

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

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TITUS HENDERSON,

Plaintiff,

v.

BRIAN KOOL,

Defendant.  
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ORDER

05-C-157-C

In an order dated April 25, 2005, I granted plaintiff leave to proceed in forma pauperis on his claim that defendant Brian Kool denied him a promotion to security level three in retaliation for plaintiff's assertion that he had been transferred to the Wisconsin Secure Program Facility because he had sued Redgranite Correctional Institution. I denied plaintiff leave to proceed on five other claims and dismissed from the complaint defendants Peter Huibregtse, Burton Cox, Jeffrey Endicott, Matthew Frank, Steve Casperson, Cindy Sawinski, Amy Campbell and Judith Huibregtse.

On May 31, 2005, plaintiff filed a proposed amended complaint. On June 6, 2005, I entered an order informing plaintiff that his amended complaint would have to be screened by the court pursuant to 28 U.S.C. § 1915A. A cursory review of the amended complaint

revealed that plaintiff was attempting to reallege his claims against Peter Huibregtse, Burton Cox, Matthew Frank, Amy Campbell, Cindy Sawinski and Judith Huibregtse. Because I deemed it an inefficient use of the court's time to screen an amended complaint that appeared to be reasserting claims that I had already found to lack legal merit, I denied plaintiff leave to proceed on his amended complaint. However, I told plaintiff that I would entertain his proposed amended complaint if he were to rewrite it so that I could make out with relative ease what he was adding, dropping or changing.

Plaintiff has now responded to the June 6 order, although not in the fashion I described. In a document titled "Motion to Supplemental Pleadings Purs. to Fed. R. Civ. P. 15(d), 17(a), 19(a), 20(a)," plaintiff points the court's attention to allegations in the proposed amended complaint concerning his claim of mail censorship against Judith Huibregtse, Peter Huibregtse and CO II J. Starky. I denied plaintiff leave to proceed on a First Amendment mail censorship claim in his original complaint, reasoning as follows:

Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in "censorship of . . . [the] expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974). As a general rule, inmate mail can be opened and read outside the inmate's presence, Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987), but repeatedly reading a prisoner's legal mail outside his presence is actionable. Antonelli v. Sheahan, 81 F.3d 1422, 1431-32 (7th Cir. 1996). Petitioner claims that respondent Judith Huibregtse has "censored" his incoming and outgoing mail by placing a red label on it. Absent an allegation about the effect that the red label had on the delivery of petitioner's mail, there is no real suggestion of censorship. Petitioner does not allege

that prison officials failed to deliver his mail, delayed in delivering his mail, read his legal mail outside his presence or for that matter, read any of his mail, legal or non-legal, outgoing or incoming, either in or out of his presence. Absent any such allegation, I will deny him leave to proceed on his mail censorship claim.

Plaintiff points out that in his amended complaint, he has provided more detail about his mail censorship claim. In particular, plaintiff alleges that on September 5, 2004, Judith Huibregtse opened and read outside plaintiff's presence a letter from the United States Supreme Court labeled in red "Open in Presence of Inmate"; on November 10, 2004, she opened and read a letter from the Center for Constitutional Rights labeled "Legal Mail . . . Open in Presence of Prisoner"; and on March 1, 2005, CO II J. Starky confiscated and destroyed some of plaintiff's outgoing mail, both legal and non-legal in nature.

I have already explained to plaintiff that I am unwilling to allow him to raise a claim against a new defendant at this late time. Therefore, I will not grant plaintiff leave to amend his complaint to allege that CO II J. Starky confiscated and destroyed some of plaintiff's mail. If plaintiff wants to pursue a constitutional claim against Starky, he is free to do so in a separate lawsuit.

As for plaintiff's revised allegations against Peter Huibregtse, nothing in the allegations specify unconstitutional conduct on his part. Plaintiff's amended complaint contains nothing more than a bald assertion that Peter Huibregtse censored plaintiff's mail. Because liability under § 1983 hinges on an individual's personal involvement in the

constitutional violation, Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F. 3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983), plaintiff's allegations are still insufficient to state a claim against Peter Huibregtse.

However, plaintiff will be allowed to proceed on his claim in the proposed amended complaint against defendant Judith Huibrgetse. It is well established that prison officials may open and inspect non-privileged mail because of the risk that it may contain contraband. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986). However, the court of appeals has also held that an inmate has a First Amendment right to *be present* when officials open his "legal mail." Bach v. People of the State of Illinois, 504 F.2d 1100 (7th Cir. 1974). Although in Bach the court considered only communications between an inmate and his attorney, it later suggested that mail from "public officials," including a United States Senator, was also entitled to special protection. Martin v. Brewer, 830 F.2d 76, 78 (7th Cir. 1987); see also Castillo v. Cook County Mail Room Dept., 990 F.2d 304, 306-07 (7th Cir. 1993) (per curiam) (allegation that prisoner's letters from court and Department of Justice were opened outside his presence stated a claim upon which relief could be granted). But see Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996) ("Mail from the courts, as contrasted to mail from a prisoner's lawyer, is not legal mail.").

Although plaintiff has a constitutional right to be present when his "legal mail" is

opened, he cannot hold a prison official liable for money damages in a suit under § 1983 unless he can prove that this right was violated as a result of more than mere negligence. Kinkaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992) (plaintiff must prove more than negligence to succeed under § 1983). To this end, the court of appeals has emphasized the significance of repeated infractions that might be indicative of a pattern or policy of mishandling mail. Zimmerman v. Tribble, 226 F.3d 568, 572-73 (7th Cir. 2000) (dismissing allegation of single instance of mail interference).

In Castillo, 990 F.2d 304, the panel majority held that a complaint could not be dismissed out of hand as frivolous when it alleged that three letters from public officials, two from a federal district court and one from the Department of Justice, which were marked clearly with the legend “LEGAL MAIL - OPEN IN PRESENCE OF INMATE,” had been opened outside the inmate’s presence. The majority reasoned that the three instances alleged were enough to suggest ongoing activity. Id. at 306. In his dissent, Judge Coffey expressed skepticism that the inadvertent opening of three letters was constitutionally consequential. Id. at 308 (Coffey, J., dissenting).

Plaintiff’s allegations are even more scant than those in Castillo. He has alleged only two instances in which Judith Huibregtse opened and read his “legal mail” outside his presence. Although plaintiff may not be able to succeed on his claim simply by proving just two instances of interference with his legal mail, I read Castillo for the proposition that

district courts are to grant leave to proceed when a complaint contains allegations suggesting an ongoing problem with the way mail is handled. Id. at 306 (“Because these incidents may be indicative of ongoing activity, [the plaintiff’s] allegations are not legally frivolous for the purposes of § 1915.”). Erring on the side of caution, I conclude that plaintiff’s allegations meet this standard; he has alleged that Judith Huibregtse opened and read two well-marked and easily identifiable legal correspondence in relatively close period of time. Accordingly, I will allow plaintiff to proceed on his First Amendment claim against Judith Huibregtse.

#### ORDER

IT IS ORDERED that

1. Plaintiff’s “Motion to Supplemental Pleadings . . . .” is construed as a motion for leave to proceed in forma pauperis on his amended complaint dated May 25, 2005 and the motion is GRANTED. Plaintiff’s May 25, 2005 amended complaint will be considered the operative pleading in this case.

2. With one exception, the claims that were dismissed from the original complaint in this court’s order of April 25, 2005, are DISMISSED from the amended complaint. The exception is that plaintiff is GRANTED leave to proceed in forma pauperis on his claim that defendant Judith Huibregtse violated his rights under the First Amendment by opening and reading his legal mail.

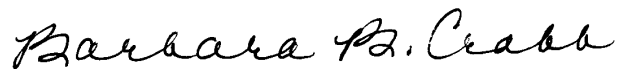
3. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on Judith Huibregtse.

4. Plaintiff's request for leave to amend his complaint to add a new claim against CO II J. Starky is DENIED.

5. The existing defendants may have until the date defendant Judith Huibregtse has to respond to the amended complaint in which to file their response to the amended complaint. In lieu of filing a new answer, the existing defendants may advise the court and plaintiff that they intend to stand on their answer to the original complaint as their response to the amended complaint.

Entered this 30th day of June, 2005.

BY THE COURT:

A handwritten signature in black ink, reading "Barbara B. Crabb". The signature is written in a cursive, flowing style.

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BARBARA B. CRABB  
District Judge