

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH FORTUNE

Plaintiff

vs.

: 3: 91-1371

JOSEPH D. LEHMAN, ET AL.

Defendants

FILED  
SCRANTON

NOV 21 1991

PER CTC  
DEPUTY CLERK

MEMORANDUM AND ORDER

Before the Court is the Report and Recommendation of United States Magistrate Judge Raymond J. Durkin on the above-captioned civil rights action. It is the recommendation of the Magistrate Judge that we grant Plaintiff's request to proceed in forma pauperis and thereafter dismiss this case. The Plaintiff responded to said Report and Recommendation by filing objections on November 5, 1991. After reviewing the matter "de novo", we shall adopt the Report and Recommendation, thereby granting Plaintiff's request to proceed in forma pauperis and dismissing this case.

BACKGROUND

Plaintiff, an inmate at the State Correctional Institution, Huntingdon, Pa., filed this civil rights action on October 25, 1991, pursuant to 42 U.S.C. § 1983. Plaintiff contends that the Defendants violated his constitutional rights by intentionally depriving Plaintiff of his personal property, to wit: **twenty (20) copies of Watchtower Magazine and personal mail.**

On June 20, 1991, Plaintiff was placed on pre-hearing confinement status and was removed from the general population and placed in D-Annex Restricted Housing Unit. **Plaintiff claims that**

at this time, all his personal property was confiscated from him and placed in storage. (Doc.No. 1, ¶ 11).

On June 24, 1991, Plaintiff's status was changed from pre-hearing confinement to Disciplinary Custody Status. Plaintiff contends that shortly thereafter his personal property was inventoried by Defendants, Correctional Officers Kauffman and Conway, to determine which property he could have in disciplinary custody and which property must be stored. (Doc. No. 1, ¶ 15). Plaintiff alleges that he was told by Defendant Conway that Plaintiff was not allowed to have twenty (20) copies of the Watchtower Magazine in disciplinary custody. Defendant Conway further told Plaintiff that if his mail was not taken to the Restricted Housing Unit (RHU), Plaintiff had to mail it home or it would be thrown in the trash. (Doc.No. 1, ¶ 16). Plaintiff refused to mail the magazines or personal mail home and instead requested that these items be placed in storage with the rest of his property (Doc. No. 1, ¶ 17).

Plaintiff asserts that Defendant Conway then threw Plaintiff's magazines and personal mail in the trash, "acting very hostile and prejudicial towards Plaintiff by ignoring Plaintiff's protest/questions." and "without affording Plaintiff the proper opportunity to protest the confiscation of his property." (Doc.No. 1, ¶ 19).

Plaintiff filed a grievance complaint on June 25, 1991, which concluded in the affirmation of Defendant Conway's action. This

result was upheld throughout the exhaustion of Plaintiff's administrative appeals.

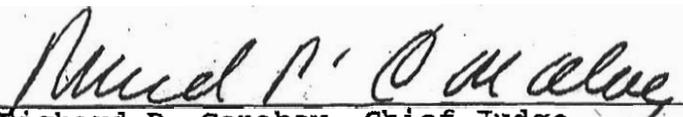
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It is well settled that in an action brought pursuant to 42 U.S.C. § 1983 the Plaintiff must allege that there was a deprivation of a right "secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. When an unauthorized deprivation occurs, as Plaintiff claims here, a constitutional violation will exist only when the state fails to provide an adequate remedy for the Plaintiff to seek redress of his claim. McClendon v. Turner, 765 F. Supp. 251 (W.D. Pa. 1991). In other words, "an intentional or negligent deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available on a state level." Hudson v. Palmer, 468 U.S. 517, 533 (1980). Because post-deprivation remedies exist through State tort and common law actions, Plaintiff's claim does not rise to the level of a constitutional deprivation at this time. Therefore, if a deprivation of Plaintiff's constitutional rights did occur, Plaintiff's appropriate course of action is to pursue the available state remedies. Accordingly, Plaintiff is precluded at this time from seeking redress pursuant to 42 U.S.C. § 1983 and this case is dismissed without prejudice.

CONCLUSION

For the reasons discussed above, we shall adopt the Report and Recommendation of the Magistrate Judge and grant Plaintiff's request to proceed in forma pauperis. We shall also dismiss Plaintiff's complaint without prejudice at this time.

An appropriate Order is attached.

  
Richard P. Conaboy, Chief Judge  
Middle District of Pennsylvania

DATE: 11/21/91

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH FORTUNE

:

Plaintiff

:

vs.

: 3: 91-1371

JOSEPH D. LEHMAN, ET AL.

:

Defendants

:

ORDER

AND NOW, THIS 21st DAY OF NOVEMBER, 1991, IT IS HEREBY  
ORDERED AS FOLLOWS:

1. The Report and Recommendation of the Magistrate Judge is adopted and approved.
2. Plaintiff's request to proceed in forma pauperis is granted.
3. Plaintiff's complaint is dismissed without prejudice at this time.
4. The Clerk of the Court is directed to close this case file.

*Richard P. Conaboy*  
Richard P. Conaboy, Chief Judge  
Middle District of Pennsylvania

DATE: 11/21/91

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FILED  
SCRANTON

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA NOV 1 - 1991

KENNETH FORTUNE,	:	
	:	PER <u>JWS</u>
Plaintiff	:	DEPUTY CLERK
v.	:	CIVIL ACTION NO. 91-1371
JOSEPH D. LEHMAN, <u>et al.</u> ,	:	(CONABOY, C.J.)
Defendants	:	(DURKIN, M.J.)

REPORT AND RECOMMENDATION

Plaintiff, an inmate at the State Correctional Institution, Huntingdon, PA, filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that defendants have intentionally deprived him of his personal property. He has submitted an affidavit in support of a request to proceed in forma pauperis which, for present purposes, will be deemed sufficient. The complaint will now be given preliminary consideration.

Plaintiff alleges that on June 20, 1991, the plaintiff was placed on pre-hearing confinement status and was removed from the general population and placed in D-Annex Restricted Housing Unit. Plaintiff claims that all his personal property was confiscated from him and placed in storage. (Doc. No. 1).

On June 24, 1991, the plaintiff's status was changed from pre-hearing confinement to Disciplinary Custody Status (Restricted Housing Unit (RHU)). Plaintiff states that soon after the status change he had his personal property inventoried by defendants, Correctional Officers Kauffman and Conway, to determine what property he could have in disciplinary status and which must be stored. (Id.).

Plaintiff claims that he was present during the course of the inventory but was handcuffed and took no active role in the inventory process. Plaintiff alleges that he was told by defendant Conway that he was not allowed to have twenty copies of the Watchtower Magazine in disciplinary custody. He was also told that if his mail was not taken to the "hole (RHU)" plaintiff had to either mail it home or it would be thrown in the trash. Plaintiff states that he refused to mail the magazines or personal mail home or throw them in the trash. Plaintiff requested that these items be placed in storage with the rest of his property. (Id.).

Plaintiff claims that defendant Conway then threw plaintiff's magazines and personal mail in the trash and did not give the plaintiff a confiscation slip. Plaintiff states that defendant Conway "acted very hostile and prejudicial towards the plaintiff by ignoring plaintiff's protest/questions" and "without affording plaintiff the proper opportunity to protest the confiscation of his property." (Id.).

On June 25, 1991, plaintiff states that he filed a grievance complaint with defendant Grove, grievance coordinator, who concurred and affirmed defendants' actions. Plaintiff states that "this decision was upheld throughout exhaustion of administrative appeals by defendants William J. Love, Superintendent and Joseph D. Lehman, Commissioner. Plaintiff seeks injunctive relief as well as compensatory and punitive damages. (Id.).

In an action brought pursuant to 42 U.S.C § 1983, the plaintiff must allege that the defendants deprived him a right secured by the Constitution and laws of the United States. Maine v. Thiboutot, 448 U.S. 1 (1980); Baker v. McCollan, 443 U.S. 137 (1979). It is well-settled that negligent or even intentional deprivations of property by state officials does not violate the Fourteenth Amendment if there exist appropriate state means for post-deprivational redress of the injuries sustained by the inmate. Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 527 (1981). In the present case, if a negligent, or even intentional, deprivation of plaintiff's property did occur, he can seek redress through state action. Thus, since state tort and common law remedies are available, the plaintiff is precluded from seeking redress pursuant to § 1983.

Thus, this complaint can be dismissed as frivolous under 28 U.S.C. § 1915(d). A complaint which contains both factual allegations and legal conclusions is frivolous where it lacks an arguable legal basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319 (1989). Because a post-deprivational remedy exists on the state level, the plaintiff's complaint lacks an arguable basis upon which his desired relief may be granted by this court and thus is to be deemed frivolous.

On the basis of the foregoing,  
IT IS RESPECTFULLY RECOMMENDED THAT  
for record purposes, the plaintiff be  
permitted to proceed in forma pauperis,  
and the same be dismissed.

  
Raymond J. Durkin  
United States Magistrate Judge

Dated: October 31, 1991



**904.2 Review of Case-Dispositive Motions and Prisoner  
Litigation - 28 U.S.C. Sec. 636(b)(1)(B).**

Any party may object to a magistrate judge's proposed findings, recommendations, or report, under subsections 901.4, .5, and .6 of these rules, supra, within ten (10) days after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Rule 904.1 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.



Raymond J. Durkin  
U. S. Magistrate Judge

Dated: 10/31/91

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 3:91-cv-01371 Fortune v. Lehman

True and correct copies of the attached were mailed by the clerk  
to the following:

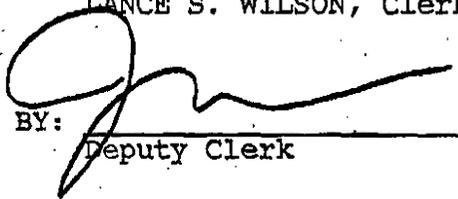
Kenneth Fortune  
SCI-H  
SCI at Huntingdon  
AY-9297  
Drawer R  
Huntingdon, PA 16652

DATE:

11/5/91

LANCE S. WILSON, Clerk

BY:

  
Deputy Clerk