IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL HENDLER,

ORDER

Plaintiff,

04-C-915-C

v.

GARY McCAUGHTRY and
MARK CLEMMONS,

Respondents.

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This is a proposed civil action for monetary and declaratory relief, brought under 42 U.S.C. § 1983. Plaintiff Paul Hendler claims that defendants Gary McCaughtry and Mark Clemmons violated his constitutional rights by destroying papers he had marked for his defense attorney. Although plaintiff has paid the filing fee in full, because he is a prisoner, his complaint must be screened pursuant to 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

This court will not dismiss plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff 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). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Paul Hendler is an inmate currently incarcerated at the Waupun Correctional Institution in Waupun, Wisconsin. Defendant Gary McCaughtry is the Warden at the Waupun facility and defendant Mark Clemmons is the security director.

Plaintiff has been charged with homicide carrying a potential sentence of life imprisonment if he is found guilty. Plaintiff's defense attorney, Wright Laufenberg, asked plaintiff to provide any information he has regarding his membership in a gang and how it is relevant to the homicide. Pursuant to this request, plaintiff prepared a letter to his lawyer containing gang related information and wrote at the top "Attention Lawyer Laufenberg." In addition, he wrote his criminal case number and an exhibit number on the top of these papers. After preparing these documents, plaintiff was transferred from the Wisconsin

Resource Center in Winnebago, Wisconsin, to the Waupun facility. His property, including these papers, were gathered together for transfer and plaintiff was given a "property ticket" signed by defendant Clemmons.

On June 8, 2004, a corrections officer at the Waupun facility was sorting through plaintiff's property and found two handwritten pages mixed in with plaintiff's legal papers setting out 37 rules for membership in the Outlaws Motorcycle Club or a "1% organization." The officer wrote a conduct report alleging that plaintiff had violated Wis. Admin. Code § DOC 303.20, which prohibits inmate possession of gang-related materials. Following a disciplinary hearing, plaintiff was ordered to spend 8 days in adjustment segregation and 360 days in program segregation and his documents were destroyed. Plaintiff appealed this disciplinary decision to defendant McCaughtry, who affirmed it even though plaintiff submitted letters from his defense attorney attesting to the fact that he had asked plaintiff to provide any and all information on gangs that plaintiff could provide. According to this letter, plaintiff's attorney had made the request because "it [was] tough to sit down and talk face to face" with plaintiff because of his incarceration.

Plaintiff is unable to use this destroyed "evidence" in his homicide case in which he faces a sentence of life imprisonment. As a result, plaintiff has suffered a great deal of stress and anxiety and has contemplated suicide.

DISCUSSION

A. First Amendment

Prisoners have a limited liberty interest in their mail under the First Amendment. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); 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 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), reading a prisoner's legal mail outside his presence is actionable. Antonelli v. Sheahan, 81 F.3d 1422, 1431-32 (7th Cir. 1996); Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306-07 (7th Cir. 1993) (allegations that prisoner's legal mail was opened outside his presence stated a claim). The extra protections afforded legal mail are reserved generally for privileged correspondence between inmates and their attorneys, Wolff, 418 U.S. at 574; Antonelli, 81 F.3d at 1432.

I construe plaintiff's complaint to allege a claim that defendants violated his First Amendment rights by reading privileged communications with his lawyer outside of his presence. However, the documents at issue in this case may not qualify as "legal mail" under this line of reasoning. Prisons can adopt administrative procedures for identifying protected legal mail, requiring it to be marked in a specified manner. Martin, 830 F.2d at 78. Documents not conforming with these requirements are not entitled to the heightened

protection afforded to legal mail. Id. At this early stage, I will assume that plaintiff's documents qualify as legal mail and grant him leave to proceed on his First Amendment claim.

B. Access to Courts

Prisoners have a constitutional right to meaningful access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Snyder v. Nolen, 380 F.3d 279, 290 (7th Cir. 2004) (citing Lewis v. Casey, 518 U.S. 343, 355 (1996)). However, the right of access to the courts is not without bounds; inmates are not guaranteed total freedom from restriction in pursuing legal claims. Lehn v. Holmes, 364 F.3d 862, 866 (7th Cir. 2004) ("the right of access to the court is not an unlimited one"). The right is to be afforded "meaningful" access. Bounds v. Smith, 430 U.S. 817, 828 (1977); Brooks v. Buscher, 62 F.3d 176, 179 (7th Cir. 1995). Meaningful access is satisfied when an inmate has assistance from persons trained in the law. Bounds, 430 U.S. at 830-32; Brooks, 62 F.3d at 179; DeMallory v. Cullen, 855 F.2d 442, 446 (7th Cir.1988). In this case, plaintiff had the assistance of an attorney in defending against the criminal charges lodged against him. No limitation was imposed on plaintiff's ability to relay the information about gangs contained in the destroyed documents to his attorney orally. Although plaintiff's attorney noted that it was difficult to arrange face to face sessions because plaintiff was incarcerated, time, place and manner restrictions do not render legal assistance

meaningless. See, e.g., Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986) (time, place and manner restrictions on prison library constitutional).

Even if I were to speculate that plaintiff could not reconstruct the destroyed documents or communicate the information contained therein to his lawyer by some other means, his claim would be barred under Heck v. Humphrey, 512 U.S. 477 (1994). Heck forbids a convicted person from seeking damages on any theory that implies the invalidity of his conviction without first getting the conviction set aside. The Court of Appeals for the Seventh Circuit has had two occasions to apply the rule stated in Heck to denial of access to the courts claims involving inmates alleging that they had been obstructed from challenging their criminal convictions. In both Nance v. Vieregge, 147 F.3d 589 (7th Cir. 1998) and Hoard v. Reddy, 175 F.3d 531 (7th Cir. 1999), the court concluded that Heck barred the inmate's claims for money damages. However, in both cases, the court recognized that if there was an on-going obstruction, an inmate might obtain prospective injunctive relief under § 1983 to clear the blockage. Nance, 147 F.3d at 591; Hoard, 175 F.3d at 533. Nonetheless, this exception does not apply in this case because plaintiff is not seeking prospective injunctive relief. Because plaintiff's allegations do not suggest that he has been deprived of meaningful access to the courts and because his claim would be barred under Heck in any event, I will deny him leave to proceed on his access to the courts claim.

C. Personal Involvement

Defendant Clemmons was the security director at the Waupun facility, so I will assume that he was personally involved in the decision to read plaintiff's documents. Gentry, 65 F.3d at 561 (liability under § 1983 must be based on a defendant's personal involvement). However, the only involvement defendant McCaughtry appears to have had is affirming the finding of the adjustment committee that plaintiff had violated Wis. Admin. Code § DOC 303.20, an action for which he is entitled to immunity. Forrester v. White, 484 U.S. 219, 226-27 (1988); Wilson v. Kelkhoff, 86 F.3d 1438, 1443-1445 (7th Cir. 1996). Although defendant McCaughtry is the warden of the Waupun facility, the doctrine of respondeat superior, under which a superior may be liable for a subordinate's tortious acts, does not apply to claims under § 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Accordingly, defendant McCaughtry will be dismissed.

D. Motion for Appointment of Counsel

Plaintiff asks that counsel be appointed to represent him in this case. Before the court can appoint counsel in a civil action such as this, it must find first that the plaintiff made a reasonable effort to retain counsel and was unsuccessful or that he was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiff must submit a list of the names and addresses of at least three lawyers who declined

to represent him before the court will find that he made reasonable efforts to secure counsel on his own. Although plaintiff states that he has contacted approximately twenty pro bono lawyers, he has not submitted any names or addresses.

Second, the court must consider whether the plaintiff is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is too new to allow me to assess plaintiff's abilities. Therefore, plaintiff's motion will be denied without prejudice to his renewing it at some later stage of the proceedings.

ORDER

IT IS ORDERED that

1. Plaintiff Paul Hendler may proceed against defendant Mark Clemmons on his claim that his First Amendment rights were violated when defendant Clemmons read legal documents that plaintiff had marked for his lawyer.

2. Plaintiff's claim that defendants violated his constitutional right of access to the courts is DISMISSED pursuant to 28 U.S.C. § 1915A(b)(2) for plaintiff's failure to state a claim upon which relief may be granted.

3. Defendant Gary McCaughtry is DISMISSED from this case.

4. Plaintiff's motion for appointment of counsel is DENIED without prejudice to his renewing it at some later stage of the proceedings.

5. Plaintiff is responsible for serving his complaint upon the defendant. A memorandum describing the procedure to be followed in serving a complaint on individuals in a federal lawsuit is attached to this order, along with one copy of plaintiff's complaint and blank waiver of service of summons forms.

6. For the remainder of this lawsuit, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

7. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 1st day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge