IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FRANCIS E. ALTMAN,

Petitioner, ORDER

v. 03-C-371-C

MARATHON COUNTY JAIL ADMINISTRATOR
ROBERT DICKMAN and THREE UNNAMED
JAIL STAFF, BADGE #S 2143, 2149 AND
OFFICER WITH INITIALS "CP,"

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, Francis E. Altman, who is presently confined at the Marathon County jail in Wausau, 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 and attachments, petitioner alleges the following facts.

## ALLEGATIONS OF FACT

Petitioner Francis E. Altman entered the Marathon County jail as an inmate on March 19, 2003 and has been there since that date.

On June 12, 2003, a letter addressed to petitioner without a return name and address was received by the jail. According to jail rule V(B)(3), "all incoming mail must include a complete return address with sender's name or it will be placed in the inmate's property bag

and remain there until the inmate is released." The letter was placed in petitioner's property bag and correctional officer #2149 notified petitioner of the letter and its location with a Property Denial Form. When petitioner asked, jail officers would not tell him who sent the letter. Worried that the letter might be from his sister concerning his father's health, on June 13, 2003, petitioner submitted to jail staff a request form, property release form and an envelope addressed to Rick Kent. Petitioner hoped Kent could identify the writer and return the letter to that person. Respondent "CP" returned the request form to the petitioner, denying the request and stating that petitioner would receive the letter upon release.

On June 17, 2003, petitioner filled out an "Inmate Grievance Form," expressing his concerns about his inability to forward the letter to Kent. Petitioner stated in the grievance that he had been in contact with "the postmaster general in Madison and filed a complaint." In addition, petitioner threatened that if he did not receive the letter by June 20, 2003, he would pursue a civil suit in federal court. Petitioner addressed the grievance form to respondent Robert Dickman, the jail administrator. The following day, respondent jail officer #2143 returned the grievance form to petitioner, stating that the letter was not sent through the mail but was dropped off in the box "outside huber." From this response, petitioner deduced who wrote the letter. Petitioner then wrote the writer, a lady friend, and placed the letter in an envelope addressed to Rick Kent. Petitioner addressed the letter to Kent because he wanted to check with Kent in a day or two to determine whether the letter

made it out of the jail. On June 20, the envelope and letter were returned to petitioner. On the outside of the envelope was a written note stating, "We need an address to the person that you are writing to." The note was not signed by the officer writing it. Before June 20, 2003, petitioner had sent letters to his lady friend "this way." Petitioner believes that the refusal to send the letter was "in retaliation for having sent the postmaster general a complaint and threatening this civil suit."

Petitioner has had other problems with the Marathon County jail mail system. Between March 19 and late May, 2003, petitioner attempted to send four letters to his attorney, Richard Voss of Rhinelander, and one letter to his cell phone company in connection with his upcoming trial, which was scheduled for June 2 and 3, 2003. Petitioner did not receive a response to any of these letters. On May 28, 2003, petitioner filed a motion to have his attorney withdraw from his case. A hearing was held on the motion on May 30, 2003. At the hearing, petitioner complained that Voss had not responded to his letters, to which Voss responded that he had not received the letters. According to petitioner, the only other way of communicating with his attorney is through the phone system, but the carrier at the jail does not serve the Rhinelander area. Rule III(B)(5) in the Marathon County Jail "Rules, Regulations and Information" pamphlet states that inmates "may request a non-recorded telephone call for privileged communications including conversations with your attorney. If the call is long distance it must be collect."

In late May petitioner wrote to his cell phone company, requesting a copy of a bill so he could make a payment and find out whether an informant related to his pending case had attempted to contact him through his cell phone or a land line. Petitioner is convinced that this letter was not sent by jail staff because "no business that is owed money would just ignore a request for a copy of a bill." Petitioner suspects that none of the letters written to his cell phone company or his attorney were ever mailed but rather were "diverted to the district attorney's office."

## DISCUSSION

Petitioner contends that certain aspects of respondents' conduct violate the Wisconsin Administrative Code. Specifically, petitioner contends that respondents Dickman and jail officers 2143, 2149 and "CP" acted without legal authority because they did not properly promulgate the Marathon County jail rules under the relevant state statutes. These are state law claims and can be pursued in state court. Petitioner cannot bring claims of violations of state statutes or administrative regulations in federal court under 42 U.S.C. § 1983 because the federal courts are prohibited under the Eleventh Amendment from entertaining such suits. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (Ex parte Young, 209 U.S. 123 (1908), does not apply in suits asserting that state officials have violated state laws or administrative regulations). Accordingly, I will not exercise

jurisdiction over petitioner's state law claims.

Petitioner's remaining claims include alleged First and Sixth Amendment violations.

A. First Amendment: Freedom of Expression

It is well-established that prisoners have a First Amendment right to communicate with those outside the prison, even for non-legal purposes. Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 ( 1987); Procunier v. Martinez, 416 U.S. 396 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). However, an infringement on an inmate's First Amendment rights is permissible if it is "reasonably related to legitimate penological interests." O'Lone v. Estate of Shabaz, 482 U.S. 342, 348 (1987) (quoting Turner v. Safley, 482 U.S. 78, 81 (1987)).

I understand petitioner to contend that the jail rules for mail violate his right to privacy and First Amendment right to free speech because the rules do not serve a legitimate penological interest and have been enacted without explanation or consideration of available alternatives. I will also construe as a First Amendment violation petitioner's claim that the jail rule requiring all incoming mail to contain a return name and address prevents friends or family from sending him timely evidence or witnesses for his upcoming trial.

Because petitioner's complaint does not reveal the reasons respondents Dickman and jail officers 2143, 2149 and "CP" imposed these restrictions on an inmate's mail, I am

unable to tell at this early stage whether these restrictions reasonably relate to legitimate penological interests. A prison rule or regulation has a legitimate penological purpose if it meets four factors. First, a valid, rational connection must exist between the regulation and a legitimate governmental interest, such as jail security. Second, the prisoner must have available alternative means of exercising the right in question. For example, if there are other ways a prisoner can communicate with people on the outside, the second factor would be satisfied. Third, accommodation of the asserted right will have negative effects on guards, inmates or prison resources. Finally, there must be obvious, easy alternatives available to the prisoner at a minimal cost. Turner v. Safely, 482 U.S. 78, 89 (1987). "The Court adopted a reasonableness standard, as opposed to a heightened scrutiny, to permit prison administrators 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration' and thereby prevent unnecessary federal court involvement in the administration of prisons." Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991); see also Young v. Lane, 922 F.2d 370,. 375 (7th Cir. 1991) ("The standard set out in Turner is not demanding. . .and is driven by a wide-ranging deference to prison officials, especially state prison officials.").

Respondents will have an opportunity to show how their mail rules meet the four Turner factors. However, at this time, petitioner will be allowed leave to proceed on his First Amendment free speech claim as it relates to respondents' restrictions requiring outgoing

mail to be addressed to the same person to whom the letter is written, and incoming mail to contain a return name and address and forbidding inmates to forward mail lacking a return name and address.

I will deny petitioner's request for leave to proceed on his claim against respondent Dickman, who enforced the rule that allows jail staff to open and read non-legal mail, allegedly in violation of petitioner's right to privacy and the rights of others with whom petitioner communicates. Petitioner's claim that respondent Dickman permits jail staff to receive and read his mail is characterized appropriately as a First Amendment claim. Although petitioner has not framed his claim under the First Amendment, it will be construed as one.

Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. at 407; 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, Martin, 830 F.2d at 77, but legal mail may be subject to somewhat greater protection. The inspection of personal mail for contraband is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship). Petitioner admits that jail staff may "inspect incoming and outgoing mail for

contraband . . . and may read inmate mail to ensure the safety of the institution, staff, inmates, and the general public." Petitioner implies that these are legitimate reasons, but alleges that they do not apply to his situation. Rather, petitioner believes his mail was opened and read for "harassment." Because petitioner admits the existence of other legitimate reasons for jail staff to open and read all non-legal mail, I will deny his request for leave to proceed on this claim.

Petitioner also contends that respondent Dickman's enforcement of the rule permitting jail staff to open and read petitioner's mail invades the privacy rights of those with whom petitioner communicates. "Non-prisoners do indeed have a First Amendment right to correspond with prisoners." See Rowe v. Shake, 196 F.3d 778, 783 (7th Cir. 1999) (citing Thornburgh, 490 U.S. at 407, Procunier v. Martinez, 416 U.S. at 408-09). To state a claim, the prisoner must allege facts from which an inference can be drawn of "actual injury." See Lewis v. Casey, 518 U.S. 343, 349 (1996). However, a non-prisoner who believes her First Amendment right to correspond with a prisoner has been violated must bring her own action to vindicate her rights. Petitioner does not have standing to assert the rights of others in his lawsuit. Id. (noting that district court erred in ruling that frequent correspondent of prisoner and who filed §1983 suit against prison employees lacked standing). I will deny petitioner's request for leave to proceed on a claim that the jail's regulations at issue infringe the First Amendment rights of a person outside the prison.

B. First Amendment: Retaliatory Conduct

Petitioner alleges that shortly after he exercised his right to file grievances expressing his dissatisfaction with the jail's mail restrictions, respondent Dickman and other unnamed respondents retaliated against him by prohibiting him from sending a letter to his lady friend in the same manner he had sent other letters to her before he filed his grievances. Petitioner's allegations of retaliation for exercising his right to file grievances are sufficiently detailed to put the respondents on notice of the retaliation claim so that they may file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (indicating that plaintiff's charge that he was placed in lockdown segregation for 11 days after bringing lawsuit satisfied bare minimum facts necessary to put defendant on notice of claim so that he could file answer); See also Walker v. Thompson, 288 F.3d 1005,1009 (7th Cir. 2002) (stating that there is no pleading requirement to allege chronology of events from which retaliation may plausibly be inferred). The Court of Appeals for the Seventh Circuit has held that an act in retaliation for exercise of a constitutionally protected right is actionable under §1983 and that a prisoner can recover damages for action taken by prison officials in retaliation for the exercise of his right of access to the courts. Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978). State officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of

that right in the future.

Petitioner will be granted leave to proceed in forma pauperis on his retaliation claims against respondents.

C. Sixth Amendment: Right to Counsel and Access to Courts

Petitioner alleges that respondent Dickman and unnamed jail staff did not send his attorney four letters petitioner had written. Legal mail may be subject to somewhat greater protection than non-legal mail on the theory that inmates possess a greater interest in maintaining the confidentiality of privileged communications with their attorneys and of other private legal matters and that allowing prison officials to read such mail would chill a prisoner's access to courts. See Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (upholding prison procedure of inspecting but not reading legal mail in part because no threat of chilled communications); Campbell v. Miller, 787 F.2d 217, 225- 26 (7th Cir. 1986) (interference in legal communications between prisoner and counsel implicates prisoner's Sixth Amendment right of access to the courts); Bach v. People of the State of Illinois, 504 F.2d 1100, 1102 (7th Cir. 1974) (opportunity to communicate privately with attorney is vital ingredient of access to courts).

As with other access to the courts claims, plaintiff must make some showing that the interference with his legal mail has damaged his legal position in some way. See Lewis

v. Casey, 518 U.S. 343, 349 (1996) (prisoner must show that he has suffered actual injury in order to bring claim of denial of access to courts). See also Alston v. DeBruyn, 13 F.3d 1036, 1041 (7th Cir. 1994) (access to courts claim requires showing of "'some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of the plaintiff's pending or contemplated litigation'") (quoting Shango v. Jurich, 965 F.2d 289, 291 ( 7th Cir. 1992)).

With respect to the four letters to Voss, petitioner has made general allegations that jail staff refused to mail his privileged correspondence. He does not allege what privileged information the letters might have contained or how his attorney's failure to receive such correspondence damaged his legal position. Because petitioner has not alleged facts from which an inference may be drawn that he suffered any cognizable injury resulting from respondents' conduct, he may not proceed on this Sixth Amendment claim.

Petitioner also contends that respondent Dickman and unnamed jail staff did not send out a letter he wrote to his cell phone company in connection with his upcoming trial. Petitioner alleges that he suspects that respondents forwarded the letters he wrote to Voss and the cell phone company to the district attorney's office to be used against him and therefore cause him to lose his case and go to prison.

It is well established that prisoners have a Sixth Amendment right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their

confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir., 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 578- 80; Procunier v. Martinez, 416 U.S. 396, 419 (1974). However, inmates' right of access to the courts is not unconditional. Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983). The constitutionally relevant benchmark is "meaningful" access, not total or unlimited access. Bounds v. Smith, 430 U.S. 817, 823 (1977). Meaningful access has been interpreted as having access to an adequate law library or access to adequate legal representation. Id. at 817; see also Gometz v. Henman, 807 F.2d 113, 116 (7th Cir. 1986) (prison officials may eliminate one kind of protection - be it inmate writ-writers or prison libraries - if they supply adequate substitutes, such as lawyers); Caldwell v. Miller, 790 F. 2d 589, 606 (7th Cir. 1986).

To state a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This principle derives ultimately from the doctrine of standing, id., and requires that a plaintiff demonstrate that a nonfrivolous legal claim has been or is being frustrated or impeded. Id. at 2181 nn. 3-4 and related text. In light of Lewis, a plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted.

Petitioner is only speculating when he alleges that his letters to Voss and the cell phone company were forwarded to the district attorney's office is speculative. Petitioner

states that the letter to his cell phone company "*could* have been redirected to the district attorney's office," indicating that he does not know that it was sent there. As to the letters to Voss, petitioner states that "*If* these letters to my attorney were sent to the district attorney, the information *could* be used against me, causing me to lose my case and go to prison." Again, petitioner does not appear convinced that the letters to Voss were forwarded to the district attorney. What "could" happen rather than what petitioner believes did happen does not rise to the level of actual injury.

Furthermore, respondents did not deny petitioner meaningful access to the courts because he had access to legal representation through Voss. At the hearing on May 30, petitioner had an opportunity to tell Voss the content of the letters. Because petitioner could communicate with his attorney through alternate means, he did not suffer an actual injury and still had meaningful access to the courts. Voss could also investigate whether petitioner's informant contacted him on his cell phone or a land line. This is the attorney's job. Hence, respondents did not violate petitioner's Sixth Amendment right to meaningful access to the courts. I will deny petitioner leave to proceed on his claims that respondents failed to send a letter to his cell phone company and forwarded letters to Voss and the cell phone company to the district attorney's office.

Personal Involvement

Petitioner describes the persons who allegedly mistreated him as "jail staff," "officers,"

"jail staff badge # 2143," "jail staff badge #2149," and "officer CP," suggesting that he may not know the identities of the individuals who personally deprived him of his rights. In such a circumstance, a petitioner can name a high official such as respondent Dickman, serve that official with his complaint, and then seek formal discovery from the official to learn the names of the persons directly responsible for allegedly violating his constitutional rights. Duncan v. Duckworth, 644 F.2d 653, 655-56 (7th Cir. 1981) (high official should not be dismissed from pro se complaint for lack of personal involvement when claim involves conditions or practices which, if they existed, would likely be known to higher officials or if petitioner is unlikely to know person or persons directly responsible absent formal discovery). Accordingly, with respect to those claims upon which petitioner will be allowed to proceed, he may proceed against respondent Dickman for the purpose of discovering the identities of "jail staff," "officers," "jail staff badge # 2143," "jail staff badge #2149," and "officer CP" who allegedly violated his constitutional rights. Once petitioner learns the identities of those individuals, he will have to amend his complaint to name them specifically.

ORDER

IT IS ORDERED that

1. Petitioner Francis E. Altman's request for leave to proceed in forma pauperis against respondents Dickman and jail officers 2143, 2149 and "CP" is GRANTED on his First Amendment claim as it relates to the respondents' restrictions requiring outgoing mail to be addressed to the same person to whom the letter is written, incoming mail to contain a return name and address and forbidding inmates to forward mail lacking a return name and address.

2. Petitioner's request for leave to proceed against respondents Dickman and other unnamed respondents is GRANTED on his First Amendment claim against respondents in connection with respondents' alleged retaliation against him for exercising his constitutional right to seek judicial relief.

3. Petitioner's request for leave to proceed against respondent Dickman is DENIED on his First Amendment claims concerning the enforcement of a rule that allows jail staff to open and read non-legal mail as it affects him and those with whom he communicates because he admits legitimate penological interests for such action and does not have standing to sue on behalf of others.

4. Petitioner's request for leave to proceed against respondents Dickman and

unnamed jail staff is DENIED on his Sixth Amendment claims regarding respondents' alleged failure to send letters he wrote to Voss because petitioner has not shown that he suffered actual injury.

5. Petitioner's request for leave to proceed against respondents Dickman and unnamed jail staff is DENIED on his Sixth Amendment claims regarding respondents' alleged failure to send a letter to his cell phone company and forwarding his letters to Voss and the cell phone company to the district attorney's office because he has shown no actual injury and still had meaningful access to the courts.

6. Petitioner's request for leave to proceed against respondents Dickman and jail officers 2143, 2149 and "CP" is DENIED on his state law claims because I do not have jurisdiction over them.

7. 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 lawyers who will be representing respondents, he should serve the lawyers 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' lawyers.

Entered this 28th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge