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United States District Court, S.D. New York.

Anthony D. AMAKER, Plaintiff,
v.
Gayle HAPONIK, et al., Defendants.

No. 98 CIV. 2663(JGK).
|
Feb. 17, 1999.

Attorneys and Law Firms

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OPINION AND ORDER

KOELTL, District J.

***1** This is an action brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1986. The plaintiff alleges that the defendants, G. Haponik, D. Bilden, C.O. Brady, C.O. McDonnell, Package Room Supervisor Sgt. John Doe, G. Schneider, C.P. Artuz, and Sgt. Maldonado, interfered with his right of access to the courts, retaliated against the plaintiff because of previous lawsuits he has filed against the defendants and other prison officials, interfered with the plaintiff's legal property because of racial bias, violated his First Amendment right to receive incoming mail, and violated two unspecified court decrees. The defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

On a motion to dismiss, the allegations in the complaint are accepted as true. *See* *Cohen v. Koenig,* 25 F.3d 1168, 1172–73 (2d Cir.1994). In deciding a motion to dismiss, all reasonable inferences must be drawn in the plaintiff's favor. *See* *Gant v. Wallingford Bd. Of Educ.,* 69 F.3d 669, 673 (2d Cir.1995); *Cosmas v. Hasset,* 886 F.2d 8, 11 (2d Cir.1989). The court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden,* 754 F.2d 1059, 1067 (2d Cir.1985). Therefore, the defendant's motion should only be granted if it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See* *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *Valmonte v. Bane,* 18 F.3d 992, 998 (2d Cir.1994); *see also* *Goldman,* 754 F.2d at 1065.

Where a pro se litigant is involved, the same standards for dismissal apply. However, a "court should give the pro se litigant special latitude in responding to a motion to dismiss." *Gaston v. Gavin,* 97 Civ. 1645, 1998 WL 7217, at *1 (S.D.N.Y. Jan. 8, 1998); *Adams v. Chief of Security Operations,* 966 F.Supp. 210, 211 (S.D.N.Y.1997); *Andujar v. McClellan,* 95 Civ. 3059, 1996 WL 601522, at *1 (S.D.N.Y. Oct. 21, 1996).

II.

While the plaintiff's complaint is not completely clear, the following allegations are accepted as true for purposes of this motion.

The complaint contends that in September 1997 the plaintiff's family mailed legal papers to him at Green Haven Correctional Facility, where he was being confined in the Special Housing Unit. (Compl.¶ IV.) Prison officials mailed the legal papers back to the plaintiff's family without delivering them to the plaintiff. (Compl.¶ IV.) In December 1997,[1] the plaintiff received a letter from defendant McDonnell stating that mail from the plaintiff's family had been returned because it had not been sent by a legal return sender and thus was not recognized as legal mail. (Compl.¶ IV.) The refusal to deliver the plaintiff's legal mail from his family allegedly occurred a few weeks before a court date of the plaintiff's in the Court of Claims on January 8, 1998. (Compl. ¶ IV at 2–3.)

***2** The complaint next alleges that, because of racial bias, defendants Haponik and Schnieder interfered with the

plaintiff's legal papers when the plaintiff was sent to another facility for a deposition in one of his pending cases. (Compl. ¶ IV at 3–4.)

The complaint also alleges that some of the plaintiff's mail has not reached this Court and Magistrate Judge Grubin. (Compl. ¶ IV at 4.) Further, defendant Brady allegedly told the plaintiff on an unspecified date that he mailed an audiotape from the plaintiff to the Eastern District of New York, but the tape was never received. (Compl. ¶ IV at 5.) Because they have failed to send the plaintiff's mail, the staff at Green Haven has allegedly been fabricating mail receipts to indicate that the plaintiff's mail has reached the Court. (Compl. ¶ IV at 4.)

The complaint next contends that defendant Maldonado, the package room supervisor at Green Haven, ordered a package of the plaintiff's returned to sender and stole a catalog that had been mailed to the plaintiff. (Compl. ¶ IV at 5.) In addition, defendant Maldonado returned mail addressed to the plaintiff because it did not have an address from a permissible source, although the mail was allegedly legal mail. (Compl. ¶ IV at 5–6.)

The complaint also alleges that defendants Haponik, Bilden, Schneider and Artuz have been encouraging defendant Maldonado to harass the plaintiff. (Compl. ¶ IV at 7.) Further, the defendants allegedly changed the rules in the Special Housing Unit in ways that violate two court decrees concerning recreation and law library assistance, and medical treatment. (Compl. ¶ IV at 7.) The provisions of the alleged court decrees are not discussed and the only specific violation alleged is that defendant Schneider has not provided a law library clerk to the plaintiff to assist with his legal problems. (Compl. ¶ IV at 7.) Finally, the complaint alleges that the defendants somehow interfered with the plaintiff's request for an extension of time from the Court of Claims and as a result the plaintiff's request was denied. (Compl. ¶ IV at 7.)

Construing the plaintiff's pro se complaint broadly, as is required, the complaint can be read to allege five claims: 1) that the defendants' failure to deliver the plaintiff's legal mail, or to insure that the plaintiff received his legal papers, interfered with the plaintiff's right of access to the courts, 2) that the defendants' actions with respect to the plaintiff's mail were in retaliation for the plaintiff's decision to exercise his right to bring grievances and lawsuits against the defendants and other prison officials, and 3) that the defendants discriminated against the plaintiff because of his race, 4) that the defendants' failure to deliver legal mail from his family to him violated the plaintiff's First Amendment rights, and 5) that the defendants violated two court decrees concerning recreation and law library services and medical treatment. The plaintiff seeks damages jointly and severally from the defendants in both their individual and official capacities for the damages he incurred as a result of their actions, namely the "possible" loss of two claims for which a trial date of January 7, 1998 had been set. (Compl.¶ IV–A.) He seeks $80,000 compensatory damages and $80,000 punitive damages from each defendant for a total amount of $2,560,000. (Compl.¶ V.)

III.

***3** As an initial matter, it is clear that the plaintiff's claim that the defendants violated his right of access to the courts should be dismissed. In order to plead a violation of the plaintiff's right of access to the courts, the plaintiff must demonstrate that he has suffered, or will suffer, actual injury because of the conduct of prison officials. *See* *Lewis v. Casey,* 518 U.S. 343, 349 (1995). In other words "the plaintiff must show ... that a 'nonfrivolous legal claim had been frustrated or was being impeded' due to the actions of prison officials." *Warburton v. Underwood,* 2 F.Supp.2d 306, 312 (W.D.N.Y.1998) (quoting *Lewis,* 518 U.S. at 353); *see also* *Monsky v. Moraghan,* 127 F.3d 243, 247 (2d Cir.1997) ("In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that a defendant caused actual injury, ... i.e. took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim.") (internal citations and quotation marks omitted), *cert. denied,* 119 S.Ct. 66 (1998).

The plaintiff here has not alleged that any injury resulted from the defendants' alleged mishandling of the plaintiff's mail. "[T]he mere delay in serving some court documents does not state a constitutional claim." *Warburton,* 2 F.Supp.2d at 312. Further, the plaintiff only alleges that the defendants caused the "possible" loss of two of the plaintiff's claims. He does not allege that he actually lost the claims or that he was ultimately impeded in pursuing those claims. A hypothetical injury is not sufficient to state a claim for violation of the right of access to the courts. Similarly, the plaintiff alleges that defendants Haponik and Schneider failed to provide him with access to unspecified legal papers when he was sent to another facility for a deposition, but fails to allege that there

was any injury to him or his claims as a result. Finally, the plaintiff's allegations that defendant Brady did not mail a tape to the Eastern District of New York and that other unspecified mail has not reached this Court and the Magistrate Judge are not connected to any injury to the plaintiff and his claims. Because the plaintiff's complaint does not connect any of the defendants' alleged actions to any actual injury, the plaintiff has failed to state a claim for a violation of his right of access to the courts and the motion to dismiss this claim is granted without prejudice and with leave to replead. In any amended pleading the plaintiff should set forth the actions allegedly taken by each of the defendants, the case to which such actions were related, the effect on the case, and the ultimate result in the case.

IV.

The plaintiff's retaliation and discrimination claims should also be dismissed.

The plaintiff alleges that the defendants' interference with his mail and legal papers was committed in retaliation against the plaintiff because the plaintiff had previously filed lawsuits against the defendants and other prison officials. The defendants contend that the plaintiff's allegations of retaliation are wholly conclusory and thus fail to state a claim.

***4** A prisoner may state a claim for retaliation where he alleges that prison officials retaliated against him in some way because he exercised a constitutional right. For example, "[p]risoners, like non-prisoners, have a constitutional right of access to the courts and to petition the government for the redress of grievances, and prison officials may not retaliate against prisoners for the exercise of that right." *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995); *see also Higgins v. Coombe,* 95 Civ. 8696, 1997 WL 328623, at *9 (S.D.N.Y. June 16, 1997) (noting that a plaintiff may state a claim for retaliation where "[t]he crux of plaintiff's claim is that state officials violated his First Amendment right by retaliating against him for exercising his constitutionally protected right to seek redress in federal court.").

The plaintiff here has alleged that the defendants worked together and encouraged one another to harass and retaliate against him for exercising his right to pursue his grievances against the defendants and other prison officials in court. However, he alleges no specific facts indicating a conspiracy to retaliate against him. Instead his complaint alleges that the defendants mishandled the plaintiff's mail and legal papers and that "[c]onsequently, the above named defendants are only retaliating against my rights to use the court, because I was assaulted. They hate prisoners who bring them to the court, because they fail to adequately train and supervise their employees." These allegations are "unsupported, speculative, and conclusory" and are therefore insufficient to state a claim for retaliation. *Boddie v. Schneider,* 105 F.3d 857, 862 (2d Cir.1997) (upholding district court's decision granting motion to dismiss prisoner's retaliation claim in part because retaliation claims were "unsupported, speculative, and conclusory"); *Leon v. Murphy,* 988 F.2d 303, 311 (2d Cir.1993) ("A complaint containing only conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.") (internal citation and quotation marks omitted). However, the plaintiff may be able to plead facts sufficient to state a claim for retaliation. The plaintiff's retaliation claim is therefore dismissed without prejudice and with leave to replead.

Similarly, the plaintiff's claims of racial discrimination must be dismissed. The plaintiff alleges virtually no facts in support of his contention that the defendants actions with respect to his mail and legal papers were motivated by racial bias. Instead the complaint simply states that "racial hatred ... is always the main reason of staff assault in [the] facility at Green Haven Correctional Facility." (Compl. ¶ IV at 3–4.) The allegations of racial bias are vague and conclusory and are supported by no specific facts. Complaints containing only conclusory, vague or general allegations of a conspiracy to deprive a person of constitutional rights, such as the right to equal protection, do not state a claim for relief. *See, e.g., Brown v. City of Oneonta,* 106 F.3d 1125, 1133 (2d Cir.1997) (citing *Sommer v. Dixon,* 709 F.2d 173, 175 (2d Cir.), *cert. denied,* 464 U.S. 857 (1983)); *Hunt v. Budd,* 895 F.Supp. 35, 38 (N.D.N.Y.1995) (granting motion to dismiss a pro se plaintiff's claims of conspiracy and racial discrimination because "[t]he Second Circuit has repeatedly held that complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning.") (citation omitted). Again, however, it is not clear that the plaintiff could not plead a set of facts that would support a claim of racial discrimination. Thus the plaintiff's claim of racial discrimination is dismissed without prejudice and with leave to replead.

***5** If the plaintiff chooses to replead any claims of retaliation or racial discrimination he should set forth his factual allegations with respect to each individual defendant and his or her personal involvement in the alleged events and describe the actions about which he is complaining and the factual bases for his claims.

V.

The plaintiff's next claim is that the defendants have violated the plaintiff's First Amendment right to receive mail.[2] The plaintiff contends that defendant McDonnell's decision to return legal mail that had been sent to the plaintiff by his family was unconstitutional, and that defendants Haponik, Schneider and Bilden were involved in permitting defendant McDonnell and other staff members to make similar determinations. The complaint also alleges that defendant Maldonado improperly ordered a package addressed to the plaintiff to be returned to its sender and did not deliver legal mail from the plaintiff's family to the plaintiff. The defendants do not specifically address this First Amendment claim in their papers except to argue generally that 1) all of the plaintiff's claims are barred by 42 U.S.C. § 1997e(e) because the plaintiff has not alleged a physical injury, and 2) the defendants are entitled to qualified immunity.

As an initial matter, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution ... nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.' " *Thornburgh v. Abbott,* 490 U.S. 401, 407 (1989) (internal citations and quotation marks omitted). The Supreme Court has recognized on a number of occasions that prisoners have protected First Amendment interests in sending and receiving correspondence. *See, e.g., Thornburgh,* 490 U.S. at 407, 413 (1989) (recognizing that prison regulations concerning whether an inmate may receive publications from a source outside prison implicates the inmate's First Amendment rights, but finding that the regulations at issue met the reasonableness test articulated in *Turner v. Safley*); *Turner v. Safley,* 482 U.S. 78, 89 (1987) (finding in case concerning inmate-to-inmate correspondence that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Procunier v. Martinez,* 416 U.S. 396, 406, 415 (1974) (finding, in case that concerned "the appropriate standard of review for prison regulations restricting freedom of speech," that prison regulations authorizing censorship of outgoing prisoner mail were unconstitutional). In *Turner,* the Supreme Court listed four factors that a court must consider in order to determine whether a prison regulation impinging on inmates' constitutional rights is permissible. Those factors are "(1) whether there is a rational connection between the restriction and the legitimate governmental interest used to justify it; (2) whether alternative avenues of exercising the right remain open to the inmate; (3) whether accommodation of the right will have an adverse impact on guards, other inmates, and prison resources generally; and (4) whether obvious, easy alternatives to the restriction exist." *Purnell v. Lord,* 952 F.2d 679, 683 (2d Cir.1992) (citing *Turner,* 482 U.S. at 89–90).

***6** The plaintiff states that the applicable regulations in this case provided that he was permitted to receive mail, including legal mail, from his family.[3] He claims that legal mail sent to him by his family was mailed back to his family in violation of the policy and that the reason given for one such return of mail to the plaintiff's family was that the mail was "not recognized as legal mail unless from legal return sender." (Compl.¶ IV.) The plaintiff contends that this and other mail was returned without proper justification and that he was otherwise unable to receive the information.

The defendants do not address whether the plaintiff's allegations concerning the defendants' interference with his right to receive mail has stated a cause of action under the First Amendment. The defendants have not even argued that the regulations are valid under *Turner* and its progeny. Reading the plaintiff's complaint broadly, it cannot be said that the plaintiff can prove no set of facts in support of a cause of action for violation of his First Amendment right to receive mail, particularly in view of the failure of the defendants to move to dismiss based on such an argument. It should also be noted that the defendants do not attempt to explain the justification for the regulation at issue, the plaintiff apparently lacked another way of exercising his right to communicate with his family since he alleges that his visitation with his family was curtailed,[4] allowing the plaintiff to receive legal mail from his family does not pose an obvious security threat, and it is not clear that monitoring the plaintiff's correspondence would have been a difficult alternative to the actions taken here, since the plaintiff at least raises an inference that the defendants were opening his mail anyway.

The defendants argue, however, that the plaintiff's claim must be dismissed under 42 U.S.C. § 1997e(e). Section 1997e(e) provides that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The defendants argue that under § 1997e(e), a prisoner can only bring a federal civil suit when he has sustained a physical injury and that the plaintiff has not alleged any such physical injury. However, the defendants rely for this proposition primarily on cases dismissing Eighth Amendment excessive force claims and cases in which the plaintiff explicitly sued for mental and emotional injury. *See, e.g., Zehner v. Trigg,* 133 F.3d 459 (7th Cir.1997) (dismissing prisoner lawsuit based on exposure to asbestos where there was no physical injury). The plaintiffs do not cite to any case where the Court relied on § 1997e(e) to dismiss a prisoner's claim for violation of the prisoner's First Amendment rights.

Indeed, at least two courts have found that § 1997e(e) does not apply to claims alleging a violation of First Amendment rights. In *Canell v. Lightner,* 143 F.3d 1210, 1213 (9th Cir.1998), the Court of Appeals for the Ninth Circuit noted that the plaintiff, who was asserting a violation of his First Amendment rights, was "not asserting a claim for 'mental or emotional injury.' ... The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought." *Canell,* 143 F.3d at 1213; *see also Self–Allah v. Annucci,* 97 Civ. 607, 1998 WL 912008, at *5 (W.D.N.Y. Oct. 14, 1998) ("Section 1997e(e) simply does not apply to First Amendment claims."). Other courts have similarly concluded that 42 U.S.C. § 1997e(e) merely bars suits seeking damages for "mental or emotional injury" and that suits alleging a violation of certain constitutional rights are not suits for "mental or emotional injury" within the meaning of § 1997e(e). *See, e.g., Lewis v. Sheahan,* 98 C. 346, 1999 WL 47090. at *4 n. 3 (N.D.Ill. Feb. 2, 1999) (noting that "different courts have held that 42 U.S.C. § 1997e(e) does not necessarily bar an inmate's right to vindicate certain types of constitutional claims.... Persuaded by [that] authority, this court finds that plaintiff's right-of-access claims are not barred by 42 U.S.C. § 1997e(e)."); *Friedland v. Fauver,* 6 F.Supp.2d 292, 310 (D.N.J.1998) ("Friedland does not seek damages for mental or emotional injury. He seeks damages for unconstitutional incarceration resulting from his arrest without probable cause and his continued incarceration after the preliminary hearing. Accordingly, 42 U.S.C. § 1997e(e) does not bar this action ....").

***7** The plain language of § 1997e(e) does not foreclose the plaintiff's First Amendment claim. Section 1997e(e) specifically prohibits "Federal civil action[s] ... *for mental or emotional injury* ... without a prior showing of physical injury." (emphasis added). It does not apply without qualification to *all* federal civil actions whether or not the plaintiff is claiming mental or emotional injury. If Congress had intended to apply § 1997e(e)'s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language "for mental or emotional injury." The defendants' reading of the statute would require that a prisoner have sustained physical injury before bringing any federal civil suit. That reading would render superfluous the qualifying language "for mental or emotional injury" and would be contrary to the well-established principle that all words in a statute should be read to have meaning. *See, e.g., O'Brien v. DuBois,* 145 F.3d 16, 23 (1st Cir.1998) ("Rather than reading words out of a statute, courts should strive to give every word in a statute meaning and effect."); *Association of Bituminous Contractors, Inc. v. Andrus,* 581 F.2d 853, 862 (D.C.Cir.1978) ("A statutory interpretation that gives meaning to all the words used is to be preferred over one that leaves some words as inoperative."); *Fox–Knapp, Inc. v. Employers Mut. Casualty Co.,* 725 F.Supp. 706, 709 (S.D.N.Y.) ("A court should not readily assume that words in statutes are superfluous."), *aff'd,* 893 F.2d 14 (2d Cir.1989). The term "mental or emotional injury" has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts. The injury occasioned by a violation of a plaintiff's First Amendment rights is not a "mental or emotional" injury in the same sense as these injuries. Thus § 1997e(e) does not bar the plaintiff's First Amendment claims and the defendants' motion to dismiss the plaintiff's claim based on § 1997e(e) is denied.

The defendants next argue that they are entitled to qualified immunity. Under the qualified immunity defense, "government officials performing discretionary functions generally are shielded 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); *see* *Crawford–El v. Britton,* 118 S.Ct. 1584, 1592 (1998). "A right is clearly established when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. The unlawfulness must be apparent." *McEvoy v.. Spencer,* 124 F.3d 92, 96 (2d Cir.1997) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). Even where the plaintiff's constitutional right was clearly established, the qualified immunity defense protects a government actor if it was objectively reasonable for the official to believe that his actions were lawful at the time of the challenged act. *See* *Anderson,* 483 U.S. at 640–41; *Gaston,* 1998 WL 7217, at *7.

***8** To determine whether a particular right was clearly established at the time of the alleged offense, courts should look to: (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. *See Jermosen v. Smith,* 945 F.2d 547, 550 (2d Cir.1991), *cert. denied,* 503 U.S. 962 (1992). The use of an "objective reasonableness" standard permits qualified immunity claims to be decided as a matter of law. *Danahy v. Buscaglia,* 134 F.3d 1185, 1190 (2d Cir.1998); *Carter v. Lussier,* 955 F.2d 841, 844 (2d Cir.1992); *Malsh v. Austin,* 901 F.Supp. 757, 764 (S.D.N.Y.1995).

It is clear that regulations prohibiting a prisoner from receiving mail may violate the First Amendment. Both the Supreme Court and the Court of Appeals for the Second Circuit had held prior to the events at issue in this case that inmates' right to receive mail may be impinged only by regulations that are "reasonably related to legitimate penological interests" and had articulated the test for determining whether a given regulation is valid under that standard. *See* *Turner,* 482 U.S. at 89; *see also Davidson v.. Mann,* 129 F.3d 700, 701 (2d Cir.1997) (noting that prison regulation limiting stamps available to prisoners for non-legal mail was subject to *Turner* analysis and upholding the regulation under *Turner*). In fact, the Court of Appeals for the Second Circuit recently reversed a district court decision granting summary judgment dismissing a prisoner's claim that his right to receive mail was being violated. The Court of Appeals held that none of the applicable factors in the test articulated by the Supreme Court facially favored prison regulations forbidding the receipt of newspapers other than those sent directly from the publisher or an approved distributor.[5] *See Allen v. Coughlin,* 64 F.3d 77, 79–80 (2d Cir.1995). Given the existing precedent, the defendants should have been aware that the plaintiff's First Amendment right to receive mail could only be impinged by reasonable regulations connected to the legitimate concerns of prison officials. The defendants in their papers have failed to explain how the regulation at issue comports with well-established First Amendment law or how reasonable officials should have so concluded. The defendants' argument that defendants Maldonado, McDonnell, Artuz, Haponik, Schneider, and Bliden are entitled to qualified immunity is entirely conclusory. They state that the decision to send back the plaintiff's mail or to allow others to do so was objectively reasonable, but they fail to cite to any case law in support of that argument.

Moreover, it is simply premature at this stage of the proceedings to find that the defendants are entitled to qualified immunity. The Court has no information bearing on the factors the Supreme Court has identified from which the Court could determine whether the defendants violated any clearly established constitutional right of the plaintiff. The defendants have not provided the Court with information concerning 1) whether there is a legitimate penological justification for the alleged policy of prohibiting prisoners in the Special Housing Unit from receiving personal and legal mail not from a legal return sender, 2) whether there are alternative means by which the plaintiff could exercise his First Amendment rights, 3) whether an accommodation of the plaintiff's right to receive mail would have an adverse impact on guards, other inmates, and prison resources generally, and 4) whether obvious, easy alternatives to the restriction exists. The Court also has no information before it about the regulations at issue in this case, such as Directives # 4933 and 4422 and Green Haven Procedure # 309, or how they were applied to the petitioner. Thus a finding of qualified immunity is premature. *See, e.g.,* *Burgess v. Goord,* 98 Civ.2077, 1999 WL 33458, at *6 (S.D.N.Y. Jan. 26, 1999)

(finding qualified immunity defense premature on a motion to dismiss); *Thomas v. Coombe,* 95 Civ. 10342, 1998 WL 391143, at *5 (S.D.N.Y. July 13, 1998) (same); *Whitley v. Westchester Correctional Facility,* 97 Civ. 0420, 1997 WL 659100, at *9 (S.D.N.Y. Oct. 22, 1997) (same). The defendants' motion to dismiss the plaintiff's First Amendment claim based on qualified immunity is therefore denied without prejudice.

VI.

***9** The plaintiff's final claim is that the defendants have violated "court decrees" concerning recreation and law library assistance and adequate medical treatment. However, allegations that a state actor has violated a consent decree or settlement agreement does not by itself state a claim under § 1983. Rather, a claim that a consent decree or settlement agreement has been violated is properly enforced in, for example, a contempt or breach of contract proceeding. *See Batista v. Rodriguez,* 702 F.2d 393, 398 (2d Cir.1983) ("The remedy for breach of [a consent decree concerning having counsel present at administrative proceedings] is a suit for breach of contract or enforcement of the decree through judicial sanctions, including contempt, not an action under § 1983."); *Wallace v. Conroy,* 945 F.Supp. 628, 633 (S.D.N.Y.1996) ("[T]he appropriate way to enforce a claim for breach of a settlement agreement is to move for contempt in state court, where the settlement agreement was entered."); *see also DeGidio v. Pung,* 920 F.2d 525, 534 (8th Cir.1990) (noting that the plaintiff in that case "cite[d] no case in support of the proposition that a consent decree may be enforced through section 1983, and we have found none.... [W]e decline to hold that a consent decree may be enforced through a section 1983 action."). The plaintiff's allegation that the defendants have violated two consent decrees, without more, does not state a claim under § 1983.

In any event, the plaintiff's papers provide no information about either the terms of the alleged consent decrees or how those terms have been violated. Thus, the plaintiff has failed to state a claim for violation of § 1983 based on these conclusory allegations. The plaintiff's response to the motion to dismiss also contends that the plaintiff has suffered from some physical ailments, such as eye strain, but it is not clear that those ailments are alleged to be connected to any violation of the alleged consent decree. The Complaint itself in this action does not refer to any physical ailments. Under these circumstances, the plaintiff's claim concerning the defendants' violation of two consent decrees is dismissed.

Conclusion

For the reasons explained above, the defendants' motion to dismiss the plaintiff's access to courts claim is granted without prejudice and with leave to replead. The motion to dismiss the retaliation claim is granted without prejudice and with leave to replead. The motion to dismiss the racial discrimination claim is granted without prejudice and with leave to replead. The motion to dismiss the plaintiff's First Amendment claim concerning his right to receive mail is denied. The motion to dismiss the plaintiff's claim for violations of two consent decrees is granted. The plaintiff may file an amended complaint by March 30, 1999. Any such complaint should state separately the claims that the plaintiff is pursuing. Any such complaint should detail the personal involvement, if any, of each of the defendants in each of the claims. The amended complaint should also set forth the factual basis for each of the claims. This case is hereby referred to the Magistrate Judge for all pretrial purposes.

***10** SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 76798

Footnotes

1 The plaintiff states at one point that the date of the letter was December 26, 1996 rather than 1997, but the other allegations in the complaint make it clear that the letter must have been sent in 1997.

2 Although the plaintiff's complaint also makes various allegations about the defendants' interference with the plaintiff's ability to send mail, these allegations are primarily related to the plaintiff's claim that he is being denied access to the courts. As noted in section IV above, the complaint fails to state a claim for violation of the plaintiff's right of access to the courts because the plaintiff has not alleged an actual injury resulting from any alleged failure to send his legal mail. If the plaintiff did intend to bring a First Amendment claim concerning his right to send mail, he may replead such a claim.

3 The plaintiff states explicitly in his opposition to the motion to dismiss that "The right of the plaintiff guarantee to mail from his family had been clearly established." (Pl.'s Aff. in Opp'n ¶ 8.) The Court may consider the allegations in the pro se plaintiff's papers in opposition in deciding the motion to dismiss. *See* *Burgess v. Goord,* 98 Civ.2077, 1999 WL 33458, at *1 n. 1 (S.D.N.Y. Jan. 26, 1999) (collecting cases).

4 For example, the plaintiff appears to allege in his response to the motion to dismiss that he was also denied visits with his family. (Pl.'s Aff. in Opp'n ¶ 9.)

5 The Court of Appeals affirmed summary judgment dismissing the claims for damages against the defendants in their individual capacities based on qualified immunity. It did so, however, because there was a decision from the Appellate Division upholding the regulation at issue and the Court of Appeals concluded that it could not have expected the defendants to have been more prescient than the Appellate Division. *See Allen,* 64 F.3d at 81.