

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SEP 22 1997

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DONALD D. MacFARLANE

Plaintiff,

v.

KAY WALTER, et al.,

Defendants.

NO. 96-CY-3102 -LRS

REPORT AND RECOMMENDATION

Before the court is defendants' Motion for Summary Judgment and Dismissal. Ct. Rec. 20. On hearing without oral argument, plaintiff appeared pro se, and Assistant Washington State Attorney General Colleen B. Evans represented defendant.

Plaintiff is an inmate incarcerated at Airway Heights Correction Center (AHCC). Plaintiff filed suit under 42 U.S.C. § 1983, claiming that defendants violated his First and Fourteenth Amendment rights by prohibiting delivery of publications to which he subscribed, Prison Legal News and the American Civil Liberties Union National Prison Project Journal, without issuing mail rejection notices. These publications are sent as non-profit third-class mailings. Plaintiff maintains that he received these publications while housed at other Washington state correctional facilities. Plaintiff argues that AHCC's prohibition against bulk mail has been unconstitutionally applied to his subscription

1 publications. Defendants claim that they have a legitimate  
2 penological interest in prohibiting delivery of "bulk mail," a  
3 category in which plaintiff's subscription publications are  
4 included. Further, defendants maintain that plaintiff was given  
5 adequate due process by virtue of notice of the bulk mail policy.

6 The constitutionality of AHCC's prohibition against non-  
7 profit paid subscription publications, including Prison Legal  
8 News, was recently ruled upon in this district. In Miniken v.  
9 Walter, et al., No. CS-97-407-JLQ, the Judge Quackenbush found  
10 that subscription publications sent via non-profit third-class  
11 mail, or "standard mail," did not fall within the definition  
12 contained in AHCC Field Instruction 450.100. Thus, the court  
13 ruled that such publications cannot be denied delivery on the  
14 basis of the "bulk mail" definition. Moreover, Judge Quackenbush  
15 found that the defendants "have set forth no rational connection  
16 between the prohibition of non profit paid subscription  
17 publications such as Prison Legal News and any legitimate neutral  
18 penological purpose." Miniken v. Walter, et al., No. CS-97-407-  
19 JLQ, Memorandum Opinion and Order Granting Plaintiff's Motion for  
20 Summary Judgment at p. 12. Additionally, Judge Quackenbush ruled  
21 that plaintiff Miniken's due process rights were violated by the  
22 defendants failure to notify either plaintiff or the publisher of  
23 the rejection of the publication. Finally, Judge Quackenbush held  
24 that defendants were not entitled to qualified immunity.  
25 Accordingly, Judge Quackenbush enjoined defendants from denying  
26 delivery of subscription publications sent "standard mail" and  
27 awarded plaintiff Miniken damages. As such, under the law of this  
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1 district, the AHCC policy at issue is unconstitutional as applied  
2 to plaintiff's subscription publications.

3 Furthermore, the doctrine of issue preclusion mandates the  
4 same result in this case. Issue preclusion is appropriate when:  
5 (1) the issue decided in the prior adjudication is substantially  
6 identical to the issue in the subsequent action; (2) there was a  
7 final judgment on the merits; and (3) the party against whom the  
8 estoppel is asserted was a party to or in privity with a party in  
9 the first action. Durkin v. Shea & Gould, 92 F.3d 1510, 1516 (9th  
10 Cir. 1996), cert. denied, 117 S. Ct. 1553 (1997), citing Pension  
11 Trust Fund for Operating Eng'rs v. Triple A Machine Shop, Inc.,  
12 942 F.2d 1457, 1462 (9th Cir. 1991).

13 In this instance, plaintiff raises the same issue that was  
14 the subject of the Miniken decision: whether the AHCC practices of  
15 prohibiting delivery of subscription publications mailed via the  
16 standard rate and failing to give rejection notices for such  
17 publications violate inmates First and Fourteenth Amendment  
18 rights. Judge Quackenbush issued a final judgment on the merits  
19 and found that the AHCC practice was unconstitutional. All  
20 parties in this actions were either a named party in Miniken or in  
21 privity thereto as employees of the Department of Corrections.  
22 Finally, application of the doctrine will not work an injustice.  
23 Quite the contrary; to fail to apply the doctrine of issue  
24 preclusion would cause an injustice. Therefore, the undersigned  
25 finds that judgment should be rendered in favor of plaintiff.

26 The only remaining issue involves whether the claims against  
27 defendants Ervin and Riveland should be dismissed. Defendants  
28 Ervin and Riveland claim that they did not personally participate

1 in the violations of plaintiff's First Amendment rights and  
2 therefore must be dismissed from the action. Plaintiff agrees  
3 that dismissal of defendant Ervin is appropriate. However,  
4 plaintiff opposes defendant's argument with respect to defendant  
5 Riveland. Plaintiff claims that defendant Riveland had knowledge  
6 of AHCC's practice regarding personal subscription publication  
7 sent via bulk rate mail and approved this policy.

8 In order to hold a defendant liable for damages, plaintiff  
9 must show that the defendant either participated in or directed  
10 the violations, or knew of the violations and failed to act to  
11 prevent them. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.  
12 1989); Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988). In this  
13 case, defendant Riveland knew that AHCC destroyed, without notice,  
14 personal subscription publications sent non-profit third-class  
15 mail. Apparently, the publisher of Prison Legal News wrote to  
16 defendant Riveland in October of 1995, long before plaintiff filed  
17 this action. See plaintiff's First Amended Complaint, Exhibit  
18 2(d). In fact, defendant Riveland directed Director of Prisons  
19 Tom Rolfs to respond to this letter, in which Mr. Rolfs defended  
20 the policy at AHCC. Id., Exhibit 2(E). Further, in a response to  
21 admissions, defendant Riveland admitted that AHCC's policy had  
22 been brought to his attention. Ct. Rec. 40, Exhibit 12. In light  
23 of such evidence, it is clear that defendant Riveland knew of  
24 AHCC's policy administered in violation of plaintiff's First and  
25 Fourteenth Amendment Rights. Therefore,

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1           IT IS HEREBY RECOMMENDED that:

2           1. Defendant Riveland's motion for dismissal for lack of  
3 personal participation be DENIED, and defendant Ervin's motion for  
4 dismissal for lack of personal participation be GRANTED.

5           2. Plaintiff's Motion for Summary Judgment regarding  
6 violations of his First Amendment rights and Fourteenth Amendment  
7 right to procedural due process be GRANTED and Defendant's Motion  
8 for Summary Judgment regarding the same be DENIED in accordance  
9 with the ruling in Miniken v. Walter, et al., No. CS-96-407-JLQ.

10          2. Defendants be PERMANENTLY ENJOINED from prohibiting  
11 delivery of an inmate's paid-for subscription to a profit or  
12 nonprofit publication on the sole basis that the publication is  
13 mailed via "standard mail," in accordance with the ruling in  
14 Miniken v. Walter, et al., No. CS-96-407-JLQ.

15          3. Plaintiff be AWARDED actual damages in addition to costs,  
16 with the deadline for submission of plaintiff's affidavit of costs  
17 and damages to be set by the referring judge. Plaintiff's actual  
18 damages are those suffered as a direct result of defendants'  
19 failure to deliver his subscription publications or Prison Legal  
20 News and the ACLU's National Prison Project Journal, the  
21 publications referenced in his Complaint.

22          Any party may object to the Magistrate Judge's proposed  
23 findings, recommendations or report within ten (10) days after  
24 being served with a copy thereof. Intermediate weekends and legal  
25 holidays are excluded. Fed. R. Civ. Proc. 6(a). Such party shall  
26 file with the Clerk of the Court and serve on all parties written  
27 objections, specifically identifying the portions to which  
28 objection is being made, and the basis therefor. Any response to

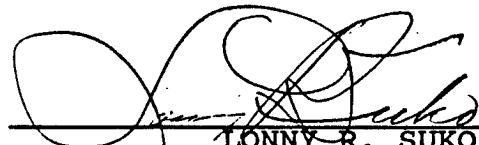
1 the objection shall be filed within ten (10) days after receipt of  
2 the objection. Intermediate weekends and legal holidays are  
3 excluded. Fed. R. Civ. Proc. 6(a). Attention is directed to Fed.  
4 R. Civ. Proc. 6(e) which adds another three (3) days from the date  
5 of mailing where service is by mail.

6 A District Judge shall make a de novo determination of those  
7 portions to which objection is made and may accept, reject, or  
8 modify the magistrate's determination. The Judge need not conduct  
9 a new hearing or hear arguments and may consider the Magistrate  
10 Judge's record and make his own determination thereon. The Judge  
11 may also receive further evidence or recommit the matter to the  
12 Magistrate Judge with instructions. See 28 U.S.C. Sec.  
13 636(b)(1)(B) and (C), Fed. R. Civ. P. 73 and LMR 4.

14 A Magistrate Judge's recommendation cannot be appealed to a  
15 Court of Appeals; only the District Judge's order or judgment can  
16 be appealed.

17 The Clerk of the Court shall file this report and  
18 recommendation and serve copies of it on the petitioner, counsel  
19 for respondent, and the referring judge, the Honorable Robert H.  
20 Whaley.

21 DATED this 22<sup>nd</sup> day of September, 1997.

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25 LONNY R. SUKO  
26 United States Magistrate Judge  
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