

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DARRYL M. EVANS, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 03-868-KAJ  
 )  
 C/O FORD, VINCENT BIANCO, )  
 DEPARTMENT OF CORRECTION, )  
 C/O TRUITT, and CORPORAL )  
 A. HOLMES, )  
 )  
 Defendants. )

**MEMORANDUM ORDER**

**I. STANDARD OF REVIEW**

Plaintiff Darryl M. Evans ("Evans"), SBI #205832, is a pro se litigant who was incarcerated at the Central Violation of Probation Center ("CVOP") in Smyrna, Delaware at the time he filed this complaint. Evans 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.

Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the Court must determine whether the Evans is eligible for pauper status. The Court granted Evans leave to proceed in forma pauperis on September 26, 2003, and determined that Evans had no assets with which to pay an initial partial filing fee. Nonetheless, the Court ordered Evans to file an authorization form within thirty days, or the complaint would be dismissed. Evans filed the authorization form on October 8, 2003.

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 Evans' complaint falls under any one 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 Prob. & 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 '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)).

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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 in forma pauperis 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).

The United States Supreme Court has held that § 1915(e)(2)(B)'s term "frivolous" when applied to a complaint, "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." Neitzke v. Williams, 490 U.S. 319, 325 (1989).<sup>2</sup> Consequently, a claim is frivolous within the meaning of § 1915(e)(2)(B) if it "lacks an arguable basis either in law or in fact." Id. As discussed below, Evans' claim has 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 and the Amendments**

Evans initially filed this complaint against Correctional Officer Ford ("Ford"), Vincent Bianco ("Bianco"), the Department of Corrections ("DOC"), and Correctional Officer Truitt ("Truitt"). (D.I. 2) Evans alleges that on September 1, 2003, he asked Ford to make five copies of a document to be sent to the District Court. (Id. at 3) Evans further alleges that Ford only made one copy for him and told him that she would not make any more copies. (Id.) On September 24, 2003, Evans filed an amended complaint, alleging that on September 1, 2003, he filed a grievance against Ford for not making copies as he requested. (D.I. 6) Evans further alleges that on September 1, 2003, his cell was searched by Truitt. (Id.) Evans further alleges that he believes Ford actually searched his cell in retaliation because he filed a grievance against her. (Id.)

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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 frivolous under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 104-134, 110 Stat. 1321 (April 26, 1996).

On September 25, 2003, Evans filed an affidavit, which the Court construes as a motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a). (D.I. 8) Evans alleges that on September 21, 2003, an unknown Correctional Officer searched his cell while Evans was in the dining hall. (Id.) Evans further alleges that he believes Truitt searched his cell in retaliation for filing a grievance against Ford. (Id.) On October 8, 2003, Evans filed an affidavit, which the Court construes as a second motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a). (D.I. 14) Evans reasserts his allegations regarding Truitt searching his cell. He further alleges that Ford violated his right to access the courts on October 2, 2003, because she stayed in the room while he used the telephone to contact the American Civil Liberties Union ("ACLU"). (Id. at 2)

On October 14, 2003, Evans filed a third motion to amend the complaint requesting leave to correct the spelling of defendant "Vincent Vianco's" name to "Vincent Bianco." (D.I. 15) On October 20, 2003, Evans filed an affidavit, which the Court construes as a fourth motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a). Evans alleges that Truitt refused to provide envelopes to another inmate, and requests that the Court consider this information when assessing Truitt's character. (D.I. 17) On November 12, 2003, Evans filed an affidavit, which the Court construes as a fifth motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a). Evans alleges that on October 11, 2003, Corporal A. Holmes ("Holmes") searched his cell while Evans was in the dining hall. (D.I. 18) Evans further alleges that he asked Holmes for a grievance form and she told him to get one from the next shift. (Id.)

"After amending once or after an answer has been filed, the plaintiff may amend only with leave of the court or the written consent of the opposing party, but 'leave shall

be freely given when justice so requires." Shane v. Fauver, 23 F.3d 113, 115 (3d Cir.2000) (quoting Fed. R. Civ. P. 15(a)). The Court shall grant Evans' motions and enter an order directing the clerk to amend the caption of the complaint to correct Vincent Bianco's name and to add Corporal A. Holmes as a defendant. The Court will also consider all relevant allegations when making decisions in this matter.

Evans requests that the Court award him compensatory damages in the amount of Forty Thousand Dollars (\$40,000), and punitive damages in the amount of Two Hundred Thousand Dollars (\$200,000). (Id. at p. 4.) Evans also requests that the Court issue a temporary restraining order, ordering both Ford and Truitt to stay away from him. (D.I. 7; D.I. 9) Evans argues that both Ford and Truitt are in positions of authority and therefore, should not have contact with inmates who file grievances, or lawsuits against them. (Id.) Evans is no longer incarcerated. Therefore, his request for a temporary restraining order shall be denied as moot. Evans has also filed a motion for appointment of counsel. (D.I. 11; D.I.13) Because the Court finds that his complaint is frivolous, the motions for appointment of counsel shall also be denied as moot.

## **B. Analysis**

### **1. Evans' Access to the Courts Claim**

Evans alleges that Ford violated his right to access the courts by refusing to make copies for him and by listening to his conversation with the ACLU. He also alleges that Holmes violated his right to access the courts by telling him to get a grievance form from the next shift. Prisoners possess the constitutional right of meaningful access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). However, that does not mean Evans is entitled to have Correctional Officers make

copies of legal documents for him. See Lewis v. Casey, 518 U.S. 343 (1996). Rather, the State must enable Evans to prepare a complaint and put his grievance before the court. See Id. at 360. Furthermore, in order to prevail on these claims, Evans must allege that he suffered an actual injury. See Id. at 351. An actual injury means that Evans was unable to put before a court, an arguable legal claim relating to his conviction, sentence or conditions of confinement. See Id. at 354.

Although Evans alleges that he needed to file documents in the district court, he has not alleged that he suffered any adverse consequences from Ford's refusal to make him copies. Moreover, prisons are not required to provide inmates with free photocopies. See Id.; See also Johnson v. Moore, 948 F.2d 517, 521 (9<sup>th</sup> Cir. 1991) ("A denial of free photocopying does not amount to a denial of access to the courts."). Evans merely alleges that Ford refused to make a specified number of copies for him. He does not allege that he was unable to file his documents with the district court. Furthermore, Evans does not allege that he was unable to put before a court an arguable legal claim relating to his conviction, sentence, or conditions of confinement, as a result of Ford not leaving the room when Evans called the ACLU. Finally, Evans does not allege that he was unable to put before a court, an arguable legal claim relating to his conviction, sentence or conditions of confinement, as a result of Holmes telling him to get a grievance form from the next shift. See Id. Consequently, Evans' claims that Ford violated his right to access the courts by refusing to make him copies and not leaving the room when he called the ACLU have no arguable basis in law or in fact. Evans' claim that Holmes violated his right to access the courts also has no

arguable basis in law or in fact. Therefore, these claims shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915 (e)(2)(B)-1915A(b)(1).

## **2. Evans' Right to Privacy Claim Regarding the Searches**

Evans also alleges that Truitt, Ford, Holmes and an unknown Correctional Officer have violated his right to privacy, by searching his cell while he was not present. (D.I. 2; D.I. 8; D.I. 18) Prison inmates do not have a constitutionally protected right to privacy in their prison cells, which can be searched at random, any time. Hudson v. Palmer, 468 U.S. 517, 527-29 (1984). Here, Evans alleges that Truitt, Ford, Holmes and an unknown Correctional Officer searched his cell while Evans was in the dining hall. (D.I. 8) Evans alleges that he knows these searches occurred because he "rigged" his room in order to detect a search. (D.I. 6; D.I. 8)

Nothing in the complaint indicates that any of the alleged searches, even if they did occur, were conducted in a unreasonable manner. Bell v. Wolfish, 441 U.S. 520, 560 (1978). Evans further alleges that the searches were conducted in retaliation for Evans' filing a grievance against both Truitt and Ford. (D.I. 6; D.I. 8; D.I. 14; D.I. 18) Significantly, Evans does not allege that he suffered any adverse action as a result of any of the alleged searches. Consequently, Evans' claim that the searches of his cell violated his right to privacy has no arguable basis in law or in fact. Therefore, his claim shall be dismissed pursuant to 28 U.S.C. §§ 1915 (e)(2)(B)-1915A(b)(1).

## **3. Evans' Vicarious Liability Claim Against Bianco**

Evans' claim against Bianco must also fail because it rests solely on a theory of vicarious or supervisory liability. Supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. See Monell v. Dep't. 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)). Evans does not raise any specific allegations regarding Bianco. Rather, Evans merely lists Bianco as a Defendant in the caption, noting he is the Warden of the CVOP. This implies that Evans is attempting to hold Bianco liable simply because of his supervisory position. (D.I. 2 at 3)

Nothing in the complaint indicates that Bianco was the "driving force [behind]" the actions of Ford, Truitt or Holmes, or that Bianco was aware of Evans' allegations and remained "deliberately indifferent" to his plight. Sample v. Diecks, 885 F.2d at 1118. Consequently, Evans' claim against Bianco has no arguable basis in law or in fact. Therefore, Evans' claim against Bianco is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

#### **4. Sovereign and Eleventh Amendment Immunity**

Even if Evans had included specific allegations in his complaint against the DOC, his claims against it must fail. To state a claim under 42 U.S.C. § 1983, Evans must allege "the violation of a right secured by the Constitution or laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988) (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981) (overruled in part on other grounds not relevant here by, Daniels v. Williams, 474 U.S. 327, 330-31 (1986)). "[T]he Supreme Court has held that neither



a State nor its officials acting in their official capacities are 'persons' under § 1983."

Ospina v. Dep't of Corrections, State of Delaware, 749 F.Supp. 572, 577 (D. Del.

1991)(citing Wills v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

Furthermore, "[a]bsent a state's consent, the Eleventh Amendment bars a civil rights suit in federal court that names the state as a defendant." Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981) (citing Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam)).

The DOC is an agency of the State of Delaware, and the State of Delaware has not waived its sovereign immunity under the Eleventh Amendment. See Ospina v. Dep't of Corrections, 749 F.Supp. at 579. Consequently, Evans' claim against the DOC has no arguable basis in law or in fact. Therefore, Evans' claim against the DOC is frivolous and shall be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

NOW THEREFORE, this 25th day of August, 2004, IT IS HEREBY ORDERED that:

1. Evans' Motions to Amend the Complaint (D.I.8; D.I. 14; D.I. 15; D.I. 17; and D.I. 18) are GRANTED.

2. The Clerk of the Court shall amend the caption to reflect the correct spelling of Vincent Bianco's name.

3. The Clerk of the Court shall add Corporal A. Holmes to the caption as a Defendant.

4. Evans' Motions for a Temporary Restraining Order (D.I. 7; D.I. 9) are DENIED as MOOT.

5. Evans' Motions for Appointment of Counsel (D.I. 11; D.I.13) are DENIED as MOOT.

6. Evans' complaint is DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE