

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

LORENZO JOHNSON,

Plaintiff,

OPINION AND ORDER

v.

13-cv-113-wmc

SECRETARY EDWARD WALL, SEC.
DESIGNEE DEIRDRE MORGAN, D.A.I.
ADMINISTRATOR CATHY A. JESS,
WILLIAM POLLARD, CORR. PROG.
SUPERVISOR MR. GREFF,

Defendants.

Plaintiff Lorenzo Johnson alleges that various employees of the Department of Corrections (1) violated his constitutional right to access the courts and (2) failed to accommodate his disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12312. Johnson asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Johnson has provided, the court concluded that he is unable to prepay the full fee for filing this lawsuit. Johnson has also made the initial partial payment of \$133.96 required of him under § 1915(b)(1).

Because Johnson is incarcerated, the PLRA also requires the court to screen his complaint and dismiss any portion that is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After applying this standard as set forth below, the court will allow Johnson to proceed and require the state to respond with respect to certain defendants and certain claims.

ALLEGATIONS OF FACT¹

A. The Parties

Johnson is, and was for all times relevant to his complaint, an inmate at the Waupun Correctional Institution. Material to his ADA claim, Johnson alleges that he is “functionally illiterate with Borderline Intellectual Functioning with a mental diagnosis of Depressive Disorder,” and that he reads at a third grade level. (Compl. (dkt. #1) ¶ 4 (citing Ex. A, which purports to be a Psychological Services Report dated February 11, 2010).) Johnson further alleges that “[d]ue to my illiteracy and Borderline Intellectual Functioning and Depressive Disorder, without assistance, I am unable to perform or Participate in daily life activities such as filing inmate grievances, write personal and business letters or communicate with staff by reading and writing communications.” (*Id.* at ¶ 19.)

Edward F. Wall is the Secretary of the Wisconsin Department of Corrections (“DOC”). Deirdre Morgan is an employee of the DOC and is the Secretary’s designee for final decisions on inmate grievances. Cathy A. Jess is the Administrator of the Division of Adult Institutions at the DOC. William Pollard is the Warden at Waupun. Mr. Greff is employed at Waupun as the Corrections Programming Supervisor. As such, Greff has authority to implement and oversee programs and policies in the Health and Segregation Unit (“HSU”).

¹ In addressing any pro se litigant’s complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Johnson alleges, and the court assumes for purposes of this screening order, the following facts.

B. Underlying Incident and Sentence to Segregation

On July 3, 2012, Johnson was issued Conduct Report #1547265, alleging that he violated Rules 303.20 “Group Resistance & Petitions,” 303.47 “Possession of Contraband,” and 303.63 “Violations of Institutional Policies and Procedures.” The complaint primarily concerned Johnson’s alleged possession of materials relating to a “Security Threat Group,” known as the “5%ers.” (Compl. (dkt. #1) ¶ 1.) On July 19, 2012, a hearing was held on the conduct report, at the end of which Johnson was adjudged guilty and sentenced to 210 days of disciplinary separation in the Segregation Unit.

C. Denial of Access to Inter-Institutional Legal Mail

While confined in segregation, Johnson alleges that he relied on the use of the prison’s “Legal Route,” which allows prisoners to send each other legal documents for assistance through an inter-institutional mailing system, because he is “indigent.” (*Id.* at ¶¶ 5-6.)² Specifically, Johnson alleges that he challenged the guilty finding on the conduct report and his sentence by filing an administrative appeal, which was written with the assistance of “Inmate para-legals.” (*Id.* at ¶ 3.) That administrative appeal must have been unsuccessful because, at some point before August of 2012, Johnson filed a certiorari action in the Dane County Circuit Court seeking reversal of the disciplinary

² In light of Johnson’s statements about his own limitations and the level of sophistication of his pleading, the court assumes that an inmate litigator or paralegal similarly assisted him in drafting the present complaint.

committee's decision, expungment of the conduct report from his prison file and a return of the seized materials.

On August 27, 2012, defendant Jess issued a memorandum indicating that “[e]ffective September 30, 2012, institutions will no longer forward inmate to inmate legal correspondence or other correspondence via inter-institution routing.” (*Id.* at ¶ 7; Compl., Ex. B (dkt. #1-1) p.5.)³

On November 1, 2012, Johnson received a letter from the Dane County Clerk of Courts, indicating that his certiorari action would not be filed because he had failed to enclose certain documents with his filing, and warned him that he had 21 days to file the necessary documents. (*Id.* at ¶ 10; Compl., Ex. C (dkt. #1-1) pp.6-7.) Johnson alleges that it was “almost impossible for me to read and understand without assistance” the letter from the court. (*Id.* at ¶ 13.) Johnson also alleges that he was unable to obtain a copy of his prisoners trust account statement, one of the required documents, because of defendants’ new policy requiring payment of \$.15 for each copy. (*Id.* at ¶ 11.) On January 7, 2013, the Dane County Circuit Court denied Johnson’s writ of certiorari action because of his failure to comply with the statutory filing requirements. (*Id.* at ¶ 15; Compl., Ex. F (dkt. #1-1) pp.12-13.)

³ Johnson also alleges that defendant Greff “has the authority to implement a policy other than the legal route system, to allow inmates housed in the H.S.U. to have communication with one another by inter alia, joint legal Rec. periods or limiting [the] legal route to only prisoners Indigent and housed in the H.S.C.” (Compl. (dkt. #1) ¶ 18.)

D. Exhaustion of Administrative Remedies

Johnson alleges that he filed an inmate complaint, with the legal assistance of other inmates, challenging the DOC's decision to cut off the legal route on the ground that it violated his rights to access the courts. (*Id.* at ¶ 8.) That complaint was dismissed by defendant Morgan on November 17, 2012. (*Id.* at ¶ 14; Compl., Ex. E (dkt. #1-1) p.11.)

OPINION

Johnson asserts two causes of action: (1) defendants violated his constitutional right to access the courts by discontinuing the legal route system and failing to establish an alternative; and (2) defendants violated the Americans with Disability Act, 42 U.S.C. § 12132 by failing to provide an accommodation. The court will consider each in turn.

I. Access to Courts Claim

In thwarting his ability to access prisoner paralegals by means of the legal route system, Johnson claims that defendants violated his constitutional right of access to the courts, which includes the right to file nonfrivolous lawsuits. *Lehn v. Holmes*, 364 F.3d 862, 868 (7th Cir. 2004); *In re Maxy*, 674 F.3d 658, 660 (7th Cir. 2012) (“[P]risons are obligated to assist or, put another way, may not impinge on a prisoner’s efforts to pursue a legal claim attacking, as relevant here, his criminal judgment.”) (citing *Casey*, 518 U.S. at 355). “[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong.”

Christopher v. Harbury, 536 U.S. 403, 414-15 (2002). Johnson also has the right to complain about prison conditions under the free speech clause, *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009), and to file grievances under the petition clause, *Powers v. Snyder*, 484 F.3d 929, 932 (7th Cir. 2007).

To state a claim for denial of access to the courts, Johnson must allege facts suggesting that the actions of prison officials have caused him an “actual injury” in the form of prejudice to an underlying cause of action. *Lewis v. Casey*, 518 U.S. 343, 351-52 (1996); *see also In re Maxy*, 674 F.3d at 660 (“[T]o satisfactorily state a claim for an infringement of the right of access, prisoners must also allege an actual injury.”); *Eichwedel v. Chandler*, 696 F.3d 660, 673 (7th Cir. 2012) (“[A]n inmate may prevail on a right-of-access claim only if the official actions at issue hindered his efforts to pursue a legal claim.” (internal citation and quotation marks omitted)).

In this case, Johnson alleges that defendants Jess and Greff deprived him of the means to file a writ of certiorari in Dane County Circuit Court, challenging a guilty adjudication on a conduct report, and that their actions resulted in his state law complaint being dismissed. This allegation is adequate to plead that defendants’ actions caused him an actual injury, namely the dismissal of his state claim. Johnson also alleges that he sought to challenge the segregation sentence based on his defense that the materials at issue were religious and not related to a security risk. For purposes of screening, therefore, Johnson has adequately pled that he was pursuing a nonfrivolous action.

The most troubling aspect about Johnson's claim as pled is the causal link between the policy prohibiting the legal route system and Johnson's access to courts. Access cases typically involve situations where the causal link is more direct. *See Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) (requiring prisons to provide pens, paper, stamps and notarial services); *Marshall v. Knight*, 445 F.3d 965, 968-69 (7th Cir. 2006) (recognizing a prisoner's access-to-courts claim based on diminished access to the prison law library); *Leahm*, 364 F.3d at 970 (holding that prison's failure to make out-of-state legal materials available to prisoner state an access-to-courts claim).

Still, given the combination of factors alleged here -- Johnson's cognitive and functional limitations, the fact that he was in segregation cutting off all access to prison litigators, and that he was attempting to challenge his segregation sentence before his state writ of certiorari was dismissed for lack of prosecution -- the court will grant Johnson leave to proceed against defendant Jess and Greff. Johnson should be aware that to prevail on his claim he will have to prove the *specific* actions of each individual defendant that caused him prejudice concerning his writ of certiorari action.

Johnson will be denied leave to proceed on his access to courts claim against defendants Wall, Morgan and Pollard. Liability under § 1983 arises only through a defendant's personal involvement in a constitutional violation. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). Unless a state official directly deprives an individual of a constitutional right, then to find personal responsibility, the official must at least: (1) have known about the unconstitutional conduct; or (2) facilitated it, approved it, condoned it or turned a blind eye to it. *Id.* While Johnson alleges that Wall and Morgan

had decision-making authority with respect to his grievance, he fails to allege that they were involved in the decision to prohibit the legal route system or otherwise failed to adequately provide an alternative means for Johnson (or others similarly limited) to access prison litigators.

II. Proposed ADA Claim

Johnson also claims that defendants failed to make a reasonable accommodation for his disability, invoking the protection of the Americans with Disabilities Act. While Congress has abrogated states' Eleventh Amendment sovereign immunity for ADA violations that also constitute federal constitutional violations, it is unsettled law in this Circuit whether ADA violations that do not implicate constitutional rights may be brought in federal court. *Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012). In circumstances where an ADA claim is questionable and a *pro se* plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, the Seventh Circuit has suggested reading in a claim under the Rehabilitation Act so as to avoid this tricky abrogation question. *Id.* Accordingly, this court will do so.

The Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). To state a claim under the Rehabilitation Act, Johnson must allege that “(1) he is a qualified person (2) with a disability and (3) the Department of Corrections denied him access to

a program or activity because of his disability.” *Jaros v. Ill. Dep’t of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) (citing 29 U.S.C. § 705(2)(B)). “Refusing to make reasonable accommodations is tantamount to denying access; although the Rehabilitation Act does not expressly require accommodation, ‘the Supreme Court has located a duty to accommodate in the statute generally.’” *Jaros*, 684 F.3d at 672 (quoting *Wis. Cmty. Serv. v. City of Milwaukee*, 465 F.3d 737, 747 (7th Cir. 2006)); *see also School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 n.17 (1987).

Johnson has not alleged that defendants denied him access to a *prison* program or activity because of his disability; rather, Johnson’s allegations are solely that the prison has hindered his access to the courts. Read liberally, perhaps Johnson is claiming that the DOC’s new policy against intra-institutional mail amounts to a failure to accommodate. This allegation does may not fit within a contours of a Rehabilitation Act claim, but the court will nevertheless allow Johnson leave to proceed on such a claim against the same defendants for which he was granted leave to proceed on an access to courts claim. In addition to demonstrating his disability, Johnson will also have to prove receipt of Federal financial assistance and that legal mail route constitutes a reasonable accommodation.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Lorenzo Johnson’s request to proceed on his claims that defendants Cathy A. Jess and Mr. Greff denied him access to the courts and violated the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, is GRANTED.

- 2) Plaintiff's request to proceed against defendants Edward F. Wall, Deirdre Morgan, and William Pollard is DENIED and these defendants are DISMISSED.
- 3) Plaintiff's request to proceed on an ADA claim is DENIED.
- 4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- 5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 6) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 31st day of July, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge