

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

[Filed Electronically]

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

**RODNEY BALLARD, former
Commissioner, in his individual capacity;
JIM ERWIN, acting Commissioner, in his
individual and official capacities;
KIMBERLY POTTER-BLAIR, Deputy
Commissioner, in her individual and official
capacities; CHRIS KLEYMEYER,
Director, Division of Operations &
Programs, in his individual and official
capacities; ASHLEY SHORT, in her
individual and official capacities; DEBBIE
KAYS, in her individual and official
capacities; and DOES 1-20, in their
individual and official capacities,**

Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
DAMAGES UNDER THE CIVIL
RIGHTS ACT, 42 U.S.C. § 1983**

JURY TRIAL DEMANDED

COMPLAINT

I. INTRODUCTION

1. Plaintiff, Human Rights Defense Center (“HRDC” or “Plaintiff”) brings this action to enjoin Defendants’ censorship of books sent from Plaintiff and other publishers to prisoners held by the Kentucky Department of Corrections (“KDOC”), in violation of the First and Fourteenth Amendments of the United States Constitution. Defendants have adopted and implemented mail policies prohibiting delivery of written speech from Plaintiff and other speakers, failed to provide adequate due process notice of and an opportunity to challenge the censorship, and denied Plaintiff equal protection as required under the Constitution.

II. JURISDICTION AND VENUE

2. This action is brought pursuant to 42 U.S.C. § 1331 (federal question), as this action arises under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343 (civil rights), as this action seeks redress for civil rights violations under 42 U.S.C. § 1983.

3. Venue is proper under 28 U.S.C. § 1391(b). At least one Defendant resides within this judicial district, and a substantial part of the events or omissions giving rise to the claims asserted herein all occurred within this judicial district.

4. HRDC's claims for relief are predicated upon 42 U.S.C. § 1983, which authorizes actions to redress the deprivation, under color of state law, of rights, privileges and immunities secured to HRDC by the First and Fourteenth Amendments to the U.S. Constitution and the laws of the United States.

5. This Court has jurisdiction over claims seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure, as well as nominal and compensatory damages, against all Defendants.

6. HRDC's claim for attorneys' fees and costs is predicated upon 42 U.S.C. § 1988, which authorizes the award of attorneys' fees and costs to prevailing plaintiffs in actions brought pursuant to 42 U.S.C. § 1983.

7. HRDC is informed, believes, and based thereon alleges that the individual Defendants acted as described herein with the intent to injure, vex, annoy and harass HRDC, and subjected HRDC to cruel and unjust hardship in conscious disregard of HRDC's rights with the intention of causing HRDC injury and depriving it of its constitutional rights.

8. As a result of the foregoing, HRDC seeks injunctive and declaratory relief, as well as compensatory and punitive damages against the individual Defendants.

III. PARTIES

9. The Human Rights Defense Center is a not-for-profit charitable organization recognized under § 501(c)(3) of the Internal Revenue Code, incorporated in the state of Washington, and with principal offices in Lake Worth, Florida. The purpose of HRDC, as stated in its Articles of Incorporation, is to educate prisoners and the public about the constitutional rights of prisoners, conditions in American jails and prisons, and the economic and social costs of mass incarceration. HRDC accomplishes its mission through litigation, advocacy, and publication and/or distribution of books, magazines and other information concerning prisons and prisoner rights.

10. Defendant Rodney Ballard was the Commissioner of the KDOC from March 2016 until his resignation in May 2017. No successor to Defendant Ballard's position has been appointed. While he was Commissioner, Defendant Ballard had ultimate responsibility for the promulgation and enforcement of all KDOC staff policies and procedures and was responsible for the overall management of the KDOC, to include processing of mail. Defendant Ballard is sued in his individual capacity. Plaintiff further intends to amend the instant Complaint to add the new Commissioner for KDOC when that office is filled.

11. Defendant Jim Erwin is currently the acting Commissioner of the KDOC, and is currently overseeing the KDOC's operations until a new commissioner is appointed. Defendant Erwin has ultimate responsibility for the promulgation and enforcement of all KDOC staff policies and procedures and is responsible for the overall management of the KDOC, to include processing of mail. Defendant Erwin is sued in his individual and official capacities.

12. Defendant Kimberly Potter-Blair is the Deputy Commissioner for Support Services of the KDOC. Defendant Potter-Blair is responsible for the promulgation and implementation of

policies, procedures, and practices at the KDOC. Defendant Potter-Blair is sued in her individual and official capacities.

13. Defendant Chris Kleymeyer is the Director of the KDOC Division of Operations & Programs. As such, Defendant Kleymeyer oversees the KDOC's Policy & Procedure Branch, which is responsible for the adoption and implementation of the mail policies at the KDOC, and/or for the hiring, screening, training, retention, supervision, discipline, counseling and/or control of KDOC staff who interpret and implement the mail policies. Defendant Kleymeyer is sued in his individual and official capacities.

14. Defendants Ashley Short and Debbie Kays are employed in the KDOC's Policy & Procedure Branch. As such, they were responsible for the adoption and implementation of the mail policies at the KDOC, and/or for the hiring, screening, training, retention, supervision, discipline, counseling and/or control of KDOC staff who interpret and implement the mail policies. Defendants Short and Kays are both sued in their individual and official capacities.

15. The true names and identities of Defendants DOES 1 through 20 are presently unknown to HRDC. Each of Defendants DOES 1 through 20 are or were employed by and are or were agents of Defendants when some or all of the challenged inmate mail policies and practices were adopted and/or implemented. Each of Defendants DOES 1 through 20 were personally involved in the adoption and/or implementation of the mail policies at the KDOC, and/or were responsible for the hiring, screening, training, retention, supervision, discipline, counseling, and/or control of the KDOC staff who interpret and implement these mail policies. HRDC will seek to amend this Complaint as soon as the true names and identities of Defendants DOES 1 through 20 have been ascertained.

16. At all times material to this action, the actions of all Defendants as alleged herein were taken under the authority and color of state law.

17. At all times material to this action, all Defendants were acting within the course and scope of their employment as agents and/or employees of Defendant KDOC.

IV. FACTUAL ALLEGATIONS

A. HRDC's Mission and Outreach to the KDOC

18. For more than 26 years, the focus of HRDC's mission has been public education, advocacy and outreach on behalf of, and for the purpose of assisting, prisoners who seek legal redress for infringements of their constitutionally guaranteed and other basic human rights. HRDC's mission, if realized, has a salutary effect on public safety.

19. As part of its mission to educate prisoners and the public about prisons, HRDC publishes and distributes publications including: 1) an award-winning, 72-page monthly magazine titled *Prison Legal News: Dedicated to Protecting Human Rights*, which contains news and analysis about prisons, jails and other detention facilities, prisoners' rights, court opinions, management of prison facilities, prison conditions, and other matters pertaining to the rights and/or interests of incarcerated individuals; and 2) approximately fifty (50) different softcover books about the criminal justice system, legal reference books, and self-help books of interest to prisoners. These books are designed to foster a better understanding of prisoners' rights and criminal justice policies and to allow prisoners to educate themselves about related issues, such as legal research, how to write a business letter, health care issues, and similar topics.

20. Accordingly, HRDC engages in core protected speech and expressive conduct on matters of public concern, such as the operation of prison facilities, prison conditions, prisoner health and safety, and prisoners' rights. HRDC's publications, as described above, contain

political speech and social commentary, which are core First Amendment rights and are entitled to the highest protection afforded by the United States Constitution.

21. HRDC has thousands of customers in the United States and abroad, including prisoners, attorneys, journalists, public libraries, judges, and members of the general public. HRDC distributes its publications to prisoners and law librarians in more than 2,600 correctional facilities located across all fifty states, including the Federal Bureau of Prisons, KDOC and various state and local facilities within the Commonwealth of Kentucky. Within KDOC alone, HRDC has sent its publications to the following facilities: Bell County Forestry Camp, Blackburn Correctional Complex, Eastern Kentucky Correctional Complex, Green River Correctional Complex, Kentucky Correctional Institution for Women, Kentucky State Penitentiary, Kentucky State Reformatory, Little Sandy Correctional Complex, Luther Lockett Correctional Complex, Northpoint Training Center, Roederer Correctional Complex, and Western Kentucky Correctional Complex.

22. HRDC has sent its monthly magazine, *Prison Legal News*, to numerous prisoners in the KDOC. The magazine has not been censored by Defendants; instead, it is delivered to the intended prisoner-recipients.

23. Unlike the magazine, however, Defendants have adopted a policy and practice of arbitrarily prohibiting receipt of various HRDC's books sent to individual prisoners held by the KDOC. Specifically, since July 2016, HRDC has sent numerous softcover books to prisoners held by the KDOC, including: 1) *The Habeas Citebook: Ineffective Assistance of Counsel* ("*Habeas Citebook*"), which describes the procedural and substantive complexities of federal habeas corpus litigation with the goal of identifying and litigating claims involving ineffective assistance of counsel; 2) *Prisoner Diabetes Handbook: A Guide to Managing Diabetes – for Prisoners, by Prisoners*, which provides guidance on treating and managing diabetes while incarcerated; 3) the

Prisoners' Self-Help Litigation Manual, a comprehensive tool for learning about prisoner's civil rights, and providing the necessary information and background to formulate a strong legal self-defense for those rights; 4) *Represent Yourself in Court: How to Prepare & Try a Winning Case*, which breaks down the civil trial process in easy-to-understand steps; and 5) the *Merriam-Webster Dictionary of Law*.

24. Defendants censored a substantial portion of these books and did not deliver them to the intended prisoner-recipient in the KDOC. Since July 2016 HRDC separately sent one hundred fifty-eight (158) softcover books to various prisoners held by the KDOC. One hundred thirty-one (131) of these books were sent complimentary, while twenty-seven (27) were purchased by prisoners or on behalf of prisoners.

25. Plaintiff can identify at least twenty-six (26) books sent by HRDC to prisoners held by the KDOC which were censored by Defendants. In one instance, a copy of the *Diabetes Handbook* was returned to HRDC with the notations "MAIL ROOM KY STATE PENITENTIARY REFUSED", "policy 2-C-1", and with boxes checked indicating the refusal was due to "Colored paper/envelope/ink", "Stickers", "Contraband", and "Other." None of the other censored books were returned to HRDC; instead, Plaintiff was notified by either the prisoner-recipient or the KDOC itself that the book was not delivered.

26. On information and belief, a substantial portion of the other books mailed by HRDC to individual prisoners held by the KDOC were also censored by the Defendants.

27. Further, in several instances Defendants failed to provide HRDC any notice or opportunity to appeal these censorship decisions. When notice was sent by the Defendants, it did not adequately describe the censorship or the procedure by which KDOC's decision could be appealed.

28. On or about August 1, 2016, HRDC received seventeen (17) separate “NOTICE OF UNAUTHORIZED MAIL” forms from the KDOC. The forms did not state what the unauthorized mail was, but presumably were in reference to books that HRDC had sent to prisoners at the Kentucky State Penitentiary earlier that month. Each form referenced a different prisoner, and in every instance gave the reason for rejection as “Free Book.”

29. HRDC received additional NOTICE OF UNAUTHORIZED MAIL forms on or about February 2, 2017, March 20, 2017, and April 28, 2017. These notices were in reference to three separate books that were sent to separate prisoners at the Eastern Kentucky Correctional Complex. In each case, the reason for rejection was “Books ... not directly from publisher or authorized distributor....” The April 28, 2017 form had an additional notation in the contraband section: “Free.”

30. All of the NOTICE OF UNAUTHORIZED MAIL forms referenced the appeal policy contained in Kentucky Corrections Policy 16.2. That policy states that “[a] publisher may appeal a decision not to deliver an item to an inmate to the Commissioner [of the Department of Corrections].” The policy does not impose any time limit on when a publisher may enter an appeal.

31. The NOTICE OF UNAUTHORIZED MAIL forms received on August 1, 2016 (but not the forms received on later dates) also included the following language: “If a Publisher’s item was returned you may file an appeal within fifteen (15) calendar days to the Commissioner of the Department of Corrections @ 275 East Main St. Frankfort, Ky, 40601.”

32. For all other books that were not delivered, HRDC did not receive any notice of the KDOC’s decision to censor its mail.

33. On or about August 16, 2016, HRDC appealed the rejection of its books at the Kentucky State Penitentiary to Defendant Ballard. Plaintiff has not received a decision on its appeal.

34. HRDC continued to attempt to resolve the censorship issues at the KDOC by writing a letter to the General Counsel for the Department of Corrections on January 23, 2017, outlining the constitutional infirmities in the KDOC's mail policies. HRDC sent a follow-up letter regarding the same issues on April 5, 2017. HRDC has not received a response to either letter.

35. Plaintiff will continue to mail copies of its books and other publications to subscribers, customers and other individuals imprisoned within the KDOC, but seeks the protection of this Court to ensure that the materials are delivered and, if not, that due process is afforded to the Plaintiff so it may challenge the basis for any censorship.

B. Defendants' Unconstitutional Mail Policies and Practices

36. Defendants' mail policy and practice bans books sent by HRDC and other senders to prisoners in the KDOC because the books were not purchased by prisoners, but rather were sent to them as gifts, and/or because the sender was not on a pre-approved vendor list. Accordingly, Defendants' mail policies and practices violate HRDC's First Amendment right to free speech.

37. Defendants' use of a pre-approved vendor list specifically excludes some publishers and vendors, like HRDC, from sending their books to prisoners within the KDOC, while allowing other publishers and vendors access to these same prisoners. Accordingly, Defendants' mail policy and practices violates HRDC's Fourteenth Amendment right to equal protection

38. Further, Defendants' policy of allowing prisoners to receive purchased books, but excluding gift books, prevents some publishers and vendors, like HRDC, from disseminating their speech to prisoners in the KDOC, while allowing other publishers and vendors access to these same prisoners. Accordingly, Defendants' mail policy and practices violates HRDC's Fourteenth Amendment right to equal protection.

39. Lastly, Defendants engage in a policy or practice that fails to provide senders of censored mail constitutionally adequate notice and an opportunity to appeal the censorship of the mail to the intended prisoner. Accordingly, such policy violates HRDC's Fourteenth Amendment rights to due process.

40. Said mail policies and practices are the moving force behind the constitutional violations at issue herein.

41. The accommodation of the free speech, expression, equal protection and due process rights of HRDC with respect to written speech protected by the Constitution will not have any significant impact on the prison, its staff or prisoners.

42. Due to Defendants' actions as described above, HRDC has suffered damages, and will continue to suffer damages, including, but not limited to: the suppression of HRDC's speech; the impediment of HRDC's ability to disseminate its political message; frustration of HRDC's non-profit organizational mission; the loss of potential subscribers and customers; and the inability to recruit new subscribers and supporters, among other damages.

43. Defendants' actions and inactions were and are motivated by ill motive and intent, and were and are all committed under color of law with deliberate indifference to HRDC's rights.

44. Defendants, and other agents of the KDOC, are responsible for or personally participated in creating and implementing these unconstitutional policies, practices, and customs, or for ratifying or adopting them. Further, Defendants are responsible for training and supervising the staff persons whose conduct has injured and continues to injure HRDC.

45. Defendants' unconstitutional policy, practices, and customs are ongoing, continue to violate HRDC's rights, and were and are the moving force behind the injuries HRDC suffered as a direct result of the constitutional violations. As such, HRDC has no adequate remedy at law.

46. Without relief from this Court HRDC will suffer irreparable injury since its fundamental First Amendment, due process and equal protection rights are being denied. The balance of hardships favors the Plaintiff and the public interest will be served by granting injunctive and declaratory relief.

47. HRDC is entitled to declaratory relief as well as injunctive relief prohibiting Defendants from refusing to deliver publications and correspondence from HRDC and other senders without any legal justification, and prohibiting Defendants from censoring mail without due process of law.

IV. CLAIMS

Count I – 42 U.S.C. § 1983 ***Violation of the First Amendment (Censorship)***

48. HRDC re-alleges and incorporates the allegations of Paragraphs 1 through 47 of the Complaint as if fully set forth herein.

49. The acts described above constitute violations of HRDC's rights, the rights of other publishers who have attempted to or intend to communicate with prisoners held by the KDOC, and the rights of the prisoners confined within the KDOC, under the First Amendment to the United States Constitution.

50. HRDC has a constitutionally protected liberty interest in communicating with incarcerated individuals, a right clearly established under existing case law.

51. The conduct of Defendants was objectively unreasonable and was undertaken recklessly, intentionally, willfully, with malice, and with deliberate indifference to the rights of others.

52. HRDC's injuries and the violations of its constitutional rights were directly and proximately caused by the policies and practices of Defendants, which were and are the moving force of the violations.

53. Defendants' acts described above have caused damages to HRDC, and if not enjoined, will continue to cause damage to HRDC.

54. HRDC seeks declaratory and injunctive relief, and nominal, compensatory and punitive damages against all Defendants. HRDC seeks punitive damages against the individual Defendants in their individual capacities.

Count II – 42 U.S.C. § 1983
Violation of Fourteenth Amendment (Due Process)

55. HRDC re-alleges and incorporates the allegations of Paragraphs 1 through 54 of the Complaint as if fully set forth herein.

56. The acts described above constitute violations of HRDC's rights and the rights of other publishers who have attempted to or who intend to communicate with prisoners held by the KDOC under the Fourteenth Amendment to the United States Constitution.

57. Because HRDC and others outside the KDOC facilities have a liberty interest in communicating with prisoners, HRDC and other senders have a right under the Due Process Clause of the Fourteenth Amendment to receive notice of and an opportunity to appeal Defendants' decisions to censor their written speech.

58. Defendants' policy and practice fail to provide HRDC and other senders with adequate notice and an opportunity to be heard.

59. The conduct of Defendants was objectively unreasonable and was undertaken recklessly, intentionally, willfully, with malice, and with deliberate indifference to the rights of others.

60. HRDC's injuries and the violations of its constitutional rights were directly and proximately caused by the policies and practices of Defendants, which are and were the moving force of the violations.

61. Defendants' acts described above have caused damages to HRDC, and if not enjoined, will continue to cause damage to HRDC.

62. HRDC seeks declaratory and injunctive relief, and nominal and compensatory damages against all Defendants. HRDC seeks punitive damages against the individual Defendants in their individual capacities.

Count III – 42 U.S.C. § 1983
Violation of the Fourteenth Amendment (Equal Protection)

63. HRDC re-alleges and incorporates the allegations of Paragraphs 1 through 62 of the Complaint as if fully set forth herein.

64. By permitting some publications to be delivered to prisoners within the KDOC, while specifically excluding books sent as gifts by HRDC and other senders, Defendants violate HRDC's equal protection rights as guaranteed by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

65. Further, Defendants' use of a pre-approved vendor list, which does not include Plaintiff or certain other publishers, violates HRDC's equal protection rights as guaranteed by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

66. HRDC is suffering ongoing and irreparable harm as a direct result of Defendants' discriminatory treatment, and the harm will continue unless the conduct is enjoined by this Court.

67. Defendants' conduct was objectively unreasonable and was undertaken recklessly, intentionally, willfully, with malice, and with deliberate indifference to HRDC's rights.

68. HRDC's injuries and the violations of its constitutional rights were directly and proximately caused by the policies and practices of Defendants, which are and were the moving force of the violations.

69. Defendants' acts described above have caused damages to HRDC, and if not enjoined, will continue to cause damage to HRDC.

70. HRDC seeks declaratory and injunctive relief, and nominal and compensatory damages against all Defendants. HRDC seeks punitive damages against the individual Defendants in their individual capacities.

V. REQUEST FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests relief as follows:

71. A declaration that Defendants' policies and practices violate the Constitution.
72. Nominal damages for each violation of HRDC's rights by the Defendants.
73. A preliminary and permanent injunction preventing Defendants from continuing to violate the Constitution, and providing other equitable relief.
74. Compensatory damages in an amount to be proved at trial.
75. Punitive damages against the individual Defendants in an amount to be proved at trial.
76. Costs, including reasonable attorneys' fees, under 42 U.S.C. § 1988, and under other applicable law.
77. Any other such relief that this Court deems just and equitable.

VI. JURY DEMAND

Plaintiff, Human Rights Defense Center, by and through its attorneys, hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

Dated: July 17, 2017

Respectfully submitted,

/s/ Gregory A. Belzley
Gregory A. Belzley
gbelzley@aol.com
Camille A. Bathurst
camillebathurst@aol.com
BELZLEY BATHURST ATTORNEYS
P.O. Box 278
Prospect, KY 40059
Telephone: (502) 292-2452

Sabarish Neelakanta, FL Bar #26623*
sneelakanta@hrdc-law.org
Masimba Mutamba, FL Bar #102772*
mmutamba@hrdc-law.org
Daniel Marshall, FL Bar # 617210*
dmarshall@hrdc-law.org
HUMAN RIGHTS DEFENSE CENTER
P.O. Box 1151
Lake Worth, FL 33460
Telephone: (561) 360-2523

Attorneys for Plaintiff

**Pro hac vice applications to be filed.*