SABIL M. MUJAHID, aka Terry Smith, Plaintiff, v. GEORGE SUMNER, Director of Department of Public Safety, JOHN SMYTHE, Administrator, Halawa Medium Security Facility, Defendants.

CIVIL NO. 92-00060 DAE/FIY

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

1992 U.S. Dist. LEXIS 19841

September 18, 1992, Decided
September 18, 1992, Filed

SUBSEQUENT HISTORY: [*1] Adopting Order of November 12, 1992, Reported at *1992 U.S. Dist. LEXIS 18512*.

DISPOSITION: The Court hereby recommends that Plaintiff's Motion for Summary Judgment be DENIED. The Court further recommends that Defendants' Motion for Summary Judgment be GRANTED. Plaintiff's Motion to Strike Defendants' Pleading and Motion to Sanction Counsel are hereby DENIED. In addition, Plaintiff's Motion for a Preliminary Injunction is DENIED.

JUDGES: Yamashita

OPINION BY: FRANCIS I. YAMASHITA

OPINION

REPORT AND RECOMMENDATION; DENIAL OF PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' PLEADING AND MOTION TO SANCTION COUNSEL; DENIAL OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. *STATE OF PLEADINGS*

On February 3, 1992, inmate Sabil Mujahid, aka Terry Smith, ("Plaintiff") filed a *42 U.S.C. § 1983* civil rights action against George Sumner, Director of the Department of Public Safety and John Smythe, Administrator at Halawa Medium Security Facility ("Defendants"). Plaintiff sues Defendants in their official and individual capacities. [*2] Plaintiff seeks declaratory and injunctive relief and compensatory damages for deprivation of his rights.

Both parties have moved for summary judgment. In the alternative, Defendants have moved for judgment on the pleadings. Plaintiff has also filed a Motion to Strike Defendants' Pleading, a Motion to Sanction Counsel for misstating facts in the pleading that Plaintiff seeks to strike, and a Motion for a Preliminary Injunction.

II. *FACTUAL DETERMINATIONS*

Plaintiff alleges that Defendants promulgated and enforced policies that prevented Plaintiff from writing to specific members of the news media. Also, Plaintiff alleges that his equal protection rights were violated because other prisoners were selectively allowed to write to specific members of the news media while he is not allowed to do so. [1]

1 Read very broadly, Plaintiff's memorandum could allege a third claim that Plaintiff has been denied the right to send any letters to the media in general. (D.14 at 3, 6, 7, 37, exhibit 8). However, a memorandum in support of summary judgment is not the appropriate place to raise new claims and this Court will not address claims not raised in the complaint.

[*3] Defendants claim that they should not be held liable to Plaintiff under theories of absolute and qualified immunity. Defendants also claim that the policies should be upheld to prevent inmates from becoming news media "sources", thereby undermining prison security. Finally, Defendants claim that Plaintiff has not been a victim of selective enforcement of the policies as Plaintiff has not shown that other inmates have been allowed to write to specific members of the news media.

III. *STANDARDS*

Standard for Judgment on the Pleadings

A complaint can be dismissed on the pleadings 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." *Maurer v. Ind. and as Members of Los Angeles Cty., 691 F.2d 434, 437* (9th Circuit, 1982).

Pro se plaintiffs are held to a less stringent standard and should be given an opportunity to amend unless the deficiency cannot be overcome by amendment. *Maurer, 691 F.2d at 437* (citations omitted).

Standard for Summary Judgment

Summary Judgment is appropriate if the evidence, construed in the light most favorable [*4] to the nonmoving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-1340 (9th Cir. 1989)*. If the nonmoving party bears the burden of proof at trial with respect to a material fact, that party is required to go beyond the pleadings and present specific facts establishing each element of his claim on which he would bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1989)*; *Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990)*. In order to establish a valid civil rights claim under *42 U.S.C. § 1983*, Plaintiff must show "(1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the constitution or the laws of the United States." *Leer v. Murphy, 844 F.2d 628, 632 (9th Cir. 1988)*.

IV. *DISCUSSION*

Policies that Prevent Plaintiff [*5] *from Writing to Specific Members of the News Media*

Plaintiff alleges that the following subsections of Title 17-203-11 of the Hawaii Administrative Rules ("Rules") are constitutionally infirm:

(g)(4) No press shall be included in the personal correspondence and visitor list and be granted "visitor" status and privileges unless the press member has had a bonafide friendship with the inmate or ward that was established prior to commitment. In such instances, personal visits shall not be made for the purpose of securing news information. The press member should be viewed as entering the facility in the official capacity as a media member and thus the visit

should be classified as an "official" press visit. The press member entering for personal reasons shall visit on weekends and holidays, whereas press member[s] entering for official visits can be scheduled on weekdays.

(i) Inmates and wards may correspond with a member of the news media provided that the inmate or ward has a bona fide friendship with the person that was established prior to commitment.

Plaintiff claims that the Rules are overbroad and serve no legitimate penological interest.

Defendants assert that the standard [*6] for deciding whether a restriction placed on outgoing correspondence constitutes an impermissible restraint on Plaintiff's *First Amendment* rights is stated in *Turner v. Safley, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*. In *Turner,* the Supreme Court held that *First Amendment* rights of prisoners may be regulated if the regulation is reasonably related to a legitimate penological goal. *Turner, 482 U.S. at 89. See also, Harper v. Wallingford, 877 F.2d 728 (9th Cir. 1989)*. The Supreme Court in *Turner* suggested several factors to be considered in determining whether a challenged prison regulation is reasonable and explicitly ruled that the government penological objective must be a legitimate and neutral one. In particular, those regulations that restrict inmates' *First Amendment* rights must operate without regard to content. *Turner, 482 U.S. at 90*.

Plaintiff disagrees with Defendants, stating that the appropriate standard is found in *Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974)*. In *Martinez,* the Supreme Court held that censorship of prisoner [*7] correspondence is justified if the following criteria are met: (1) the regulation must further one or more of the important and substantial governmental interests of security, order and the rehabilitation of inmates, and (2) it must be no greater than is necessary to further the legitimate government interest involved.

Plaintiff states the correct standard for analysis of a restriction placed on outgoing mail. In *Thornburgh v. Abbott, 490 U.S. 401, 413, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*, the Supreme Court limited the *Martinez* standard to outgoing mail, thus, holding that regulations affecting incoming mail must be analyzed under the *Turner* reasonableness standard.

To date, the only censorship applied to correspondence with specified news persons has involved outgoing mail. Therefore, the stricter *Martinez* standard should be applied.

1. Whether the regulation furthers one or more of the important and substantial governmental interests of security, order, and the rehabilitation of inmates.

Title 17-203-4 of the Hawaii Administrative Rules specifies that prison officials may censor incoming or outgoing mail to and from inmates subject to the following two criteria:

[*8] (1) Censorship must further a substantial governmental interest, such as maintaining the security and order of the facility, correctional programming for the inmate or ward, or ensuring safety of facility personal, inmates, and the general community;

(2) The facility shall censor no more of the letter than necessary or essential to achieve the particular governmental interest.

Defendants assert that the purpose of the regulation which prohibits inmates from corresponding with individual members of the press is to prevent particular inmates from becoming media news sources, and thus, gaining notoriety and enhanced influence over other inmates. (D.9, Memorandum at 2, 4). As noted by the court in *Pell v. Procunier, 417 U.S. 817, 832, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974)*,

extensive press attention to an inmate who espoused a practice of non-cooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institution's ability to deal effectively with the inmates generally.

While *Pell* dealt with face to face interviews between inmates and the press, this Court finds that the danger such interviews pose to prison order and security is similar to [*9] that posed when an inmate solicits ongoing attention from particular members of the press.

2. Whether the regulation is no greater than is necessary to further the legitimate government interest involved.

Pursuant to Department of Corrections Policy 493.15.02 [9], and Halawa Correctional Facility Policy 2.15.02 [5], Plaintiff may send letters to the news media if the letters are addressed to the news media in general and not to a specific individual. In addition, pursuant to Rules 17-203-11 (g)(4) and (i), Plaintiff may communicate with the press when he has a bonafide friendship with the news media person prior to confinement.

As noted by the *Pell* court, a regulation is no greater than is necessary when inmates can communicate with particular members of the press through their families, friends, clergy or attorneys. *Pell, 417 U.S. at 825*. Although alluded to, Plaintiff makes no specific claim and has produced no factual support that he has been precluded from other channels of communication which are clearly allowable. *See* Footnote 1. In particular, Plaintiff does not claim that he was denied the opportunity to mail generally addressed letters [*10] to the news media. [2] Therefore, the Rules which only prohibit Plaintiff from corresponding directly with named reporters censor no more than is necessary.

> 2 Plaintiff's affidavits and statements that he was "denied access to the media" do not state a claim that Plaintiff was denied access to the media in general. (D. 14. at 6). For example, Plaintiff's letter addressed to "broadcasting personnel of (KIKI) channel 4 television station" was more specific than necessary to communicate with the channel 4 television station. *Id*.

The Court finds that the challenged prison regulations restricting Plaintiff's correspondence with the press furthers the important and substantial governmental interests of maintaining security and order in the prison and are not greater than are necessary to further the legitimate government interests involved. In view of the above, Plaintiff has no clearly established constitutional right to correspond with specific members of the media.

Equal Protection

In the Complaint, Plaintiff [*11] alleges that his equal protection rights were violated because other inmates were allowed to write to selected media members and Plaintiff was not allowed to do so.

The *equal protection clause* "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). See also, Mlikotin v. City of Los Angeles, 643 F.2d 652, 654 (9th Cir. 1981)*. One Ninth Circuit court that addressed the issue of inequitable administration of prison policies discussed the two standards used by other courts to determine whether an equal protection claim was stated. *Badea v. Cox, 931 F.2d 573, 577 (9th Cir. 1991)*. One standard states that Plaintiff must have been singled out for undesirable treatment. The second standard states that in addition to singling Plaintiff out, Plaintiff must be singled out on an impermissible basis.

Plaintiff fails to allege that he was singled out for discriminatory treatment. The exhibits submitted by Plaintiff as evidence that other inmates have been allowed to write to specific media members [*12] are all letters to the editor, published in the letter section of the local newspaper. (D. 14 at exhibits 17, 18, 19) Defendants' policies do not prevent inmates from writing letters to local newspapers to be published under the inmates' names. Plaintiff has failed to show any evidence that he has been singled out for discriminatory treatment while fellow inmates have been allowed to write to specific members of the news media. Therefore, Plaintiff's claim fails under both standards.

Further, even if Plaintiff could show that he was singled out, Plaintiff's claim still fails as "'discrimination based merely on individual, rather than group, reasons will not suffice' for an equal protection claim." *Badea, 931 F.2d at 577* (citation omitted). "A person bringing an action under the *Equal Protection Clause* must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an

individual." *New Burnham Prairie Homes v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990).*

Plaintiff claims that he has been discriminated against because he is black, a [*13] muslim, and a jailhouse lawyer whose letters are critical of the facility and its administration. (D. 14 at 35). This claim is refuted by Plaintiff's Exhibits 17 and 18. (D. 14). The Exhibits are letters from John Sims, a Halawa Correctional Facility inmate who is black, a Muslim, a jailhouse lawyer, and whose letters are critical of both the facility and its administration. [3] (D. 15 at 4; *Sims v. Falk,* Civil No. 88-348 DAE). Therefore, Plaintiff fails to show any class of which he is a member that was discriminated against by Defendants.

3 Defendants request that the Court take judicial notice of *Sims v. Falk,* Civil No. 88-060 DAE. The case number stated for the *Sims* case is incorrect. Apparently, there was a numerical transposition with the case number of the case at hand which is Civil No. 92-060 DAE. The correct case number for the *Sims* case is Civil No. 88-348 DAE. The Court hereby takes judicial notice of the facts in Civil No. 88-348 DAE.

Absolute Immunity

Defendants claim that they are [*14] entitled to summary judgment because they are protected by absolute immunity under the *Eleventh Amendment*. The *Eleventh Amendment* bars a suit against state officials in their official capacity if the State is the real party in interest. *Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). See also, Demery v. Kupperman, 735 F.2d 1139, 1146 (9th Cir. 1984).* Thus, Plaintiff's action against Defendants in their official capacities is barred by *Eleventh Amendment* immunity.

Further, Defendants claim that even if they are named in their individual capacities, the Court should view this suit as one against them only in their official capacities because the suit involves acts committed under Defendants' official capacities, and Defendants are policymakers and should be immune from suits against them in their individual capacities. (D. 15 at 16). An action against a state official in his individual, rather than his official or representational, capacity is not barred by the *Eleventh Amendment. Blaylock v. Schwinden, 862 F.2d 1352, 1354 (9th Cir. 1988)* (citing *Scheuer v. Rhodes, 416 U.S. 232, 237-238, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)).* [*15] Further, damage actions brought under *42 U.S.C. § 1983* are generally viewed as suits against the individual. *Blaylock, 862 F.2d at 1354*; *Dewey v. Kupperman, 735 F.2d 1139, 1145-1146 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985).* Here, among other relief, Plaintiff seeks compensatory damages from Defendants. As Defendants cite no precedent stating that policymakers cannot be sued in their individual capacities when taking actions that result in constitutional injury, the Court cannot find that Defendants are only being sued in their official capacities.

Qualified Immunity

Defendants seek protection under the mantle of qualified immunity. *See, Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*; *Kirkpatrick v. Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986).* State officials sued in their individual capacity are protected by qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, 457 U.S. at 818.* [*16] Qualified immunity extends to prison officials in their discretionary actions. *Procunier v. Navarette, 434 U.S. 555, 55 L. Ed. 2d 24, 98 S. Ct. 855 (1978).* Therefore, in order to survive a motion for summary judgment, Plaintiff must demonstrate that (1) there was a clearly established statutory or constitutional right, (2) a reasonable person would know about it, and (3) Defendants' conduct violated that right. In the case at hand, Plaintiff does not have a clearly established constitutional right to correspond with specific members of the media. *supra* at 7. Also, Plaintiff's equal protection rights were not violated. *supra* at 7-9. Therefore, Defendants are entitled to qualified immunity regarding Plaintiff's right to correspond with specific media members since Defendants' conduct did not violate a clearly established constitutional right of which a reasonable person would have known. Further, Defendants are entitled to qualified immunity regarding Plaintiff's equal protection claim as Defendants' conduct did not violate Plaintiff's equal protection rights.

V. *PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' PLEADING AND MOTION TO SANCTION COUNSEL*

Plaintiff moves this Court [*17] to strike Defendants' pleading and sanction Defense Counsel for misstating the *Pell* opinion and misstating certain facts in its memorandum in opposition to Plaintiff's cross motion for summary judgment. (D. 17, 18).

The Court will not strike Defendants' pleading as the pleading does not include any matter that is redundant, immaterial, impertinent, or scandalous. *Fed.R.Civ.P. Rule 12(f)*. In paragraph one of Plaintiff's motion, contrary to Plaintiff's assertions, Defendants' reading of the *Pell* opinion is reasonable and not so extreme as to violate any rule of legal ethics. Also, in paragraph three of Plaintiff's motion, as the Court has already noted herein, the correct test is stated by the *Martinez* court. However, Defendants' suggested alternate test does not rise to the level of being scandalous. Finally, the Court has made note of Plaintiff's explanations of Defendants' alleged errors in paragraphs two, four, five and six. After a thorough review of Plaintiff's allegations, this Court cannot grant Plaintiff's Motion to Strike Defendants' Pleading as the errors do not rise to the level required by *Fed.R.Civ.P. Rule 12(f)*.

In addition, this Court cannot find any instance [*18] where Defense Counsel acted in bad faith. *Fed.R.Civ.P. Rule 11*. Plaintiff's Motion to Sanction must be denied.

VI. *PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION*

In view of the foregoing analysis and this Court's recommendation, Plaintiff's Motion for Preliminary Injunction is moot. Plaintiff's motion must be denied.

VII. *LOCAL RULE 220-5*

The Court would like to note that in Plaintiff's Motion for Summary Judgment, Plaintiff's memorandum alone numbers 45 pages. In addition, there are numerous exhibits. Pursuant to the Rules of the United States District Court for the District of Hawaii ("Local Rules"), Rule 220-5, any brief or memoranda in support or in opposition to any motion shall not exceed thirty (30) pages absent good cause. Any brief or memorandum exceeding the page limit may be disregarded by the Court. Plaintiff is very prolific having filed more than 500 complaints and about 55 lawsuits. (D.14, exhibit 23). Thus, although appearing *pro se* in this action, the Court should not need to remind Plaintiff of the Local Rules. The Court will not disregard Plaintiff's pleading in this instance. However, Plaintiff is forewarned that Local Rule 220-5 will be strictly [*19] enforced by this Court for *all* future pleadings.

VIII. *CONCLUSION*

The Court hereby recommends that Plaintiff's Motion for Summary Judgment be DENIED.

The Court further recommends that Defendants' Motion for Summary Judgment be GRANTED.

Plaintiff's Motion to Strike Defendants' Pleading and Motion to Sanction Counsel are hereby DENIED. In addition, Plaintiff's Motion for a Preliminary Injunction is DENIED.

DATED: Honolulu, Hawaii, SEP 18 1992

Francis I. Yamashita

United States Magistrate Judge