

defendant Harvey, who replied that the Department Policy ““does not include paralegals as legal mail correspondents.”” Id. ¶ 8 (referring to VDOC Operating Procedure, No. 803.1, “Legal Correspondence - Correspondence sent to or received from verified attorneys, officers of state, federal, and local courts, the Virginia State Bar, and tort claims filed with the Division of Risk Management.”).

Plaintiff filed a formal grievance. Defendant Watson, the Warden at Wallens Ridge, did not dispute that Deans was a paralegal. He determined plaintiff’s grievance to be unfounded. Id. ¶ 9. Plaintiff then addressed the matter with defendant Huffman, the VDOC Regional Director and Watson’s immediate supervisor. Huffman affirmed Watson’s determination that the grievance was unfounded. Id. ¶ 10.

In support of his claim, Giarratano also alleges that policymakers John M. Jabe, VDOC Deputy Director of Operations, and James R. Camache, VDOC Deputy Director of Community Corrections, authorized the VDOC policy that excludes paralegals as legal mail correspondents and thus, denies prisoners full enjoyment of the attorney-client privilege. See Id. ¶ 11.

II.

To state a claim under 42 U.S.C. § 1983, Giarratano must establish that he has been deprived of “any rights, privileges, or immunities secured by the Constitution and laws” by a “person” acting “under color of any statute, ordinance, regulation, custom, or usage.” 42 U.S.C. § 1983 (2000); see West v. Atkins, 487 U.S. 42, 48 (1988). He also must state an actual harm or injury caused by the defendants’ actions. See Lewis v. Casey, 518 U.S. 343, 351–55 (1996) (applying actual injury requirement to the inmates’ access-to-courts claim).

Notably, Lewis followed Bounds v. Smith, 430 U.S. 817 (1997), to recognize that prisoners enjoy a right to reasonable access to the courts. Id. at 354. Lewis also illuminated

what constitutes an actual injury by distinguishing “actual or imminent harm” from “merely the status of being subject to a governmental institution that was not organized or managed properly.” Id. at 350. This distinction exists because courts should not undertake tasks or responsibilities assigned to the political branches. As the Court noted, “[i]t is for the courts to remedy past or imminent official interference with individual inmates’ presentation of claims to the court; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.” Id. at 349. Id. at 349–50, 361–63. The Court noted the dismissal with prejudice of a lawsuit and the inability to file a lawsuit as examples of actual harm or injury. Id. at 356.

III.

Under these principles, Giarratano’s submissions fail to state any claim actionable under 42 U.S.C. § 1983. Specifically, Giarratano fails to assert facts stating a constitutional claim that he has been denied access to the courts, as he does not show any harm to his litigation efforts that resulted or will result imminently from defendants’ actions. The plaintiff claims that the opening of his legal mail “interferes with his attorney-client relationship, hinders his ability to communicate openly with his legal team, and hampers his ability to obtain unhindered representation in matters directly relations to his criminal conviction.” Pl. Compl. ¶ 12. Beyond that, he alleges no facts to describe how exactly the opening of his legal mail has infringed or will infringe any future or ongoing litigation. For instance, no claim is made that he was prevented from filing a lawsuit or from making a court-imposed deadline.¹

¹ On November 6, 2008, Mark Davis (“Davis”), Senior Assistant Attorney General, sent Giarratano a letter. He explained that Barry A. Weinstein, Giarratano’s attorney, wrote Warden Watson and advised him that Deans works as his legal assistant. In turn, he anticipates that personnel at Wallens Ridge will treat Dean’s communications as though they were coming from Weinstein. On November 10, 2008, Giarratano replied to Davis to express his concern that the VDOC still retains an operating policy that permits prison officials to not treat paralegals as legal correspondents.

The plaintiff had ample notice and opportunity to include more factual allegations. On September 2, 2008, defendants Harvey, Watson, and Huffman filed a motion for summary judgment. The court sent a Roseboro notice two days later. On October 1, 2008, the plaintiff filed a “Motion For Leave To File An Amended Complaint.” The undersigned directed Giarratano to indicate “any actual harm or prejudice to his ability to communicate with the court or counsel that he suffered as a direct result of the defendants allegedly opening his legal mail.” Order filed Oct. 23, 2008.

Plaintiff has responded, but fails to indicate actual harm or prejudice. He asserted that the defendants’ actions “effectively impede[] and chill[] his ability to communicate openly with his legal representatives,” “to prepare the necessary legal documents to initiate legal remedies available to him under Virginia statutory law,” “to obtain legal advice,” “to secure and maintain legal representation,” and “to exercise his right to petition the government for redress of grievances.” Third. Am. Compl. ¶ 14. These assertions do not reflect any instance in which the opening and reading of legal mail sent by paralegal Deans outside of plaintiff’s presence prevented the plaintiff from filing any legal documents at all or on-time. Further, as the Attorney General has represented that correspondence from paralegal Deans will be treated as authorized by her supervising attorney, who is counsel to Giarratano, there can be no allegation of impending injury. As such, this case fails to state a claim.

IV.

For the reasons discussed above, the undersigned recommends that, pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii), the plaintiff’s complaint be dismissed for failure to state a claim on which relief may be granted.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to petitioner and counsel of record.

Enter this 25th day of November, 2008

/s/ Michael F. Urbanski
United States Magistrate Judge