

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

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JAMES J. KAUFMAN,

Plaintiff,

v.

ORDER

06-C-205-C

THOMAS E. KARLEN; RANDALL R. HEPP;
CYNTHIA L. O'DONNELL; RICHARD RAEMISCH;
DANIELLE LACOST; MATTHEW FRANK;
PERRY NICHOLS, APRIL OLIVERSON, K. BAUER,
MICHELLE MCCAUGHTRY, JEFFREY SCHEFELKER,
TRAVIS BERRY, JUDY IMBERG
and OFFICER M. NELSON,

Defendants.

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In a preliminary pretrial conference order dated September 19, 2006, magistrate judge Stephen Crocker gave plaintiff James Kaufman until October 16, 2006, in which to amend his complaint to replace all references to John Doe or unknown defendants with the names provided to him by the state. (The state was asked to assist plaintiff in identifying the unknown officers no later than October 6, 2006. They responded by providing log books and shift assignment sheets to plaintiff by October 5, 2006.) Subsequently, plaintiff was granted an enlargement of time to October 23, 2006, in which to file his amended

complaint. The proposed amended complaint was submitted to the court on October 18, 2006.

In his amended complaint, plaintiff identified six previously unknown defendants in the caption and the body of his complaint. However, he advised the court that he could not identify the John Doe defendants described in paragraphs 46, 47, 85, 86, 89 and 91 of his complaint because the “documents provided by the defendants [were insufficient] to identify staff members assigned to the mailroom or property room on those dates.” In light of plaintiff’s inability to identify the defendants who allegedly opened mail outside his presence or rejected publications as alleged in paragraphs 46, 47, 85, 86, 89 and 91, I dismissed those claims in an order dated November 9, 2006. At that time, I accepted plaintiff’s amended complaint as the operative pleading and forwarded copies of it to the Attorney General for informal service of process on the newly added defendants.

Now, nearly three weeks after the deadline for filing an amended complaint has passed, plaintiff has submitted a letter to the court asking for modification of the November 9 order. In particular, plaintiff asks permission to reinstate claims 46, 47, 86, 89 and 91 in the amended complaint on the ground that “last week” he received “additional discovery documents” that allowed him to identify the remaining “Doe” defendants.

As an initial matter, I note that it is improper for plaintiff to be asking for modification of an order or seeking leave to amend his complaint by submitting a letter as

opposed to a formal motion. Plaintiff is a seasoned litigant who is familiar with the Federal Rules of Civil Procedure and the proper form of motions and amended complaints. In any event, I construe plaintiff's letter as a motion for modification of the November 9 order and a motion for leave to file a second amended complaint. The motions will be granted in part and denied in part.

According to plaintiff, he has discovered that either existing defendant April Oliverson or a Dale Smith opened the mail at issue in paragraphs 46 and 47 and existing defendant M. Nelson denied him the books at issue in paragraphs 86, 89 and 91. (Plaintiff also states that an Officer Coleman denied him the book at issue in paragraph 85, but that Coleman is no longer alive, so he does not wish to reinstate that claim.)

Although plaintiff has not filed a proposed second amended complaint identifying defendant Nelson in connection with his claims in paragraphs 86, 89 and 91 or defendant Oliverson in connection with his claims in paragraphs 46 and 47, I will reinstate plaintiff's claims set out in these paragraphs and allow plaintiff to proceed on them against defendants Nelson and Oliverson, respectively. So that the record remains clear which claims plaintiff is asserting against which defendants, I will cross out plaintiff's references to an "unknown officer" in paragraphs 46 and 47 and insert in their place the name of April Oliverson. Also, I will cross out plaintiff's references to an "an unknown property officer" in paragraphs 86, 89 and 91 and insert in their place the name of M. Nelson. A copy of the revised amended

complaint is enclosed to plaintiff and defense counsel with a copy of this order. In light of the fact that Nelson and Oliverson are already parties to this action and have been served with plaintiff's amended complaint, the progress of the case will not be unduly delayed by requiring them to respond to paragraphs 46, 47, 86, 89 and 91.

However, I will not alter the November 9 order or the amended complaint to allow plaintiff to proceed against another new defendant, Officer Dale Smith, on the same claims he is already pursuing against defendant Oliverson. First, plaintiff appears to be unsure whether Smith was involved personally in allegedly violating his constitutional rights. Even if Smith and not Oliverson was the individual who opened outside of plaintiff's presence mail plaintiff received on August 13, 2005 from attorney Laurence J. Dupuis clearly marked "Legal Correspondence," (paragraph 46) and mail plaintiff received on July 5, 2005, from the U.S. Dept. of Homeland Security (paragraph 47), I am not inclined to stall further progress of this lawsuit while plaintiff rewrites his amended complaint to include Smith.

First, the chances of plaintiff's success on a claim that a particular officer opened two privileged pieces of mail within a five week span are slim at best. As I noted in the order allowing plaintiff to proceed in forma pauperis on his mail interference claims, it is not at all clear whether any of the correspondence petitioner received the U.S. Dept. of Homeland Security was privileged "legal correspondence" related to his ongoing litigation or to other legal matters he was asking these agencies to pursue on his behalf. Only if it were, and if it

were clearly marked as legal mail, would petitioner be entitled under federal law to be present when the mail was opened.

Second, single instances or sporadic occurrences of mishandled legal mail do not amount to a violation of an inmate's constitutional rights. Bruscino v. Carlson, 654 F. Supp. 609, 618 (S.D. Ill. 1987), aff'd, 854 F. 2d 162 (7th Cir. 1988) ("Isolated incidents of interference with legal mail . . . (do) not show a systematic pattern or practice of interference" and do not violate the Constitution.) Constitutional protection is reserved for those situations in which is a pattern of interference or where a prisoner's mail is arbitrarily or capriciously interfered with for the purpose of harassment, Arbing v. Brown, 959 F.2d 238 (7th Cir.1992). Ordinarily, a plaintiff who claims that a prison official mishandled his mail one or two times would not be granted leave to proceed on such a claim. In this case, plaintiff was allowed to proceed on his claims of mail interference because he alleged a number of instances of improper handling. If he is to have any success in proving a claim of constitutional proportion, he will have to show systematic interference, and liability for such repeated instances of impropriety will likely fall on the shoulders of prison officials responsible for insuring proper mail handling, and not the occasional officer who committed the infraction.

In sum, the delay that would be inevitable in allowing plaintiff to amend his complaint a second time is not warranted in light of the negligible prejudice plaintiff is likely

to suffer from not being allowed to add Smith as a defendant. Therefore, I am denying plaintiff's motion for leave to file a second amended complaint naming Smith as a possible defendant with respect to the alleged wrongdoing alleged in paragraphs 46 and 47.

ORDER

IT IS ORDERED that

1) plaintiff's motion for modification of the November 9, 2006, order is GRANTED in part. Plaintiff's claims set out in the amended complaint in paragraphs 46, 47, 86, 89 and 91 are HEREBY REINSTATED. A revised copy of the amended complaint showing April Oliverson in place of the "unknown officer" identified in paragraphs 46 and 47 and M. Nelson in place of the "unknown property officer" identified in paragraphs 86, 89 and 91 is enclosed to plaintiff and defense counsel with a copy of this order and shall serve as the operative pleading.

Plaintiff's motions for modification of the November 9 order and for leave to file a second amended complaint naming Dale Smith as a defendant with respect to his claims in

paragraphs 46 and 47 is DENIED.

Entered this 16th day of November, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge