UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNARD WATKINS,

Plaintiff,

v.

BEN CURRY; et al.,

Defendants.
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No. C 10-2539 SI (pr)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Kennard Watkins, formerly an inmate at the Correctional Training Facility ("CTF") in Soledad, filed a *pro se* civil rights action under 42 U.S.C. § 1983, complaining of a one-year delay in receiving a letter. Per order filed on March 31, 2011, this court found that liberally construed, Watkins stated a cognizable First Amendment claim under § 1983 against defendant Amy Dzioba and ordered service. Dzioba has moved for summary judgment and Watkins has opposed the motion. For the reasons discussed below, Dzioba's motion for summary judgment will be granted and judgment will be entered in her favor.

BACKGROUND

This case is about a single piece of mail that went missing in a prison mailroom handling thousands of letters per day. The letter turned up almost a year later and was delivered to Watkins, but neither party knows with certainty where the letter spent those twelve months before it was handed to Watkins.

The following facts are undisputed unless otherwise noted.

Watkins was an inmate at CTF during the relevant time period. Amy Dzioba was the mailroom supervisor at CTF during the relevant time period. She supervised seven full-time office assistants and "miscellaneous redirected staff" in the mailroom. Dzioba Decl., ¶ 3.

In 2007, Watkins filed a complaint with the Los Angeles Police Department ("LAPD") regarding his criminal case and trial. Watkins Depo., RT 10-11. The LAPD sent Watkins a form response letter via certified mail, dated September 27, 2007. Complaint, Unnumbered Exhibits (Docket #1 p. 21 of 35). The letter notified Watkins that the LAPD had received his complaint and was investigating it.[1] *Id.* The letter did not require Watkins to take any action at all. *Id.* The letter from the LAPD was addressed to Kennard Watkins at a Soledad post office box address but did not identify Watkins as a prisoner and did not include his prisoner identification number or housing assignment unit.[2] *Id.* at 23.[3]

The letter from the LAPD arrived at CTF. Neither party provided any evidence as to when it first arrived at the prison.

An unknown person put the letter in correctional counselor ("C/O") Summers' mail slot on September 29 or 30, 2008 – almost a year after it was mailed. *Id.* at 20. C/O Summers called

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[1] The letter said:

> This correspondence is to advise you that the [LAPD] is continuing to actively investigate your complaint you reported on September 20, 2007. Your complaint is being thoroughly investigated and will undergo several levels of review. We ask for your continued patience, as these types of investigations take time to complete. At the conclusion of the investigation and review, you will be notified in writing of the investigative findings.

Docket # 1, p. 21 of 35.

[2] A regulation regarding incoming inmate mail address requirements states: "[a]ll incoming mail shall be properly addressed. Appropriately addressed mail shall include the inmate's name and department identification number." Cal. Code Regs. tit. 15, § 3133.

[3] About five months after sending the September 27, 2007 letter, the LAPD sent another letter to Watkins informing him "that the investigation was complete and [his] allegations were unfounded." Watkins Depo, RT 11. The LAPD did not deny his complaint due to any failure by Watkins to take action. Watkins Depo, RT. 16.

Watkins into her office and delivered the letter to him on October 3, 2008. When Watkins received his letter, it had been opened and stapled to its envelope. *Id.* The envelope had a certified mail return receipt request still attached to it. *Id.*

C/O Summers wrote up a memorandum about the circumstances surrounding the receipt of the letter. In the memorandum, Summers reported a conversation she had with Dzioba in which Dzioba said that, "[b]ecause this letter was addressed without any CDC # or inmate housing identification, the individual who processed it probably thought it was a staff member and did log it in on 10/9/07." Complaint, Unnumbered Exhibits (Docket #1 p. 20 of 35).

Within three days of receiving the letter, Watkins filed an inmate appeal regarding the delay in receiving his mail. The inmate appeal response stated that the reviewer interviewed Amy Dzioba by telephone, and Dzioba reportedly said that:

> [This] [p]iece of mail was inappropriately addressed, and upon receipt, mail was processed in error by the mailroom. We sent the mail into the institution. Since then we have made procedural changes to locate inmates more thoroughly to ensure these errors do not happen. We also will return mail to sender for additional information if inmate is not located by mailroom staff.

Complaint, Unnumbered Exhibits (Docket #1 p. 17 of 35).

In her declaration, Dzioba stated that in December 2008 she was interviewed regarding Watkins' inmate appeal. Upon investigation, she had determined that:

> [S]ome staff member of the Mail Room, accidentally sent the letter somewhere into the administration building of the prison, rather than to plaintiff at his housing unit. This initial error was responsible for some of the delay in plaintiff receiving it. The letter was filed in plaintiff's central file, perhaps by the records department, instead of being routed to the plaintiff.

Dzioba Decl., p. 2. Dzioba did not know which staff member processed the letter when it first arrived at the CTF mailroom. *Id.* Dzioba did not remember if she was the employee who sent the letter into the administration building of the prison, but doubted that she was the employee who did so because she was the mailroom supervisor and generally was not involved in distributing mail. *Id.* Dzioba did not deliver the letter to Summers' mail slot, and did not know who put it there or how long the letter was in Summers' mail slot before Summers delivered it

to Watkins. *Id.*

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of the lawsuit under governing law, and a dispute about such a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Generally, as is the situation with defendant's challenge to the First Amendment claim, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by his own affidavits, or by the depositions, answers to interrogatories, or admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324.

Where, as is the situation with defendant's qualified immunity defense, the moving party bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial. *See Houghton v. Smith*, 965 F.2d 1532, 1536 (9th Cir. 1992). He must establish the absence of a genuine issue of fact on each issue material to his affirmative defense. *Id.* at 1537; *see also Anderson*, 477 U.S. at 248. When the defendant-movant has come forward with this evidence, the burden shifts to the non-movant to set forth specific facts showing the existence of a genuine issue of fact on the defense.

A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder v. McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's verified complaint as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and correct, and allegations were not based purely on his belief but on his personal knowledge). Plaintiff's initial complaint and opposition to summary judgment is not verified and cannot be used as evidence. Plaintiff's first amended complaint is signed under penalty of perjury and suffices as an admissible opposing affidavit.

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *See id.* at 631.

DISCUSSION

A. First Amendment Claim

Prisoners enjoy a First Amendment right to send and receive mail. *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)). Prison officials have a responsibility to forward mail to inmates promptly. *Bryan v. Werner*, 516 F.2d 233, 238 (3d Cir. 1975). However, a temporary delay or isolated incident of delay or other mail interference without evidence of improper motive does not violate a prisoner's First Amendment rights. *See Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999); *accord Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir. 1990) (isolated incidents of mail interference without evidence of improper motive do not give rise to a constitutional violation); *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999) (content-neutral, short-term, and sporadic delays in prisoner's receipt of mail did

not violate his First Amendment rights). Absent evidence of a broader plan or course of conduct to censor plaintiff's mail unconstitutionally, an honest error by prison officials does not justify relief under § 1983. *See Lingo v. Boone*, 402 F. Supp. 768, 773 (C.D. Cal. 1975) (prisoner not entitled to monetary relief under § 1983 where prison officials erroneously withheld a single piece of mail on the grounds that it was inflammatory); *see also Smith*, 899 F.2d at 944 (defendants opened a single piece of legal mail by accident; "[s]uch an isolated incident, without any evidence of improper motive or resulting interference with Smith's right to counsel or to access to the courts, does not give rise to a constitutional violation"); *cf. Antonelli v. Sheahan*, 81 F.3d 1422, 1431-32 (9th Cir. 1996) (plaintiff stated a claim where he alleged not merely negligent, but deliberate, obstruction of his mail that resulted in mail delivery being delayed for an inordinate amount of time).[4]

On the undisputed evidence, a First Amendment violation is not shown. This was an isolated incident of mail mishandling. There is not a whit of evidence that the delay was based on the content of the letter or that the one-year delay was purposeful. And there is no evidence that the delay had any impact on any legal proceeding. On this record, no reasonable jury could conclude that Watkins' First Amendment rights had been violated by the one-year delay in the delivery of the mail.

Watkins argues that there was *deliberate* mishandling of the letter. As proof, he urges that the person who handled his letter did not follow CTF mailroom policies for handling improperly addressed mail (which this letter indisputably was). According to Dzioba, the

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[4]The Ninth Circuit has yet to determine whether more than mere negligence is necessary for a First Amendment violation, although *Antonelli* seems to suggest that mere negligence would not be actionable. Several other circuits have concluded that a First Amendment claim may not rest on a merely negligent act. *See, e.g., Lovelace v. Lee*, 472 F.3d 179, 201 (4th Cir. 2006) ("negligent acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause"); *Richard v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (negligent loss of mail not actionable); *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 436-37 (4th Cir. 2007) ("To hold that negligent handling of the application amounts to a constitutional violation by the City would only trivialize the fundamental rights the First Amendment was meant to protect.")

following procedure exists for handling mail that does not have an inmate's CDCR number on it:

> If the mail does not have the inmate's CDC number written on it, a search by inmate name is performed. If there is no exact match between the recipient of the mail and an inmate, the mail is returned to sender. If there is an exact match, the mailroom will write the inmate's CDC number and housing location on the mail and process it. If not, the mail is returned to sender.

Opposition, Defendant's Responses to Interrogatories, Set One, p.2.[5] Showing that the mail was not handled in accordance with written policy supports an inference that the mail was mishandled, but does not support an inference that the mail was *intentionally* mishandled. Whether it was intentional or negligent or an innocent mistake is speculative. The evidence suggests the absence of any reason or motive for defendant to intentionally delay or mishandle the mail: Watkins did not know Dzioba and this was the only piece of mail he ever complained about being mishandled. Watkins Depo., RT 39-41.

At best, Watkins has established that someone in the mailroom did not follow the mailroom policies when he or she processed Watkins' letter. Watkins has not presented any evidence that would allow a jury to reasonably infer that Dzioba or any other person deliberately sent the letter into the prison administration buildings because of an improper motive. Rather, the evidence shows only that, in a mailroom sorting and delivering thousands of pieces of mail daily, a CTF mailroom employee ignored mailroom policies and mishandled a single letter. That one incident of mail delay does not rise to the level of a First Amendment violation.

Watkins also argues that the sheer length of the delay proves a constitutional violation. However, he has not shown that the length of the delay was anything other than pure happenstance. The letter could have turned up in a week, a year, or a decade – or maybe never.

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[5] Dzioba stated that this was the current policy, and did not state whether this was the policy in place when the mailroom processed Watkins' letter. Nonetheless the court will assume, for purposes of this motion, that the same policy was in place when Watkins' letter was received because Dzioba did not state that there was a different policy at an earlier time, despite being asked for the "current and past regulations" for handling misaddressed mail. *See* Opposition, Defendant's Responses to Interrogatories, Set No. 1, p. 2.

Thus the cases where evidence is developed showing that delay has been caused by a prison policy (such as prison officials' need to inspect mail) are not helpful in guiding the analysis of a letter that simply goes missing, only to never turn up or to turn up a year late. With no evidence of a purposeful delay in delivery, the loss of the letter for a year did not amount to a First Amendment violation by whoever delayed the mail.

B. Dzioba's Individual Liability

Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the plaintiff can show that the defendant proximately caused the deprivation of a federally protected right. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Harris v. City of Roseburg*, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a constitutional right within the meaning of § 1983 if he does an affirmative act, participates in another's affirmative act or omits to perform an act which he is legally required to do, that causes the deprivation of which the plaintiff complains. *See Leer*, 844 F.2d at 633. The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation. *Leer*, 844 F.2d at 633 To defeat summary judgment, sweeping conclusory allegations will not suffice; the plaintiff must instead "set forth specific facts as to each individual defendant's" actions which violated his or her rights. *Leer*, 844 F.2d at 634.[6]

Watkins relies heavily on Dzioba's alleged admission in a telephone interview about Watkins' inmate appeal – in which she said "[w]e sent the letter into the institution" – to show that Dzioba's actions proximately caused the delay in receiving his mail. Nevertheless, in a

[6]The parties agree that there is no *respondeat superior* liability in a section 1983 action. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81 (9th Cir. 1984); *accord Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (local governments cannot be liable under § 1983 under *respondeat superior* theory). Nonetheless, much of Watkins' argument attempts to foist exactly this kind of liability on Dzioba.

deposition, Watkins admitted that he did not know the identity of the mailroom employee who processed the letter. *See* Watkins Depo., RT 27 ("Amy [Dzioba] spoke of the individual. However, that leads me to believe that thats [sic] one of her employees . . . That she [Dzioba] had knowledge of the letter being sent to records.") He also does not dispute the evidence that, as the mailroom supervisor, Dzioba generally was not involved in distributing incoming mail and therefore it was unlikely that she actually handled his mail. As Dzioba correctly notes, the evidence does not support the inference that Dzioba mishandled Watkins' letter, only that *someone* in the CTF mailroom mishandled the letter.

Under § 1983, a supervisor "is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Here, all that Watkins has shown is that one year after the letter was sent into the administration building, Dzioba, as the mailroom supervisor, investigated and found out that some mailroom employee mishandled his letter. Watkins has not provided evidence that Dzioba participated in, directed, or knew of any mailroom employee's alleged wrongful conduct and failed to stop it. Dzioba is entitled to summary judgment on the ground that Watkins has not provided evidence from which a reasonable jury could find that she proximately caused the purported deprivation of his First Amendment right to receive mail.

C. Qualified Immunity

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-pronged test to determine whether qualified immunity exists. First, the court asks: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show

the officer's conduct violated a constitutional right?" *Id.* at 201. If no constitutional right was violated if the facts were as alleged, the inquiry ends and defendants prevail. *Id.* If, however, "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established . . . The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . .The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Although *Saucier* required courts to address the questions in the particular sequence set out above, courts now have the discretion to decide which prong to address first, in light of the particular circumstances of each case. *See Pearson v. Callahan*, 553 U.S. 223, 236 (2009).

As discussed, the record does not show that a year-long delay in delivery of a single piece of mail violated Watkins' First Amendment rights. Even if a constitutional violation had been shown, Dzioba, or any CTF mailroom employee, would prevail on the second *Saucier* prong. For the purposes of qualified immunity the official's conduct must be viewed not as a broad general proposition, but in the context of the specific facts of the case. *Saucier*, 522 U.S. at 202.

The specific facts of this case show that the letter was improperly addressed because it did not include the recipient's CDCR number or otherwise indicate that the recipient was a prisoner rather than a staff member. A reasonable prison official in Dzioba's position (or in the position of the mailroom employee who actually handled the letter) would not have understood that sending the letter into the administration building of the prison would be unlawful where the letter did not have the recipient's prisoner number or otherwise indicate that the recipient was a prisoner (e.g., by including the housing unit address). Even if the person handling the mail ignored CTF mailroom policies on handling misaddressed mail by sending the letter to the administration building, qualified immunity would not be defeated. *See Cousins v. Lockyer*, 568 F.3d 1062, 1071-72 (9th Cir. 2009) (prison operations manual describing duties that, if

performed, may have avoided the alleged wrong to plaintiff, irrelevant to qualified immunity inquiry because manual did not establish a federal constitutional right). Dzioba is entitled to qualified immunity against Watkins' claim.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is GRANTED. (Docket # 22.) Defendant is entitled to judgment on the merits, because the isolated delay in the mail did not rise to the level of a First Amendment violation and because plaintiff has not demonstrated that defendant's actions caused any delay in mail. Defendant also is entitled to qualified immunity. Judgment will be entered in defendant's favor and against plaintiff. The clerk will close the file.

IT IS SO ORDERED.

Dated: October 25, 2011

SUSAN ILLSTON
United States District Judge