

FILED: September 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6085
(6:20-cv-03365-DCN)

KEVIN HERRIOTT

Plaintiff - Appellant

v.

LIEUTENANT JACKSON

Defendant - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Floyd, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-6085

KEVIN HERRIOTT,

Plaintiff - Appellant,

v.

LIEUTENANT JACKSON,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at
Greenville. David C. Norton, District Judge. (6:20-cv-03365-DCN)

Submitted: April 27, 2021

Decided: May 3, 2021

Before KEENAN, WYNN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kevin Herriott, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kevin Herriott appeals the district court's order accepting the recommendation of the magistrate judge and dismissing Herriott's 42 U.S.C. § 1983 action under 28 U.S.C. § 1915A(b). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Herriott v. Jackson*, No. 6:20-cv-03365-DCN (D.S.C. Dec. 16, 2020). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Mr Kevin E Herriott

Plaintiff

v.

Lieutenant Jackson

Defendant

)
)
)
)
)

Civil Action No. 6:20-cv-3365-DCN

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

☐ the plaintiff (name) _____ recover from the defendant (name) _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____ recover costs from the plaintiff (name) _____.

XX other: The action is dismissed with prejudice and without issuance and service of process.

This action was (check one):

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

XX decided by the Honorable David C Norton

Date: December 17, 2020

CLERK OF COURT

s/KathyRich, Deputy Clerk

Signature of Clerk or Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

Kevin Herriott,)	C/A No.: 6:20-cv-3365 DCN
)	
Plaintiff,)	
)	
vs.)	<u>ORDER</u>
)	
Lt. Jackson,)	
)	
Defendant.)	
)	

The above referenced case is before this court upon the magistrate judge's recommendation that this action be dismissed with prejudice and without issuance and service of process. It was further recommended that this dismissal be counted as a strike pursuant to 28 U.S.C. § 1915(g).

This Court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).¹ **Objections to the magistrate judge's report and**

¹In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to

recommendation were timely filed on December 11, 2020 by plaintiff.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is **AFFIRMED**, and this action is **DISMISSED** with prejudice and without issuance and service of process.

IT IS FURTHER ORDERED that this case is deemed a "strike" for the purposes of the "three strikes" rule of 28 U.S.C. § 1915(g).

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

December 16, 2020
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure.

appraise him of what is required." Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Kevin Herriott,

Plaintiff,

vs.

Lt. Jackson,

Defendant.

C/A No. 6:20-cv-03365-DCN-KFM

REPORT OF MAGISTRATE JUDGE

The plaintiff, a state prisoner proceeding *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights. Pursuant to the provisions of 28 U.S.C. § 636(b), and Local Civil Rule 73.02(B)(2)(d) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in cases filed under 42 U.S.C. § 1983 and submit findings and recommendations to the district court.

The plaintiff's complaint was entered on the docket on September 23, 2020 (doc. 1). By Order filed October 21, 2020, the plaintiff was informed that his complaint was subject to summary dismissal because it failed to state a claim upon which relief may be granted, and that he could attempt to cure the defects identified in his complaint by filing an amended complaint within 14 days (doc. 7). The plaintiff was informed that if he failed to file an amended complaint or otherwise cure the deficiencies outlined in the order, the undersigned would recommend that his case be dismissed (*id.* at 5). On November 4, 2020, the plaintiff's amended complaint was entered on the docket (doc. 12). Because the plaintiff's amended complaint likewise fails to state a claim upon which relief may be granted, the undersigned recommends dismissal of the case.

ALLEGATIONS

The plaintiff, a state prisoner in the custody of the South Carolina Department of Corrections ("SCDC") and located at McCormick Correctional Institution, brings this action regarding alleged constitutional violations which occurred while an inmate at Lieber Correctional Institution ("Lieber") (doc. 12). The plaintiff's amended complaint alleges that on September 25 and 26, 2019, the defendant, who works at Lieber, violated the plaintiff's rights by interfering with a piece of outgoing mail (*id.* at 6, 7–8). The plaintiff contends that the defendant's actions caused a pending meritorious legal claim or appeal to be dismissed (*id.* at 7–8). For injuries, the plaintiff alleges that he was denied access to the courts, his outgoing mail was interrupted, as well as mental anguish, emotional distress, and loss of sleep (*id.* at 9). For relief, the plaintiff seeks money damages (*id.*).

STANDARD OF REVIEW

The plaintiff filed this action pursuant to 28 U.S.C. § 1915, the *in forma pauperis* statute. This statute authorizes the District Court to dismiss a case if it is satisfied that the action "fails to state a claim on which relief may be granted," is "frivolous or malicious," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Further, the plaintiff is a prisoner under the definition of 28 U.S.C. § 1915A(c), and "seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Thus, even if the plaintiff had prepaid the full filing fee, this Court is charged with screening the plaintiff's lawsuit to identify cognizable claims or to dismiss the complaint if (1) it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

As a *pro se* litigant, the plaintiff's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*). The requirement of liberal

construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

This case is filed pursuant to 42 U.S.C. § 1983, which “‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). A civil action under § 1983 “creates a private right of action to vindicate violations of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States.” *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

DISCUSSION

As noted above, the plaintiff filed the instant action pursuant to § 1983, seeking damages from the defendant. However, the plaintiff's amended complaint is subject to summary dismissal.

Interference with Mail Claims

The plaintiff alleges that his Constitutional rights have been violated because the defendant interfered with his outgoing mail on September 25 and 26, 2019 (doc. 12 at 6, 7–8).¹ As an initial matter, interference with an inmate's mail may constitute a claim under § 1983 in certain circumstances. See *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (holding that prisoners possess a First Amendment right to send and receive mail). However, even as amended, the plaintiff's vague and conclusory allegations that the

¹ To the extent the plaintiff alleges that he is being denied access to the courts due to the handling of his mail, that claim has been addressed separately. See *infra*, pp. 4–5.

defendant interfered with the plaintiff's mail on two dates, absent factual allegations regarding the alleged interference, fail to state a plausible claim for relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (citing *Twombly v. Bell Atl. Corp.*, 550 U.S. 544, 556–57 (2007)); *Griffith v. State Farm Fire and Cas. Co.*, C/A No. 2:12-cv-00239-DCN, 2012 WL 2048200, at *1 (D.S.C. June 6, 2012) (finding that the plausibility standard requires more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." (quoting *Iqbal*, 556 U.S. at 678)). Moreover, an occasional, negligent delay or interference with personal (or legal) mail, without more, does not impose a deprivation of Constitutional proportions. See *Pink v. Lester*, 52 F.3d 73, 75 (4th Cir. 1995); *Pearson v. Simms*, 345 F. Supp. 2d 515, 519 (D. Md. 2003), *aff'd* 88 F. App'x 639 (4th Cir. 2004). As such, the plaintiff's mail interference claim is subject to summary dismissal.

Denial of Access to the Courts Claim

To the extent the plaintiff asserts a denial of access to the courts claim based upon his allegation that the defendant's interference with his mail caused dismissal of another case in this court, such claim is also subject to summary dismissal. A claim for denial of access to the courts must be pled with specificity. *Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996). Further, in order to state a constitutional claim for denial of access to the courts, a prisoner must show actual injury. *Id.*; see *Lewis v. Casey*, 518 U.S. 343, 349 (1996). The actual injury requirement can be satisfied by demonstrating that a non-frivolous legal claim was frustrated or impeded by some actual deprivation of access to the court. *Lewis*, 518 U.S. at 352–53. Here, the plaintiff's conclusory allegation that the defendant caused the dismissal of another case by interfering with his mail does not plausibly allege actual injury. Further, the filings in this case—and in several others filed within this district—belie the plaintiff's claim that he lacks access to the court. See *Herriott*

v. Bostick, et al., C/A No. 6:20-cv-02833-DCN-KFM (D.S.C.) (pending); *Herriott v. State of S.C.*, C/A No. 6:20-cv-03336-DCN-KFM (D.S.C.) (pending); *Herriott v. Stirling, et al.*, C/A No. 6:19-cv-00804-DCN-KFM (D.S.C.), *dismissal aff'd as modified*, C/A No. 19-7102 (4th Cir. July 29, 2020); *Herriott v. McCabe*, C/A No. 6:19-cv-00803-DCN-KFM (D.S.C.), *appeal pending*, C/A No. 19-6878 (4th Cir.); *Herriott v. Ford, et al.*, C/A No. 6:19-cv-00751-DCN (D.S.C.), *aff'd*, C/A No. 20-6799 (4th Cir. Nov. 24, 2020); *Herriott v. Stephen, et al.*, C/A No. 6:19-cv-00750-DCN-KFM (D.S.C.), *appeal pending*, C/A No. 20-7176 (4th Cir.); *Herriott v. Joyner et al.*, C/A No. 6:19-cv-00626-DCN-KFM (D.S.C.), *appeal pending* C/A No. 20-7098 (4th Cir). As such, the plaintiff's denial of access to the courts claim is subject to summary dismissal.

RECOMMENDATION

By order issued October 21, 2020, the undersigned gave the plaintiff an opportunity to correct the defects identified in his complaint and further warned the plaintiff that if he failed to file an amended complaint or failed to cure the identified deficiencies, the undersigned would recommend to the district court that the action be dismissed *with prejudice* and without leave for further amendment. Despite filing an amended complaint, the plaintiff has not cured the deficiencies identified in the order dated October 21, 2020 (doc. 7). Therefore, the undersigned recommends that the district court decline to give the plaintiff further leave to amend his complaint and dismiss this action *with prejudice* and without issuance and service of process. *See Workman v. Morrison Healthcare*, 724 F. App'x 280, 281 (4th Cir. 2018) (in a case where the district court had already afforded the plaintiff an opportunity to amend, the district court was directed on remand to "in its discretion, either afford [the plaintiff] another opportunity to file an amended complaint or dismiss the complaint with prejudice, thereby rendering the dismissal order a final,

appealable order”) (citing *Goode v. Cent. Va. Legal Aid Soc’y, Inc.*, 807 F.3d 619, 630 (4th Cir. 2015)); see also *Bing v. Brivo Sys., LLC*, 959 F.3d 605 (4th Cir. 2020). It is further recommended that this action be designated as a “strike” pursuant to 28 U.S.C. § 1915(g).

The attention of the parties is directed to the important notice on the following page.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

December 1, 2020
Greenville, South Carolina