IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK R. PETERSEN,

ORDER

Petitioner,

03-C-0443-C

v.

PHIL KINGSTON or successor,
Warden, Columbia Correctional Institution;
CINDY O'DONNELL or successor,
Deputy Secretary of DOC,,

Respondents.

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This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, Mark R. Petersen, who is presently confined at the Columbia Correctional Institution in Portage, 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

Petitioner Mark R. Petersen entered Columbia Correctional Institution in June 2002 and has been there since that date. Respondent Phil Kingston is the warden at Columbia Correctional Institution. Respondent Cindy O'Donnell is Deputy Secretary of the Department of Corrections.

After arriving at Columbia Correctional Institution, petitioner attended a receiving

and orientation function at which he became acquainted with fellow inmate Robert Ciarpaglini. Petitioner views Ciarpaglini as a "knowledgeable person of the law, commonly [sic] referred to as a [w]rit [w]riter." While in the law library at Columbia Correctional Institution, petitioner asked Ciarpaglini for assistance with drafting a motion for sentence modification. Ciarpaglini directed petitioner's attention to an order issued by respondent Kingston on March 26, 2002 and posted in the law library prohibiting inmates from seeking or receiving legal assistance or assistance with inmate complaints from Ciarpaglini. Petitioner alleges that Ciarpaglini "presumably has been successful in his previous litigation [sic] against the [Department of Corrections] and the Warden Kingston." As a result of the order, petitioner is unable to discuss legal matters, litigation or the utilization of the internal institutional complaint system with Ciarpaglini at the dinner table, in the law library or through the mail. Petitioner is able to speak to Ciarpaglini about other topics, such as "the "weather, sports, girls, politics, or about anything else besides legal issues and institutional complaints." Petitioner states that if he does attempt to discuss legal matters with Ciarpaglini, he will be issued a conduct report for violating a direct order. Petitioner is able to seek legal help from inmates other than Ciarpaglini.

On November 22, 2002, petitioner filed a grievance with the institutional complaint examiner, stating that respondent Kingston's order violated his constitutional rights. The examiner replied on November 26, 2002, stating that petitioner's inability to consult with

Ciarpaglini did not constrain petitioner's rights. Petitioner appealed the decision, but to no avail, receiving a response from respondent Kingston dismissing his complaint on December 4, 2002. On December 13, 2002, petitioner appealed the adverse decision to the corrections complaint examiner, who recommended dismissal of the complaint on December 16, 2002. Respondent O'Donnell accepted the corrections complaint examiner's recommendation on December 19, 2002. In order to receive legal assistance, petitioner retained a private attorney at a cost of $1,000.

DISCUSSION

Petitioner contends that respondent Kingston's order and respondent O'Donnell's dismissal of his complaint regarding that order violated his First Amendment right to free speech. The speech at issue is petitioner's ability to communicate with another inmate about legal matters. Thus, I understand petitioner to have two separate claims: 1) a Sixth Amendment right of access to the courts claim; and 2) a First Amendment right to free speech claim. I will address each of these claims in turn.

A. Sixth Amendment: Access to Courts

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. at 823. 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, petitioner 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 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 petitioner must plead at least general factual allegations of injury resulting from respondents' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted.

Petitioner's allegations do not reveal a lack of meaningful access to an adequate law library or access to adequate legal representation. It is evident that petitioner has access to

Columbia Correctional Institution's law library because that is where he alleges that Ciarpaglini warned petitioner about communicating legal matters with him. Furthermore, petitioner admits that he retained a private attorney to assist him with his legal matters and could use other inmates to assist him with legal matters. Therefore, respondents did not violate petitioner's Sixth Amendment right to meaningful access to the courts. Petitioner's request for leave to proceed in forma pauperis on his claim that respondents violated his constitutional rights by prohibiting him from communicating with Ciarpaglini will be denied as legally frivolous.

B. First Amendment: Freedom of Expression

Petitioner's complaint may also be construed as raising a First Amendment claim that respondents are censoring the topics that petitioner may discuss with Ciarpaglini. I understand petitioner to contend that respondent Kingston's order violates petitioner's First Amendment right to free speech because the order does not serve a legitimate penological interest and has been issued without explanation or consideration of available alternatives. It should be noted that inmate-to-inmate correspondence that relates to legal matters receives the same First Amendment protections as any other inmate-to-inmate communication. Shaw v. Murphy, 532 U.S. 223, 228 (2001).

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 prison 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. Safley, 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.").

In this instance, it is not necessary to ask respondents to advise the court why petitioner is restricted from discussing legal matters with Robert Ciarpaglini. On previous occasions, this court has found that Ciarpaglini engaged in misconduct while assisting other inmates and took advantage of the vulnerability and lack of sophistication of these other inmates. See Kuruc v. Fiedler, 93-C-324-C, slip op. Dec. 14, 1993. The Supreme Court has

noted penological interests in controlling this type of behavior in inmates who provide legal advice. For example, in Shaw v. Murphy, 532 U.S. 223, 231 (2001), the Court stated that "it is 'indisputable' that inmate law clerks 'are sometimes a menace to prison discipline' and that prisoners have an 'acknowledged propensity . . . to abuse both the giving and the seeking of [legal] assistance'" (citing Johnson v. Avery, 393 U.S. 483, 488 (1969)). In response to Ciarpaglini's conduct, I issued an order on December 14, 1993, refusing to accept further filings from Robert Ciarpaglini on behalf of any inmate and requiring Ciarpaglini to pay $200 to the United States Treasury as a sanction for his violation of Fed. R. Civ. P. 11. That order is still in effect. Because Ciarpaglini is known to have a predatory interest in previously assisting other inmates with their legal work, respondents' action in preventing Ciarpaglini from continuing to assist petitioner or other prisoners with their legal work serves a legitimate penological interest in security and does not violate petitioner's First Amendment rights. Petitioner's request for leave to proceed in forma pauperis will be denied on this claim because it is without legal merit.

C. Motion for Preliminary Injunction

Because I am denying petitioner leave to proceed on the claims that form the basis for his motion for preliminary injunction, I will deny his request for preliminary injunctive relief as moot.

ORDER

IT IS ORDERED that

1. Petitioner Mark R. Petersen is DENIED leave to proceed in forma pauperis against respondents Phil Kingston and Cindy O'Donnell on his claim that these respondents are violating his Sixth and First Amendment rights by restricting his inability to receive Robert Ciarpaglini's legal advice and assistance and this case is DISMISSED with prejudice because the claims are without legal merit;

2. Petitioner's motion for a preliminary injunction is DENIED;

3. The unpaid balance of petitioner's filing fee is $9.37; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

5. The clerk of court is directed to close the file.

Entered this 26th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge