

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROBERT DRAPER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 02-198-SLR  
 )  
 C/O SERVERSON, TOM CARROLL, )  
 LAWRENCE MCGUIGAN, and )  
 JOSEPH BELANGER, )  
 )  
 Defendants. )

**MEMORANDUM ORDER**

Plaintiff Robert Draper, SBI #186606, a pro se litigant, is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. Plaintiff filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

**I. STANDARD OF REVIEW**

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two-step process. First, the court must determine whether plaintiff is eligible for pauper status. On March 15, 2002, the court granted plaintiff leave to proceed in forma pauperis and ordered him to pay \$20.18 as an initial partial filing fee. Plaintiff paid \$20.18 on March 27, 2002.

Once the pauper determination is made, the court must then

determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).<sup>1</sup> If the court finds plaintiff's complaint falls under any of the exclusions listed in the statutes, then the court must dismiss the complaint.

When reviewing complaints pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). See Neal v. Pennsylvania Bd. of Probation and Parole, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997) (applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears

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<sup>1</sup> These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the court to dismiss an in forma pauperis complaint at any time, if the court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the court to screen prisoner complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A(b)(1).

'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).<sup>2</sup> As discussed below, plaintiff's claims have no arguable basis in law or in fact, and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

## **II. DISCUSSION**

### **A. The Complaint**

Plaintiff alleges that on December 26, 2001, he attempted to send "[three] brown envelopes" containing "his opening and closing brief," the State's "opening and closing brief," and "transcripts of his trial" out of DCC through a visitor and was told by defendant Serverson that he was not allowed to do so. (D.I. 2 at 3, 8) Plaintiff further alleges he requested that the papers be returned to him and was told that defendant Belanger

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<sup>2</sup> Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915(e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

had taken them. (Id. at 3) On July 22, 2002, plaintiff filed a letter motion requesting appointment of counsel. (D.I. 7) Plaintiff also included additional allegations in the letter. Apparently, sometime before he filed the complaint, the documents were returned to plaintiff. Specifically, plaintiff alleges that on February 19, 2002, he mailed three "big brown envelopes" containing his legal documents to his lawyer. (D.I. 7 at 2) Plaintiff further alleges that because his attorney had not received that documents by March 4, 2002, he wrote a note to the mail room asking about them. An unknown member of the mail room staff replied, "we don't have them, all legal mail is sent to the post office everyday." (Id. at 5) Plaintiff further alleges that on March 5, 2002, "I got my three brown envelopes back telling me that the address has moved." (Id.)

On August 9, 2002, plaintiff filed another letter which the court construes as an amended complaint pursuant to Fed R. Civ. P. 15(a). (D.I. 8) Plaintiff alleges that he is "being threatened and harassed" all the time in retaliation for filing this complaint. (Id. at 1) Specifically, plaintiff alleges that Ron Drake, who has not been named as a defendant, threatened to revoke his visitation privileges. (Id.) Plaintiff also alleges that Officers Thomas and Brown, who have not been named as defendants, cursed at him and threatened him. (Id. at 4)

Plaintiff requests that the court award him unspecified

damages and order the defendants to return his documents. (D.I. 2 at 4) As noted above, plaintiff has also filed a letter requesting appointment of counsel. Because the court finds that the complaint is frivolous, the plaintiff's request shall be denied.

## **B. Analysis**

### **1. Plaintiff's Access to the Courts Claim**

Although plaintiff does not cite the First Amendment in the complaint, it is clear that he is alleging that defendants Serverson and Belanger violated his right to access the courts by not allowing him to give his legal material to his visitor. Prisoners must be allowed "adequate, effective and meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977) (holding that prisons must give inmates access to law libraries or direct legal assistance). However, in order for plaintiff to state a claim that interception of his legal materials has denied him access to the courts, he must show some **actual injury**. See Lewis v. Casey, 518 U.S. 343 (1996) (emphasis added).

Specifically, plaintiff must show that a "nonfrivolous legal claim had been frustrated or impeded" by the interception of his legal material. Id. at 355. In other words, the plaintiff must show that his nonfrivolous claim was effectively impeded because

he was unable to give his legal material to his visitor, not that the interception itself was unreasonable. See Reynolds v. Wagnor, 128 F.3d 166, 183 (3d Cir. 1997). In this case, plaintiff has failed to allege that the interception of his legal material impeded his pursuit of a nonfrivolous claim.<sup>3</sup> Absent an allegation of how his access to the courts was adversely affected, the court concludes that plaintiff's claim against defendants Serverson and Belanger has no arguable basis in law or in fact. Therefore, plaintiff's First Amendment claim against defendants Serverson and Belanger shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

## **2. Plaintiff's Retaliation Claims**

Plaintiff also alleges that Ron Drake threatened to stop his visitation privileges and that Officers Thomas and Brown entered his cell, cursed at him and threatened him in retaliation for filing his complaint. (D.I. 8 at 1-4) However, plaintiff has not alleged any specific facts to support this allegation. It has long been established in this circuit, that a complaint under § 1983 must set forth specific facts

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<sup>3</sup> In fact, it is clear that the documents were returned to plaintiff before he even filed this complaint. (D.I. 7 at 2) Furthermore, when plaintiff mailed the documents to his attorney on February 19, 2002, no one at DCC intercepted them. In fact, plaintiff admits that he received the documents on March 5, 2002 marked "address has moved." (D.I. 7 at 5) Such a notation clearly indicates that the post office attempted to deliver his mail.

regarding the defendants's alleged unconstitutional conduct. See Darr v. Wolfe, 767 F.2d 79, 80 (3d Cir. 1985) (collecting cases). Here, plaintiff's complaint is "wholly lacking in specific facts to support his conclusory claim[s]." Id. at 81. Consequently, plaintiff's retaliation claim has no arguable basis in law or in fact. Therefore the complaint shall be dismissed as frivolous pursuant to §§ 1915 (e) (2) (B)-1915A (b) (1). However, the court's dismissal of this claim will be without prejudice because it may be possible for plaintiff to cure the deficiencies regarding the claim through amendment. Darr v. Wofle, 767 F.2d at 81.

### **3. Vicarious Liability**

Plaintiff has named Tom Carroll and Lawrence McGuigan as defendants. However, plaintiff has not raised any specific allegations regarding either defendant. Rather, plaintiff has indicated that Tom Carroll is the Warden at DCC and Lawrence McGuigan is the Deputy Warden. (D.I. 2 at 3) Therefore, it appears that plaintiff is attempting to hold these defendants vicariously liable for the actions of defendants Serverson and Belanger.

Supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. See Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). In order for a supervisory public

official to be held liable for a subordinate's constitutional tort, the official must either be the "moving force [behind] the constitutional violation" or exhibit "deliberate indifference to the plight of the person deprived." Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989) (citing City of Canton v. Harris, 489 U.S. 378, 389 (1989)).

Nothing in the complaint indicates that either defendant Carroll or McGuigan were the "driving force [behind]" either defendant Serverson's or defendant Belanger's actions, or that they were even aware of plaintiff's allegations and remained "deliberately indifferent" to his plight. Sample v. Diecks, 885 F.2d at 1118. Consequently, plaintiff's claim against defendants Carroll and McGuigan has no arguable basis in law or in fact. Therefore, plaintiff's claim against defendants Carroll and McGuigan is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

NOW THEREFORE, at Wilmington this 24th day of March, 2003, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Appointment of Counsel (D.I. 7) is DENIED.

2. Plaintiff's First Amendment claim against defendants Serverson and Belanger is DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

3. Plaintiff's retaliation claim is DISMISSED without

prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

4. Plaintiff's vicarious liability claim against defendants Carroll and McGuigan is DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

5. The Clerk of the Court shall cause a copy of this Memorandum Order to be mailed to plaintiff.

Sue L. Robinson  
UNITED STATES DISTRICT JUDGE