UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES MCKINNON

PRISONER

v. Civil Action No. 3:03CV2274(SRU)

WAYNE JAMES, ET AL.

RULING AND ORDER

James McKinnon, currently incarcerated at the Corrigan Correctional Institution in Uncasville, Connecticut, filed this civil rights action pursuant to 42 U.S.C. § 1983. McKinnon claims that each of the defendants interfered with his mail on various occasions. McKinnon has filed a motion for leave to file an amended complaint (doc. # 14) and a motion to supplement the allegations of the complaint (doc. # 17). Both motions are granted. For the reasons set forth below, however, the amended complaint is dismissed.

I. Facts

McKinnon alleges that he received a privileged letter from Dr. Bannish on August 4, 2003. CTO James opened the letter before McKinnon inspected and signed for it. The letter is attached to the complaint as Exhibit 1. A legal correspondence receipt form for August 4, 2003, includes a note that CTO James accidentally opened the letter from Dr. Bannish prior to McKinnon's signing for the letter. (See Compl. at Ex. 4.) An incident report was generated as a result of the accidental opening of plaintiff's mail.

McKinnon claims that on December 30, 2003, Counselor Cordero distributed three pieces of legal mail from this court to him. McKinnon believes that one of the letters had been opened outside of his presence and resealed prior to the time it was given to him. Plaintiff submitted a

request to Captain Burke seeking the issuance of an incident report regarding the opening of his mail. Captain Burke responded to the request on January 8, 2004. Burke stated that he had discussed the claim with Counselor Cordero who had indicated that there were no problems with McKinnon's mail and that he had sent a copy of McKinnon's request to the mailroom. Counselor Cordero responded to a second request from McKinnon regarding the opening his legal mail. Counselor Cordero stated that the letter was sealed when he gave it to McKinnon and that McKinnon's identification number could be viewed in the window of the envelope.

On April 6, 2004, Warden Carter sent McKinnon a memorandum indicating that plaintiff's correspondence to Warden Gomez had been delivered to his office and had accidentally been opened. The correspondence was resealed and forwarded to Warden Gomez. Warden Carter later informed McKinnon that an incident report had been generated concerning the accidental opening of McKinnon's correspondence.

On December 18, 2003, Counselor Cordero distributed fourteen pieces of legal mail to McKinnon. McKinnon complains that there was at least a nine-day delay in receiving the letters.

II. Standard of Review

McKinnon has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d

593, 596 (2d Cir. 2000). This requirement applies both where the inmate has paid the filing fee and where he is proceeding in forma pauperis. See Carr v. Dvorin, 171 F.3d 115 (2d Cir. 1999) (per curiam).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915(e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez v. Wolf, 907 F.2d 1293, 1295 (2d Cir. 1990)).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under section 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted"); Cruz, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the complaint, the court "accept[s] as true all factual allegations in the

complaint" and draws inferences from those allegations in the light most favorable to the plaintiff. Cruz, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)). Dismissal of the complaint under 28 U.S.C. § 1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit "a pro se plaintiff who is proceeding in forma pauperis" to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

A district court is also required to dismiss a complaint if the plaintiff seeks monetary damages from a defendant who is immune from suit. See 28 U.S.C. § 1915(e)(2)(B)(iii); Spencer v. Doe, 139 F.3d 107, 111 (2d Cir. 1998) (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official capacity claims in § 1983 action because "the Eleventh Amendment immunizes state officials sued for damages in their official capacity").

In order to state a claim for relief under section 1983 of the Civil Rights Act, the plaintiff must satisfy a two-part test. First, the plaintiff must allege facts demonstrating that the defendant acted under color of state law. Second, the plaintiff must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986).

III. Discussion

McKinnon alleges that the defendants interfered with or mishandled his mail on four different occasions. The court addresses the claims regarding non-legal mail first.

A. Claims Against Defendants James and Carter

McKinnon alleges that on one occasion in August 2003, at Cheshire Correctional Institution, CTO James opened a privileged letter outside of his presence. McKinnon also alleges that on one occasion in March 2004 at MacDougall Correctional Institution, Warden Carter opened a letter delivered to him but addressed to Warden Gomez.

The United States Supreme Court and the Court of Appeals for the Second Circuit have both held that inmates have a First Amendment Right to the free flow of their incoming and outgoing mail. See Procunier v. Martinez, 416 U.S. 396, 408-11 (1974); Heimerle v. Attorney General, 753 F.2d 10, 12-13 (2d Cir. 1985). To state a claim for the violation of this right, however, an inmate must allege more than a single instance of interference with his mail. See Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) ("an isolated incident of mail tampering is usually insufficient to establish a constitutional violation.") (citations omitted); Beiregu v. Reno, 59 F.3d 1445, 1455 (3d Cir. 1995) (distinguishing single instance of privileged mail opened outside inmate's presence with evidence of pattern and practice of such behavior); Washington v. James, 782 F.2d 1134, 1139 (2d Cir. 1986) (single isolated incident of interference with prisoner's mail insufficient to state a claim cognizable under § 1983); Morgan v. Montayne, 516 F.2d 1367, 1372 (2d Cir. 1975) (single interference with delivery of inmate's personal mail, standing alone, does not constitute a constitutional violation), cert. denied, 424 U.S. 973 (1976).

In this case, McKinnon identifies only one instance of interference with his incoming

mail at Cheshire Correctional Institution by defendant James and only one instance of interference with his outgoing mail at MacDougall Correctional Institution by defendant Carter. McKinnon has not alleged that these isolated incidents were a result of intentional interference with plaintiff's mail. Thus, the claims against defendants James and Carter are dismissed for failure to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii).

B. Claims Against Defendants Burke and Cordero

McKinnon claims that on December 30, 2003, Counselor Cordero delivered three pieces of legal mail addressed to him from this court. McKinnon concedes that all three pieces were sealed when he received them. He assumes, however, that one of the letters must have been opened outside his presence and resealed because his name did not show through the window of the envelope.

McKinnon alleges that he sent an inmate request form to Captain Burke seeking an incident report regarding his mail. Captain Burke spoke to Counselor Cordero who indicated that there were no problems with McKinnon's mail and sent a copy of McKinnon's request to the mail room. Based on his investigation, Captain Burke did not issue an incident report. McKinnon has no constitutionally or federally protected right to the issuance of an incident report. Thus, the allegations against Captain Burke fail to state a claim upon which relief may be granted.

McKinnon also sent an inmate request to Counselor Cordero. Counselor Cordero responded that the envelope was sealed when McKinnon received it and that although McKinnon's name was not showing through the window of the envelope, his inmate number was visible. Thus, there was no reason for prison officials to open McKinnon's mail prior to

delivering it to him. McKinnon has failed to allege facts to support a claim of interference with his legal mail against Counselor Cordero.

Even if McKinnon's conjecture concerning the opening and resealing of one of the pieces of court mail is true, McKinnon has failed to state a claim of denial of access to courts.

In Lewis v. Casey, 518 U.S. 343 (1996), the Supreme Court clarified what is encompassed in an inmate's right of access to the courts and what constitutes standing to bring a claim for the violation of that right. First, the Court held that to show a violation of his right of access to the courts, an inmate must allege an actual injury. Id. at 349. Thus, an inmate cannot simply allege that the prison law library or legal assistance program is inadequate. He must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. at 354. The fact that an inmate may not be able to litigate effectively once his claim is brought before the court, is insufficient to demonstrate actual injury. Id. at 355. Rather, the inmate must show that he was unable to file the initial complaint or petition, or that the complaint he filed was so technically deficient that it was dismissed without a consideration of the merits of the claim.

McKinnon does not allege that any of his cases have been dismissed without a consideration of the merits of the claim or that he was unable to file a complaint or petition as a result of Counselor Cordero's opening of his legal mail outside of his presence on one occasion and Captain Burke's failure to issue an incident report regarding the incident. Accordingly, McKinnon has failed to state a claim under Lewis.

McKinnon also claims that Counselor Cordero delayed delivery of fourteen pieces of legal mail in December 2003. McKinnon concedes that the delay in delivery of thirteen of the

fourteen pieces of mail was due to the fact that those items were mailed to Cheshire Correctional Institution and had to be re-routed to MacDougall Correctional Institution. The fourteenth letter was mailed to MacDougall Correctional Institution on December 9, 2003. McKinnon did not receive the letter until December 18, 2003. McKinnon claims that the delay in receiving his legal mail interfered with his ability to correspond with the court and attorneys. McKinnon does not allege that any cases were dismissed or that he was unable to file a case as a result of the delay in receiving his legal mail. Because McKinnon has failed to allege an actual injury as a result of the actions of defendants Cordero and Burke, McKinnon's access to the courts claims as currently set forth in the amended complaint fail under Lewis, 518 U.S. at 349, and are dismissed. See 28 U.S.C. § 1915 (e)(2)(B)(ii).

Conclusion

Accordingly, the Motion for Leave to Amend [**doc. #14**] is **GRANTED**. The amended complaint is **DISMISSED** without prejudice. See 28 U.S.C. § 1915 (e)(2)(B)(ii). The clerks shall close this file. It is certified that any appeal in forma pauperis from this ruling and order would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a).

SO ORDERED this 5th day of May 2005, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge