting that "the correspondence received for inmate Kaufman is clearly identifiable as being sent from an attorney. Correspondence of that nature must be opened in the presence of the inmate." Respondent McCaughtry affirmed the complaint on April 19, 2002.

On April 15, 2002, petitioner received legal mail from the law firm of Langrock, Sperry and Wool, LLP. The correspondence was opened by respondent McCarthy before it was delivered to petitioner.

On May 10, 2002, petitioner received legal mail from the Eau Claire County Sheriff's Department that had been opened by respondent McCarthy before it was delivered to petitioner.

On June 8, 2002, petitioner mailed legal correspondence to the United States District Court in Milwaukee. On June 24, 2002, the correspondence was returned to petitioner for insufficient postage. Respondent McCarthy had opened the mail before returning it to

petitioner.

On or about July 5, 2002, petitioner received legal correspondence from the United States Department of Justice, which was opened by respondent McCarthy before it was delivered to petitioner.

On July 15, 2002, petitioner mailed legal correspondence to the Wisconsin Department of Justice that was subsequently returned to petitioner because it carried an incorrect zip code. When the mail was returned to the prison, respondent McCarthy opened it before delivering it to petitioner.

On September 12, 2002, petitioner received legal mail from the United States Department of Justice that was opened outside his presence by defendant McCarthy.

On October 3, 2002, petitioner received legal mail from the American Civil Liberties Union that was opened outside his presence by defendant McCarthy.

Respondents Muenchow, McCaughtry, Ray, O'Donnell, Hautamaki and Ronzani denied petitioner's various inmate complaints and appeals regarding the opening of his legal mail outside his presence.

C. Undelivered Publications

On February 26, 2002, petitioner received a notice that a publication titled "Quest" would not be delivered to him. Respondent McCarthy rejected the publication because it

contained nudity. Petitioner filed an inmate complaint. Respondent Muenchow recommended that the complaint be affirmed, stating that "the magazine will be allowed for inmate Kaufman's possession." Respondent McCaughtry affirmed this decision. On May 2, 2002, petitioner received another notice that an issue of "Quest" would not be delivered to him. Respondents McCarthy and Clements rejected the publication on the grounds that it was pornography and therefore violated a prison regulation. Petitioner wrote respondent Clements seeking further information about the rejection and Clements replied that "[t]his issue fit the IMP 50 definition of pornography which states in part 'publications that include photographs, pictures, and/or drawings of . . .sadomasochistic abuse.'" On June 13, 2002, petitioner wrote respondent Clements again regarding the rejection and the "feature" requirement of the settlement agreement in Aiello v. Litscher, case No. 98-C-0791-C, but was unsatisfied with Clements' response.

On May 20, 2002, petitioner received a notice that a photocopied article on the evaluation and treatment of sex offenders in prison would not be delivered to him because the photocopied materials were pornographic. After petitioner filed an inmate complaint, respondent McCarthy forwarded the article to petitioner and the complaint was rejected as moot.

On June 4, 2002, petitioner was informed that a publication titled "The Guide" would not be delivered to him because respondents McCarthy and Clements deemed it

pornographic. On July 16, 2002, petitioner was informed that the July 2002 issue of "The Guide" would not be delivered to him for the same reason. When petitioner wrote to respondent McCarthy seeking an explanation, McCarthy responded that "[p]ages 68 & 139 shows [sic] men in bondage, page 151 shows a man masturbating." Petitioner also wrote to respondent Clements but to no avail, even though petitioner pointed out that "bondage" does not equal "sadomasochistic abuse" and that to show masturbation, a picture must show nude or bare genitals, which the picture in question did not. The publication was destroyed, but because it was free, respondent Ronzani determined that petitioner need not be compensated. Petitioner was also denied the August 2002 issue of "The Guide" because respondent McCarthy determined it contained pornography. Specifically, McCarthy noted that "page 55 advertises bondage."

On September 4, 2002, petitioner was informed that "Quest" volume nine, number 10 would not be delivered to him because respondents McCarthy and Clements concluded that it contained pornography. When petitioner wrote respondent Clements seeking more information about the denial, Clements responded by saying that the information petitioner requested would not be provided to him. On October 17, 2002, petitioner received a notice of non-delivery of the October 10 to 31, 2002 issue of "Quest" because respondents McCarthy and Clements deemed it pornographic. Petitioner wrote respondent Clements to request specific information about the rejection. Clements replied that the "publication was

denied because it met the definition of pornography as defined in DOC 309 and DOC 309 IMP 50. Notification was made to you in accordance with 309.05 and no other specifics will be provided." Petitioner told respondent McCarthy to mail the publication directly to this court, which McCarthy did on November 19, 2002.

On October 6, 2002, corrections officers confiscated a book from petitioner titled "Then We Take Berlin," because the cover art, which is a reproduction of a painting with nude men, was deemed pornographic. Petitioner questioned the corrections officers but they had no knowledge of the Aiello case. The book was returned to petitioner on October 13, 2002.

On November 22, 2002, petitioner received a non-delivery notice for a catalog, which was deemed pornographic. Petitioner requested specific information about the catalog and an unidentified staff member responded by stating "Specialty Publications. Adult male nudity."

Respondents Muenchow, McCaughtry, Hautamaki, O'Donnell, Ray and Ronzani denied petitioner's various inmate complaints and appeals regarding the undelivered publications.

D. Religious Exercise

In July 2002, petitioner met with respondent Witch to discuss the formation of an

atheist inmate group. Respondent Witch gave petitioner the form necessary to start the process and instructed him to submit the form to Debra Tetzlaff, the program director. Petitioner completed the form and submitted it to Tetzlaff. On August 12, 2002, petitioner spoke with respondent Witch about the status of his request. Respondent Witch said that she supported starting an atheist group, but that the request would have to be denied because an atheist group would be a social group, not a religious group. Next petitioner wrote to Teztlaff seeking information about the status of his request. Tetzlaff told petitioner that his "request for a new religious practice is being processed at this time. I will make sure you are notified as soon as possible." On August 29, 2002, petitioner spoke with petitioner Witch again, who suggested resubmitting his request with more detailed information. Respondent Witch also suggested that petitioner might want to characterize his request as one for a new inmate leisure time activity group.

On September 15, 2002, petitioner submitted a request to respondent McCaughtry seeking permission to organize a new inmate leisure time activity group. On September 19, 2002, respondent McCaughtry denied petitioner's request, noting that at "this time we are not forming new inmate activity groups." On September 24, 2002, petitioner asked respondent Witch for a copy of her recommendation regarding the atheist group. Respondent Witch told plaintiff she had "passed my recommendation on to my supervisor and am waiting to hear back." On October 3, 2002, petitioner asked Pamela Knick, the

registrar, for all documents relating to his request to form an atheist group. On December 12, 2002, petitioner received a memo from Knick stating that a "recommendation to deny this request was signed by the Warden on November 19, 2002, and sent to Madison. As of today, the institution has not received any word from Madison as to their decision."

The only greeting cards offered for the holiday to inmates are Christian in nature. Inmates who are not Christian were not allowed to buy greeting cards from outside vendors. The holiday season is also celebrated by Jews, Muslims, Buddhists, Wiccans, atheists and others and allowing only Christmas cards is discriminatory.

OPINION

A. Legal Mail

Petitioner contends that several pieces of his "legal mail" have been opened outside his presence. In some instances, the mail was sent to petitioner by persons outside the prison. Falling into this category are letters from the law firm of Langrock, Sperry and Wool, LLP, the Eau Claire County Sheriff's Department, the United States Department of Justice and the American Civil Liberties Union. (Petitioner alleges that a letter from attorney David Steele was opened as well, but according to petitioner his inmate complaint regarding this incident was affirmed by respondents Muenchow and McCaughtry, who acknowledged that the letter was opened by mistake). In others instances the mail in question had been sent

by petitioner but was opened when it was returned to the prison because of insufficient postage or an incorrect zip code. In this category are a letter to the United States District Court in Milwaukee and the Wisconsin Department of Justice.

Prisoners have a limited First Amendment interest in their mail. Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). As a general rule, inmate mail can be opened and read outside the inmate's presence, but legal mail is subject to somewhat greater protection. Although prison officials may open a prisoner's legal mail in his presence, Wolff v. McDonnell, 418 U.S. 539, 577 (1974), repeated instances of opening a prisoner's legal mail outside his presence are actionable. Antonelli v. Sheahan, 81 F.3d 1422, 1431-32 (7th Cir. 1996) (allegations that legal mail was repeatedly opened and sometimes stolen stated claim). Petitioner will be allowed to proceed against respondent McCarthy, who allegedly opened his legal mail, and respondents Muenchow, McCaughtry, Ray, O'Donnell, Hautamaki and Ronzani, who allegedly denied his inmate complaints and appeals regarding the opening of his legal mail outside his presence. However, I note that not all legal mail warrants added protection. For instance, "prison employees can open official mail sent by a court clerk to an inmate without infringing on any privacy right." Antonelli, 81 F.3d at 1431. The extra protections afforded legal mail are reserved generally for privileged correspondences between inmates and their attorneys. Wolff, 418 U.S. at 574; Antonelli, 81 F.3d at 1432. If petitioner's legal mail does not fall into the latter category, his claim may be subject to

dismissal.

Petitioner also objects to respondents' refusal to provide him with free postage to mail letters to the United States Civil Rights Commission and Jon Sullivan, his power of attorney. In Bounds v. Smith, 430 U.S. 817, 824-25 (1977), the Supreme Court noted that because prisoners have a right of access to the courts, it "is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them." But Bounds limits state-supported access to "direct appeals from the convictions for which [inmates] were incarcerated . . . or habeas petitions . . . [or] actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" Lewis v. Casey, 518 U.S. 343, 354 (1996) (citations omitted). The right of access to the courts does not insure free postage for "correspondence addressed to individuals, offices, organizations, and agencies either involved in inmate litigation or offering advice and assistance to inmates in legal matters." Compl. at 31. Accordingly, petitioner has no entitlement to free postage to send mail to the United States Civil Rights Commission.

Nor is petitioner entitled to taxpayer subsidized postage to send materials to Jon Sullivan. Petitioner refers to Sullivan as his power of attorney and "legal representative" who has been "appearing" before a state court on a "civil claim" on petitioner's behalf. This is artful pleading. Petitioner does not allege that Sullivan is a lawyer or that the "civil claim"

in which Sullivan is "appearing" involves petitioner's basic constitutional rights. Respondents are under no obligation to insure that petitioner can function as a "litigating engine capable of filing everything from shareholder derivative actions to slip-and-fall claims." Lewis, 518 U.S. at 355. Nor are they required to pay petitioner's postage on letters mailed to a non-lawyer "appearing" in an unspecified civil action on petitioner's behalf. Accordingly, petitioner will not be allowed to proceed on this claim. If Sullivan is a lawyer representing petitioner in a § 1983 suit aimed at vindicating his basic constitutional rights, petitioner may amend his complaint to make this clear.

B. Undelivered Publications

Petitioner contends that he has been denied several publications because respondents deemed their content to be pornographic. These publications include three issues of a magazine called "Quest," three issues of a magazine called "The Guide" and a specialty catalog. (Petitioner also contends that a photocopied article, a book and another issue of "Quest" were withheld from him, but were given to him subsequently in response to inmate complaints.) The catalog in question was mailed to the court at petitioner's request and I will consider it a part of the pleadings in this case. (However, because petitioner will not be allowed to proceed on his claim regarding the specialty catalog, it will not be copied and incorporated into the complaint that will be served on respondents.) In his proposed

complaint, petitioner alleges that he directed prison officials to send this court one of the issues of "Quest" that was withheld from him as well, but the court never received such a publication. Petitioner seeks an injunction ordering respondents to "comply with the orders and agreements reached in" Aiello v. Litscher, case No. 98-C-0791-C, a case filed in this court on behalf of a class of all Wisconsin inmates that was eventually settled by the parties. As a condition of the settlement agreement, the Department of Corrections amended its administrative regulations governing the publications inmates may receive.

Taking the last of the withheld publications first, I have little trouble in concluding that petitioner was not entitled to receive the specialty catalog. The mailing includes a catalog for videos in which naked men masturbate and a pamphlet soliciting subscriptions to a magazine called "Men 2Gether," which features "hot couples in action." The pamphlet contains graphic pictures of naked men having sex. The Department of Corrections administrative regulations, as amended pursuant to the Aiello settlement agreement, provide that the "department may not deliver incoming . . . mail if it . . . is pornography." Wis. Admin. Code § DOC 309.04(4)(c)8. "Pornography" is defined in relevant part to include any "material, other than written material, that depicts human sexual behavior" and "publication[s] that features nudity." Id. at DOC 309.02(16). The term "features" means "the publication contains depictions of nudity on a routine or regular basis or promotes itself based upon nudity in the case of individual one-time issues. The department will not

prohibit a publication solely because it contains nudity that has a medical, educational or anthropological purpose." Id. at DOC 309.02(7m). The catalog and pamphlet clearly satisfy the definition of pornography that petitioner and his co-plaintiffs agreed to in the Aiello settlement agreement. Both the catalog and the pamphlet depict human sexual behavior and advertise magazines or videos that feature nudity. Accordingly, the department was not required to deliver this material to petitioner.

However, petitioner will be allowed to proceed on his claim that six magazines (three issues each of "Quest" and "The Guide") were withheld from him in violation of the Aiello settlement agreement. These magazines were not submitted along with petitioner's proposed complaint, so I have no way of evaluating their content at this stage of the proceedings. Petitioner will be allowed to proceed on this claim against respondents McCarthy, Clements, Muenchow, McCaughtry, Hautamaki, O'Donnell, Ray and Ronzani, who petitioner alleges were all involved in rejecting the publications or his inmate complaints and appeals regarding the publications.

C. Religious Exercise

I understand petitioner to contend that respondents violated his rights under the First Amendment's free exercise and establishment clauses by refusing him permission to form an atheist inmate group, even though inmate groups exist for several religious denominations.

In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court enunciated the proper standards to be applied in considering prisoners' First Amendment free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. Id. at 349. The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

> 1. whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
> 2. whether there are alternative means of exercising the right in question that remain available to prisoners;
> 3. the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
> 4. although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (additional quotation marks omitted). Respondents may well have a legitimate penological reason for refusing to allow petitioner to form an atheist inmate group, but one is not apparent from the face of petitioner's complaint. Similarly, I cannot conclude on the basis of petitioner's proposed complaint alone whether his atheist beliefs are a religion entitled to protection under the free exercise clause. See, e.g., Wells v. City and County of Denver, 257 F.3d 1132, 1152 (10th Cir. 2001) (assuming, without deciding, that atheism is a religion for purposes of free exercise clause). Accordingly,

petitioner will be allowed to proceed on this claim.

As for petitioner's establishment clause claim, that clause is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citations omitted). In this context, the fact that government may not "endorse" religion means that it is precluded "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Id. at 593 (citations omitted); Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (Supreme court "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). I understand petitioner to contend that because the Department of Corrections has sanctioned the formation of certain inmate religious groups, respondents' refusal to allow petitioner to form an atheist group amounts to a government endorsement of religion. At this early stage of the proceedings, petitioner's allegations state a claim under the establishment clause.

Petitioner will be allowed to proceed on his First Amendment free exercise and establishment clause claims against respondents McCaughtry and Witch, because petitioner alleges that they recommended to unspecified Department of Corrections officials in Madison that his request to form an atheist group be denied. Petitioner will not be allowed to proceed on these claims against the various inmate complaint examiners he has named as

respondents because his proposed complaint indicates that he filed his inmate complaints *before* a final decision was made on his request to form an atheist group. I note that this chronology may also raise issues relating to petitioner's exhaustion of administrative remedies on his claims against respondents McCaughtry and Witch, but I am not prepared to dismiss petitioner's claims sua sponte on exhaustion grounds. As noted earlier, if respondents believe that petitioner has failed to properly exhaust his administrative remedies, 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).

Petitioner also contends that his First Amendment rights were violated because "the only greeting cards offered for the holiday to inmates were Christian in nature" and "allowing only Christmas cards was clearly discriminatory." Petitioner does not explain how his ability to freely exercise his atheist beliefs was inhibited by his inability to gain access to secular holiday greeting cards. The prison authorities do not violate the establishment clause by making Christmas cards available to inmates. See, e.g., Blagman v. White, 112 F. Supp. 2d 534, 540-41 (E.D. Va. 2000) (prison "observances of such traditional holidays as Christmas and Thanksgiving do not rise to the level of violations of the Establishment Clause" because "the law has come to recognize that many typical Thanksgiving and Christmas holiday observances are essentially secular in nature"); Torricellas v. Poole, 954 F. Supp. 1405, 1411-12 (C.D. Cal. 1997), aff'd, 141 F.3d 1179 (9th Cir. 1998) (prison

Christmas party did not violate establishment clause). Petitioner will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Petitioner James J. Kaufman's request for leave to proceed in forma pauperis on his First Amendment claim that legal mail was opened outside his presence is GRANTED. Petitioner may proceed against respondents McCarthy, Muenchow, McCaughtry, Ray, O'Donnell, Hautamaki and Ronzani on this claim.

2. Petitioner's request for leave to proceed in forma pauperis on his claim that six magazines were withheld from him in violation of the Aiello settlement agreement is GRANTED. Petitioner may proceed against respondents McCarthy, Clements, Muenchow, McCaughtry, Hautamaki, O'Donnell, Ray and Ronzani on this claim.

3. Petitioner's request for leave to proceed in forma pauperis on his claim that his rights under the First Amendment's free exercise and establishment clauses were violated when he was refused permission to form an atheist inmate group is GRANTED. Petitioner may proceed against respondents McCaughtry and Witch on this claim.

4. Petitioner is DENIED leave to proceed in forma pauperis on his claims that he was denied postage to mail letters to the United States Civil Rights Commission and his power

of attorney; he was not permitted to receive a specialty catalog mailed to him; and he had access only to religious Christmas cards during the holiday season.

5. Respondents Matthew Frank, Jon E. Litscher and Darilyn J. Marthaler are DISMISSED from this case.

6. The unpaid balance of petitioner's filing fee is $144.61; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2); and

5. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. 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. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' attorney.

Entered this 27th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge