

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

JAMES J. KAUFMAN,

Plaintiff,

v.

GARY R. McCAUGHTRY, MARC W.
CLEMENTS, SGT. McCARTHY, JAMES
MUENCHOW, RENEE RONZANI,
SANDY HAUTAMAKI, JOHN RAY,
CYNTHIA L. O'DONNELL and JAMYI WITCH,

Defendants.

ORDER

03-C-27-C

Plaintiff James Kaufman has been allowed to proceed in this action on claims that between April 2002 and October 2002, defendants violated his constitutional rights by repeatedly opening his legal mail outside his presence and by refusing to allow plaintiff to form an atheist inmate group. In addition, plaintiff was allowed to proceed on a claim that defendants violated the settlement agreement in Aiello v. Litscher, case no. 98-C-791-C, when they improperly characterized six magazines sent to him between May and October, 2002, as containing pornography. Plaintiff was denied leave to proceed on claims that he (1) was denied postage to mail letters to the United States Civil Rights Commission and his

power of attorney; (2) was not permitted to receive a specialty catalog mailed to him; and (3) had access only to religious Christmas cards during the holiday season.

Presently before the court is plaintiff's "Motion for a Preliminary Injunction and/or Restraining Order." The motion does not conform to this court's procedures to be followed on motions for injunctive relief, but even if it were in compliance the motion would be denied.

In order to obtain emergency injunctive relief, plaintiff must support his motion with evidence to show that (1) he has no adequate remedy at law and will suffer irreparable harm if the relief is not granted; (2) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (3) he has some likelihood of success on the merits of his case; and (4) the injunction would not frustrate the public interest. Palmer v. City of Chicago, 755 F.2d 560, 576 (7th Cir. 1985).

The injunction plaintiff wants is two-fold. First, he wants an order requiring defendants to open in his presence "any and all incoming first class mail addressed to [him] . . . by mechanical means." In addition, he wants an order requiring defendants to deliver to him "all incoming mail and/or publications . . . which do not contain *explicit* images of sexual intercourse" and to modify the screening procedure established in the Aiello settlement agreement and subsequently codified in the prison's publication rules.

Plaintiff's motion for a preliminary injunction will be denied with respect to his

request for an order requiring defendants to open in his presence all incoming first class mail addressed to him “by mechanical means,” because he has made no showing that he will be irreparably harmed if such an injunction does not issue. As I told plaintiff when I allowed him to proceed on his claim that his legal mail was repeatedly opened outside his presence, most inmate mail may be opened and read outside an inmate’s presence. Prison officials have a legitimate penological interest in inspecting prisoner mail for contraband, escape plans or other threats to prison security. Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). However, a prisoner is entitled to be present when prison officials inspect privileged or legal mail, because inmates possess a greater interest in maintaining the confidentiality of communications with their attorneys and certain other private legal matters and because allowing prison officials to read such mail might chill a prisoner's right of access to the 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 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). Plaintiff’s request for an injunction granting him heightened protections on all mail mechanically addressed to him extends well beyond the protection to which he is entitled

under the Constitution. Therefore, plaintiff cannot show that he will suffer irreparable harm if the injunction is not granted.

The motion for a preliminary injunction will be denied with respect to plaintiff's request for special procedures to be put in place for screening publications sent to him, because I am convinced that plaintiff's request for leave to proceed in forma pauperis on the publication claim was improvidently granted. Therefore, I will dismiss the claim pursuant to 28 U.S.C. § 1915A and deny plaintiff's request for emergency injunctive relief related to it on the ground that plaintiff has not shown a likelihood of success on the merits of the claim.

When I granted plaintiff leave to proceed on his claim that he had been denied certain publications because they contained material proscribed under the prison's rules, I did not consider whether an individual class member could litigate such a claim in an independent lawsuit without affecting the Aiello class as a whole. Had I given the matter more thought, I would have concluded as I do now that there are a number of reasons why plaintiff's claim cannot be considered in the context of this action.

In essence, plaintiff's claim is that defendants are in contempt of the Aiello settlement agreement and that the agreement's terms require modification to protect his First Amendment rights. If it is true that prison officials are acting in contempt of the settlement agreement, it is the responsibility of the lawyer for the class to investigate the matter and

bring a motion for a hearing on contempt in the context of the class action suit if such a proceeding is warranted. The responsibility of the lawyer for the class is to protect the rights of the class as a whole. The settlement agreement was reached in fulfillment of that effort. If plaintiff believes he has been denied publications which should not have been denied under the agreement, he is free to bring the matter to the attention of the lawyer for the class. Counsel will then determine whether plaintiff's individual concerns are concerns that may affect the interests of all inmates subject to the settlement agreement and, if so, whether a motion for a hearing on contempt is an appropriate response.

Plaintiff's motion for a preliminary injunction makes it clear that he wants not only a declaration that defendants are in violation of the settlement agreement by the manner in which they have implemented the terms of the agreement on publications sent to him, but injunctive relief modifying the procedures established to protect the rights of the class in the Aiello case. However, so long as the settlement agreement remains in force, it defines the rights of the class. It would be inappropriate to modify the terms of the agreement in the context of a separate lawsuit filed by single class member challenging the manner in which the agreement is being implemented.

Moreover, I am aware that counsel for the class in Aiello are presently in the process of determining whether the settlement agreement requires continued enforcement or whether the prospective relief granted in the agreement should be terminated under 18

U.S.C. § 3626(b). Under the terms of the agreement, and in keeping with the requirements of 18 U.S.C. § 3626, the agreement may be terminated at any time so long as the Department of Corrections promulgates regulations embodying provisions in the agreement that were deemed necessary to protect the constitutional rights of the class. It would set up an untenable conflict to allow individual class members to pursue separate actions in federal court to enforce an agreement for prospective relief that their lawyers in the class action suit are simultaneously arranging to terminate as no longer necessary under the Prison Litigation Reform Act and 18 U.S.C. § 3626.

Even if I were to be convinced of the wisdom of individual lawsuits to enforce proper implementation of the settlement agreement in the Aiello case, plaintiff is barred by the settlement agreement itself from bringing his claim. The settlement agreement provides that it “may not be enforced based solely upon isolated misinterpretations of the rule or its successor regulations by line staff, so long as adequate procedures are in place to review and address those misinterpretations.” Dkt. #131, Agreement at II.5. Plaintiff alleges that defendants have misinterpreted the rule as it relates to six different publications that were sent to him over a six-month period. Given the volume of mail prison officials must screen under the procedures, defendants’ alleged improper characterizations of the content of six publications suggest nothing more than isolated misinterpretations of the rule. Plaintiff is not attacking the adequacy of the procedures established in the agreement and under the

Internal Management Procedure put into place following the settlement. He simply disagrees with the unfavorable decisions he has received.

I note that the settlement agreement provides that class members remain free to file two kinds of lawsuits: 1) claims for money damages based on alleged violations of the First Amendment *before* the settlement agreement was reached; and 2) claims for monetary or injunctive relief for alleged violations of the DOC regulation or policy put into place to codify the terms of the agreement. Plaintiff is not contending that the publications at issue in this lawsuit were denied to him in advance of this court's acceptance of the settlement agreement. To the extent that his claim is that defendants violated DOC § 309 and IMP 50 when they interpreted certain pictures in the six rejected publications as prohibited under those rules, the claim is one arising under state law that must be brought in state court.

Finally, plaintiff is not challenging the facial validity of the DOC rule that was applied to deny him the publications at issue in this case. If he had made such a claim, he would not have been allowed to pursue it. The rule plaintiff challenges is the very rule that was modified under the terms of the Aiello settlement to insure protection of the First Amendment rights of the inmate class. When I approved the settlement agreement, I was required under 18 U.S.C. § 3626 to find that the relief granted was narrowly drawn and extended no further than necessary to correct the alleged violations of the class members' federal rights. Thus, the members of the Aiello class, of which plaintiff is one, have already

agreed that the rule on its face does not violate their constitutional rights. Plaintiff is precluded by the settlement agreement from making a facial challenge to the rule under which his publications were denied.

Because the settlement agreement in Aiello bars plaintiff from making a facial challenge to the rule under which his publications were denied because he cannot prosecute an independent contempt proceeding or modify the terms of the settlement agreement in the Aiello case on behalf of the class and because he must sue in state court on his claim that defendants are violating state law, I will dismiss the claim pursuant to 28 U.S.C. § 1915A and deny plaintiff's motion for preliminary injunction because he has no likelihood of success on the merits of the claim in this court.

ORDER

IT IS ORDERED that plaintiff's motion for a preliminary injunction is DENIED.

Further, IT IS ORDERED that plaintiff's claim that six publications were withheld from him after having been improperly characterized as containing material prohibited under

DOC § 309 and IMP 50 is DISMISSED pursuant to 28 U.S.C. § 1915A, as is the complaint against defendant Marc Clements, whose only alleged wrongdoing relates to this claim. The case will go forward on plaintiff's claim that defendants denied him the opportunity to form an atheist inmate group and repeatedly opened his legal mail outside his presence.

Entered this 24th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge