

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARK GREEN,	:	
	:	
Plaintiff,	:	
v.	:	No. 04-cv-43
	:	
FEDERAL DETENTION CENTER,	:	
PHILADELPHIA, ET AL.,	:	
	:	
Defendants.	:	

MEMORANDUM

Presently pending is Defendant’s Motion for Summary Judgment, and the response thereto. For the following reasons Defendant’s Motion will be granted in part, and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, a pretrial inmate confined at Federal Detention Center (“FDC”) Philadelphia at the time he filed this lawsuit, brought the instant action, pursuant to 42 U.S.C. § 1983, against FDC Philadelphia and FDC Philadelphia’s employees alleging that Defendants¹ failed to follow proper Bureau of Prisons (“BOP”) procedures regarding the processing of his special mail and the monitoring of phone calls he placed to his attorney. BOP special mail procedure requires that FDC Philadelphia’s staff,

open incoming special mail only in the presence of the inmate for inspection for physical contraband and the qualification of any enclosures as special mail. The correspondence may not be read or copied if the sender is adequately identified on the envelope, and the front of the envelope is marked ‘Special Mail-Open only in the presence of the inmate.’ In the absence of either adequate identification or the ‘special mail’ marking ... staff may treat the mail as general correspondence and may open, inspect, and read the mail.

28 C.F.R. § 540.18(a)-(b). FDC Philadelphia’s unmonitored phone call policy provides that

¹Defendants are all Bureau of Prisons employees assigned to Federal Detention Center Philadelphia: Edward B. Motley, Warden; Lieutenant Keith Fields, Special Housing Unit Lieutenant; and FDC Philadelphia’s mail room staff.

[p]retrial inmates may request unmonitored calls to his/her attorney by submitting a written request to a member of their unit team. These calls can only be granted to the extent that staff resources allow.

FDC Philadelphia's Institutional Supplement 7331.04, Pretrial Inmates.

In his Complaint, Plaintiff alleges multiple instances of Defendants' misconduct regarding special mail procedures and unmonitored phone calls dating from March 2003 to January 2004. The BOP administrative procedural process requires that inmates formally submit a Request for Administrative Remedy to the institution where the inmate is being incarcerated, submit an appeal to the BOP Regional Office and then submit an appeal to the BOP Central Office before bringing a cause of action in federal court. Plaintiff claims that he "followed every step in the administrative procedure process" and has exhausted his administrative remedies regarding the issues raised in his Complaint. Pl.'s Compl. at p. 3. Defendants claim that Plaintiff has not properly exhausted his administrative remedies regarding all of the issues raised in his Complaint.

Plaintiff's Complaint consists of the standardized form used by prisoners to bring 42 U.S.C. § 1983 actions and three handwritten pages listing five separately numbered Statement of Claims. On page four of the standardized form, Plaintiff, a detainee, asserts that, while being housed in the Special Housing Unit ("SHU"), his attorney-client privilege was violated when Defendants forced him to make phone calls to his attorney using a speaker phone making it possible for prison officials to overhear Plaintiff's attorney-client phone conversations.² Plaintiff filed a December 29, 2003 Request for Administrative Remedy (No. 320487) and in its response, FDC Philadelphia granted Plaintiff's Request directing its staff to provide SHU inmates with the opportunity to place unmonitored telephone calls to their attorneys.

²Plaintiff also alleges that Defendants deprived other inmates of unmonitored calls to their attorneys. 28 C.F.R. § 542.10(a) states "[a]n inmate may not submit a Request or Appeal on behalf of another inmate." Furthermore, Plaintiff has not been certified as a class representative. Therefore, Plaintiff may neither seek relief, nor bring claims based on alleged violations of other inmates' rights by FDC Philadelphia Warden Edward Motley, Lieutenant Fields and Unit Manager Harold Mills.

Defendants claim that the administrative remedy record does not show that Plaintiff appealed FDC Philadelphia's response to either the BOP Regional or Central Offices. In his "Response To Motion For Summary Judgment," Plaintiff asserts "he appealed thru all avenues of appeal [regarding his attorney-client phone call Request] and the Defendants' assertions to the contrary must fail." Pl.'s Resp. To Mot. For Summ. J. at p. 1. In support of his assertions, Plaintiff submits what he claims to be his appeals to the BOP Regional and Central Offices regarding the monitoring of his attorney-client phone calls dated March 12, 2004 and May 28, 2004 respectively. Defendant's claim that there is no record of many of Plaintiff's appeals in the BOP's files.

II. DISCUSSION

Defendant's initially argue that Plaintiff has failed to exhaust his administrative remedies. As fully discussed in the court's order denying Defendant's Motion to Dismiss (Dkt. # 34), Plaintiff submitted certain forms which he claims demonstrate that he did, in fact, exhaust his administrative remedies. This dispute is a genuine issue of material fact, and as such, summary judgment would be inappropriate.

Defendants also argue that summary judgment is proper because they are cloaked by immunity. Specifically, they argue that sovereign immunity bars any suit for monetary damages against the Defendants in their official capacity, as such action must be deemed as if it were against the United States itself. See Dugan v. Rank, 372 U.S. 609, 620 (1963). The United States has not waived its sovereign immunity from liability for an award of damages arising from proposed violations of the Constitution. FDIC v. Meyer, 510 U.S. 471, 485-486 (1994). As such, to the extent that Plaintiff's complaint seeks damages against Defendants in their official capacity, Defendants' Motion for Summary Judgment will be granted.

Defendants also argue that they are protected by qualified immunity. In order to determine whether qualified immunity is a defense to suit, the court must decide whether 1) a constitutional right would have been violated on the facts alleged, and 2) assuming the violation

is established in the pleadings, whether the right alleged to have been violated was clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). The court concludes that on the facts alleged a constitutional right, namely access to the courts and to counsel, would have been violated for both the improper opening of Plaintiff's legal mail and the improper monitoring of his phone call. In resolving the second question, the dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Id. at 202. Assuming that Plaintiff's allegations are correct, the court concludes that it would be clear to any reasonable officer that improperly opening an inmates legal mail, and failing to timely deliver such mail, would be both unlawful and a violation of Bureau of Prison policy. Therefore, the court concludes that the Defendant's do not enjoy qualified immunity from suit.

Defendant's also argue that Plaintiff's claims do not rise to the level of constitutional violations. Plaintiff essentially has two (2) claims, 1) that a phone call between he and his attorney was monitored by Defendant Fields, and 2) that his legal mail was improperly opened ,and that its delivery was delayed, on several occasions.

As to the telephone call, Plaintiff asserts that the monitoring of his telephone call violated his rights under the Sixth and Fourteenth Amendments to assistance of counsel and access to the courts. It is settled that prisoners do not forfeit their constitutional guarantee under the Fourteenth Amendment to "adequate, effective, and meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977). The Sixth Amendment does not, however, require full and unfettered contact between an inmate and his attorney. Mann v. Reynolds, 46 F.3d 1055, 1060 (10th Cir. 1988). In order to establish an unconstitutional restriction on the right of access to the courts, an inmate must plead and prove he was actually impeded in his ability to conduct a particular case. Lewis v. Casey, 518 U.S. 343 (1996).

As to Plaintiff's claims regarding the opening of his legal mail, in order to state a cause of action for improper opening of legal mail, an inmate must prove that his legal mail was opened intentionally. See Averhart v. Shuler, 234 F.2d 173 (7th Cir. 1987). There is no

constitutional violation without evidence of a pattern or practice of interfering with or opening an inmate's legal mail. Hendrix v. Faulkner, 525 F. Supp. 435, 455 (N.D. Ind. 1981).

Plaintiff's complaint, standing alone, is insufficient to meet the burdens of proof required in a summary judgment proceeding. The court will permit Plaintiff to submit, within 30 days of the date of this order, either by affidavit or through some other means, additional evidence to establish the existence of a constitutional cause of action. Plaintiff must specifically identify when the alleged violations took place, identify where the mail was from and how it was marked, and detail the harm allegedly suffered as a result, including what proceedings were affected and how they were affected. If Plaintiff does not submit any additional evidence the court will grant summary judgment in favor of Defendant.

An appropriate order follows.

