UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Case # 3:07-cv-03470-HFF-JRM

Walter Cole McNair Jr., PLAINTIFF, vs. Jon Ozmint, Willie Eagelton, William Davis, Annie Sellers, John Burgess and Gerome McLeod, DEFENDANTS.	DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendants oppose Plaintiff's Motion for a Preliminary Injunction, for the following reasons.

1. **Standard of Review**

"The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated . . . . Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980)(internal citations omitted).

"…[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001).

2. **Plaintiff's motion should be denied because it addresses matter beyond the pleadings.**

Plaintiff's motion is improperly based on issues not raised or joined in the pleadings.

Plaintiff's Complaint alleges his due process rights were violated through a deprivation of meaningful access to the courts when a tape recording of one of his disciplinary hearings was allegedly altered. Plaintiff seeks damages for the alleged violation. Plaintiff's motion for a preliminary injunction, on the other hand, claims Plaintiff has been denied due process and meaningful access to the courts by institutional limitations on writing supplies, copies, and mailing supplies. Plaintiff's motion seeks injunctive relief instead of damages. None of the issues raised in the motion are raised by the pleadings, and Defendants do not consent to such an attempt to amend the pleadings, because the new allegations and claim are not meritorious, add new parties, would prejudice Defendants by requiring defense of additional, unmeritorious claims, and would not serve the interests of justice, as explained in the following sections of this Response.

3. **Plaintiff's motion should be denied because it seeks relief from third persons who are not parties to this action and over whom the Court lacks jurisdiction.**

Plaintiff seeks a preliminary injunction requiring the South Carolina Department of Corrections ("SCDC"), Willie Eagleton, the warden of Evans of Correctional Institution ("Warden Eagleton"), Sgt. Bangura, the law librarian at Evans Correctional Institution ("Evans"), and Ms. Hooks, the officer in charge of dispensing legal supplies at Evans, to provide him with large manila envelopes with metal clasps and, an unlimited number of photocopies, paper and pens. Of these four persons singled out in Plaintiff's motion, only Warden Eagleton is named as a defendant in this action. Sgt. Bangura and Ms. Hooks are employees at Evans who have not been named as defendants. SCDC is a State agency

under the direction of Defendant Jon Ozmint in his official capacity, but SCDC has not been named as a Defendant in this action.

Although Sgt. Bangura and Ms. Hooks are employees of Evans, under the direction of Warden Eagleton in his official capacity, and Defendant Jon Ozmint is the official director of SCDC, Plaintiff's damage claims against Warden Eagleton and Defendant Jon Ozmint must be pursued in their individual, not official, capacities, pursuant to the Eleventh Amendment. See, Nevins v. Gilchrist, 444 F.3d 237 (4th Cir. 2006); Biggs v. Meadows, 66 F.3d 56 (4th Cir. 1995). Because Defendants Ozmint and Eagleton are sued for damages in their individual capacities only, SCDC, Sgt. Bangura, and Ms. Hooks are not "officers, agents, servants, or employees" of the Defendants in their individual capacities, and they should not be subjected to injunctive relief or jurisdiction pursuant to Rule 65(d), Fed. Rules Civ. Proc.. Therefore, the Court lacks jurisdiction to issue the preliminary injunction sought against the non-parties, SCDC, Sgt. Bangura and Ms. Hooks, and the motion should be denied as to these third persons. See, In re Infant Formula Anti-trust Litigation, 72 F.3d 842 (11th Cir. 1995); see also Citizens Alert Regarding the Environment v. U.S. EPA,
259 F.Supp.2d 9 (D.D.C. 2003).

4. **The motion should be denied because there is no showing of threatened irreparable harm or likelihood of success on the merits, and there is potential for injury to Defendants and the public interest if the requested injunctive relief were granted.**

In determining whether to grant a preliminary injunction, the Court should consider four factors:

(a) The plaintiff's likelihood of success in the underlying dispute between the parties;

(b) whether the plaintiff will suffer irreparable injury if the injunction is not issued;

(c) the injury to the defendant if the injunction is issued; and

(d) the public interest.

Scotts Company v. United Industries Corporation, 315 F.3d 264, 271 (4th Cir. 2002) (citing Blackwelder Furniture Co. V. Seilig Manufacturing Co., 550 F.2d 189, 193-95 (1977)).

The Court should first determine whether the Plaintiff has made a strong enough showing of irreparable harm if a preliminary injunction were to be denied. *Id.* If the balance of the hardships "tips decidedly in favor of the plaintiff," Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir.1991)(internal quotation marks omitted), then typically it will "be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation," Blackwelder, 550 F.2d at 195 (internal quotation marks omitted). However, if the balance of hardships is substantially equal, then "the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 808 (4th Cir.1991) (internal quotation marks omitted).

Plaintiff requests mandatory injunctive relief requiring him to be supplied with a specific type of envelope and unlimited paper, pens, and photocopies. Plaintiff admits, however, that he is already receiving 100 sheets of paper, 10 letter size envelopes, and two pens every month. Essentially, Plaintiff admits he has access to supplies, just not as

many and not the type he wants. This admission of access fails to demonstrate a threat of irreparable injury or harm sufficient to support issuance of a preliminary injunction, even if the issue of access were properly joined in the pleadings.

In Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1977), the United States Supreme Court held prisoners do have the right to meaningful access to the courts. However, courts have consistently held that an inmate's right of access does not require the provision of free or unlimited access to photocopies, postage, and supplies. Harrell v. Keohane (621 F.2d 1059 (10th Cir. 1980); Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978); Lyon v. Clark, 694 F. Supp. 184, 188 (E.D.Va. 1988) aff'd (4th Cir. 1989)[Table]. "[A]s broad as the constitutional concept of liberty is, it does not include the right to Xerox." Jones v. Franzen, 697 F.2d 801, 803 (7th Cir. 1983).

In order to state a case for threat of irreparable harm to right of access, Plaintiff would have to show the denial of photocopies or supplies has substantially hindered his efforts to pursue his legal claims. Lewis v. Casey, 518 U.S. 343, 351 (1996). Conclusory allegations are not sufficient; Plaintiff would have to identify with specificity an actual threatened and irreparable injury. Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996).

Plaintiff has made no showing that the supplies he currently receives are so inadequate as to threaten immediate and irreparable harm or deprivation of judicial access. Although in a grievance dated August 27, 2007 attached to Plaintiff's motion, Plaintiff states he has "3 cases in 3 different courts," which will be dismissed for "failure to respond" due to his lack of supplies, he does not specify the cases, provide any indicia of pending deadlines which cannot be met due to lack of additional supplies, or show that

any of the cases are subject to dismissal for lack of supplies.[1]

In fact, Plaintiff has an ample history of access to the courts and, his supply limitations do not appear to have hindered or denied him meaningful access. In 2007 alone, Plaintiff filed seven cases in the South Carolina Administrative Law Court[2] and appealed three decisions of the Administrative Law Judge to the South Carolina Court of Appeals.[3] Plaintiff has filed many grievances and requests to staff members at SCDC. See, e.g., Exhibits 4-5 and 19-23 to Plaintiff's Motion for Preliminary Injunction. Rather than demonstrating lack of access to the Courts, Plaintiff has instead proved himself an "inveterate litigator." Cochran v. Morris, 73 F.3d 1310, 1314 (4th Cir. 1996). The alleged lack of sufficient quantities of supplies or specific types of supplies has not hindered Plaintiff's filing of a Complaint, three motions, and multiple discovery requests in the course of a few months in this action, and Plaintiff has attached photocopies and handwritten copies of documents to his Complaint and motions.

On the other hand, there is great likelihood of injury to Defendants and to the public interest if the preliminary injunction sought were to issue. States do not have unlimited resources. Supplies of certain types and bulk may pose security risks. Prisons are entitled to make reasonable regulations to balance the rights of prisoners with budgetary and security considerations. See, Bach v. Coughlin, 508 F.2d 303, 307-308 (7th Cir. 1974). Federal courts are generally courts of limited jurisdiction which have

[1] The South Carolina Court of Appeals dismissed Plaintiff's appeals of Administrative Law Court cases 2006-ALJ-04-01108 and 2006-ALJ-04-1091 prior to August 27, 2007 when Plaintiff first filed an administrative grievance seeking additional supplies and claiming he had suits which would be dismissed. [See attached Exhibit, Orders of Dismissal in 2006-ALJ-04-01108 and 2006-ALJ-04-1091, respectively.] Because both appeals were dismissed before Plaintiff's August 27, 2007 grievance, they could not have been the cases to which he was referring in his grievance, and Plaintiff has made no showing of any case dismissed or subject to dismissal after he filed his grievance on August 27, 2007.

[2] See Case Numbers 07-ALJ-04-00114; 07-ALJ-04 -00115; 07-ALJ-04-00195; 07-ALJ-04-00232; 07-ALJ-04-00232; 07-ALJ-04-00281; 07-ALJ-04-00681; and 07-ALJ-04-00698.

[3] See Case Numbers 06-ALJ-04-1091; 06-ALJ-04-1108 and 07-ALJ-04-115.

traditionally abstained from interference with day-to-day administration of State institutions and, with State sovereignty, absent exigent and extreme circumstances not presented here. Therefore, Plaintiff's motion for preliminary injunctive relief should be denied.

CONCLUSION

For the reasons stated above, Plaintiff's motion for a preliminary injunction should be denied.

s/ *Sally Peace*
s/Victoria T. Vaught
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January 28, 2008

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PLAINTIFF,	)
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Jon Ozmint, Willie Eagelton, William Davis,	)
Annie Sellers, John Burgess and Gerome McLeod,	)
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DEFENDANTS.	)
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CERTIFICATE OF SERVICE

I, Sally Ward Peace, Associate, Battle Vaught & Howe, P.A., hereby certify that on January 28 2008 I served a copy of Defendants' Response to Plaintiff's Motion for Preliminary Injunction upon the Plaintiff Walter Cole McNair, Jr. #00213151 by depositing a copy of the same in the U.S. Mail, postage pre-paid, addressed to him as shown below:

Walter Cole McNair, Jr., #00213151
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January 28 2008
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