

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
PRISON LEGAL NEWS,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	
)	
HAROLD CLARKE, in his individual and official)	
capacities; JAMES BENDER, in his individual and)	
official capacities; JOHN MARSHALL, in his)	
individual and official capacities; KATHLEEN)	
DENNEHY, in her individual capacity;)	
)	
Defendants.)	
_____)	

COMPLAINT

INTRODUCTION

1. Plaintiff, Prison Legal News (“PLN”), brings this civil rights action under 42 U.S.C. § 1983 for injunctive and declaratory relief, and for money damages, arising out Defendants’ violations of Plaintiff’s rights to freedom of speech and the press and to due process under the First and Fourteenth Amendments.

2. Plaintiff is an independent non-profit publisher and bookseller. PLN publishes a monthly magazine, *Prison Legal News*, and distributes approximately 40 books of special interest to prisoners. *Prison Legal News* has prisoner subscribers in all 50 states, and PLN distributes books to prisoners in 49 state prison systems and in the federal prison system. Massachusetts alone refuses to permit PLN to distribute books to its prisoners.

3. From 1998 until 2003, PLN distributed books to prisoners in the custody of the Massachusetts Department of Corrections (“DOC”) without incident and without any complaints

from DOC officials. Since approximately 2003, however, DOC has refused to deliver books distributed by PLN, purportedly because PLN is not one of the handful of “approved vendors” DOC allows to send books to prisoners. PLN has repeatedly written to DOC officials – including Defendant HAROLD CLARKE, the current DOC commissioner; Defendant JOHN MARSHALL, the Assistant Deputy Commissioner; and KATHLEEN DENNEHY, the former DOC commissioner – requesting that the “approved vendor” policy be eliminated, or that PLN be added to the approved vendor list. Defendants have denied or ignored PLN’s requests. The DOC has censored and continues to censor books sent by PLN to DOC prisoners, as well as, on occasion, *Prison Legal News*, without giving PLN notice or an opportunity to appeal.

JURISDICTION AND VENUE

4. This lawsuit is brought pursuant to 42 U.S.C. §1983 and §1988 against all Defendants for actions under color of state law in violation of the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Declaratory and further relief are authorized pursuant to 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to these claims occurred in this district.

PARTIES

6. Plaintiff, PRISON LEGAL NEWS, is a non-profit, charitable Washington corporation under IRS Code § 501(c)(3) with its headquarters in Seattle, Washington. PLN publishes *Prison Legal News*, a monthly journal of prison news, court decisions, and other developments affecting the rights of prisoners. PLN also distributes books of interest to

prisoners. *Prison Legal News* has approximately 6,800 subscribers in all 50 states and abroad. Approximately 65 percent of these subscribers are federal and state prisoners, including approximately 55 prisoners in the DOC's custody. PLN distributes books to prisoners in 49 states and in the Federal Bureau of Prisons.

7. Defendant HAROLD W. CLARKE ("CLARKE") is Commissioner of the Massachusetts DOC, a position he has held since November 2007. As Commissioner, CLARKE has ultimate responsibility for the promulgation and implementation of DOC policies, procedures, and practices and for the overall management of the DOC. Defendant CLARKE is being sued in his individual capacity for damages, and in his official capacity for injunctive and declaratory relief. At all relevant times, Defendant CLARKE has acted under color of state law.

8. Defendant JAMES BENDER ("BENDER") is Deputy Commissioner of the Massachusetts DOC, a position he has held since 2004. The Deputy Commissioner oversees the daily operations of the DOC, and directly supervises Assistant Deputy Commissioners, including Defendant MARSHALL. Defendant BENDER is responsible for departmental adherence to federal and state laws and regulations. For approximately six months in 2007, Defendant BENDER served as Acting Commissioner of the DOC; as such, he had ultimate responsibility for the promulgation and implementation of DOC policies, procedures, and practices and for the overall management of the DOC. Defendant BENDER is being sued in his individual capacity for damages, and in his official capacity for injunctive and declaratory relief. At all relevant times, Defendant BENDER has acted under color of state law.

9. Defendant JOHN MARSHALL, JR. ("MARSHALL") is Assistant Deputy Commissioner of the Massachusetts DOC, a position he has held since at least 2003. In this

capacity Defendant MARSHALL is responsible for the formulation and/or implementation of the DOC's policies regarding prisoner property including the approved vendor policy at issue in this case. Defendant MARSHALL is being sued in his individual capacity for damages, and in his official capacity for injunctive and declaratory relief. At all relevant times, Defendant BENDER has acted under color of state law.

10. Defendant KATHLEEN DENNEHY ("DENNEHY") was Commissioner of the Massachusetts DOC from March 2004 until approximately May 2007. As Commissioner, DENNEHY had ultimate responsibility for the promulgation and implementation of DOC policies, procedures, and practices and for the overall management of the DOC. Defendant DENNEHY is being sued in her individual capacity for damages. At all relevant times, Defendant DENNEHY acted under color of state law.

FACTS

11. Plaintiff publishes a monthly magazine, *Prison Legal News*, and also distributes books and other written materials concerning the legal rights of prisoners and the conditions affecting them.

12. *Prison Legal News* consists of articles from legal scholars, attorneys, inmates, and news wire services. Each issue of *Prison Legal News* contains articles on recent court decisions, as well as practical advice for prisoners on how to litigate and protect their rights. PLN has been publishing this magazine since May 1990.

13. *Prison Legal News* has approximately 6,800 subscribers in all 50 states and abroad. Approximately 65 percent of those subscribers are state and federal prisoners. Approximately 55 inmates confined in Massachusetts DOC facilities subscribe to *Prison Legal*

News.

14. Plaintiff is also a distributor of approximately 40 books and other written materials of interest to prisoners. Among the titles PLN sells or otherwise distributes are *No Equal Justice: Race and Class in the American Criminal Justice System*; *Represent Yourself in Court: How to Prepare and Try a Winning Case*; *Prisoner Diabetes Handbook: A Guide to Managing Diabetes – For Prisoners, by Prisoners*; and *Prison Writing in 20th Century America*, as well as English, Spanish-English, and legal dictionaries. PLN began distributing books in 1998.

15. PLN distributes the books and written materials in its catalog primarily through mail order sales. PLN distributes the *Prisoner Diabetes Handbook* free upon request. PLN also distributes copies of other titles in its catalog as a promotion to subscribers to the magazine.

16. PLN is the sole distributor of four publications. Prisoners have no means of obtaining these titles except through PLN. Plaintiff is also the publisher and sole distributor of the *Prisoners' Guerrilla Handbook to Correspondence Programs in the United States and Canada*.

17. By publishing its magazine, and distributing selected books and other publications, PLN is engaged in expressive activity. Among the ideas and political beliefs that PLN seeks to communicate are that prisoners have basic human rights, that they are entitled to safe and humane conditions of confinement, that corrections officers and public servants should be held accountable when they engage in misconduct, and that encouraging prisoner literacy and education benefits not only prisoners but society at large. Many of the titles PLN distributes contain critiques of the American criminal justice and prison systems. From time to time, *Prison*

Legal News publishes articles on issues involving the Massachusetts Department of Corrections. Articles within the past few years include “Massachusetts Prisoner Awarded \$250,000 for Assault During Strip Search,” “Massachusetts Prisoners Battle MRSA, Untreated Hepatitis C,” and “A Death in Custody: Massachusetts DOC Wracked by Scandal” (about the murder of defrocked priest John Geoghan).

18. PLN distributes its books to prisoners incarcerated in state correctional institutions in every other state but Massachusetts, as well as in the Federal Bureau of Prisons, without incident. California, the largest state prison system in the country, recently eliminated its “approved vendor” policy and expressly permits prisoners to receive materials from PLN.

19. From 1998 until 2003, Massachusetts DOC prisoners regularly ordered and received PLN books and other publications, including *Prison Legal News*, without incident. No DOC employee ever indicated to PLN that its materials created any security or prison management problem or otherwise threatened any penological interest.

20. In 2003, the Massachusetts DOC began refusing to deliver to DOC prisoners any materials from PLN other than the magazine. Since that time, PLN has received multiple complaints from subscribers whose access to PLN’s books and other publications for which they have paid – and, on occasion, their subscription to *Prison Legal News* – has been blocked by DOC employees pursuant to the policies of Defendants. PLN records indicate in each instance that the undelivered materials were received by the DOC facility where the inmate resided.

21. Notwithstanding DOC’s regulations requiring notice and an opportunity for appeal, *see* 103 C.M.R. § 481.16, as well as clearly established interpretations of the federal Due Process Clause, DOC has never notified PLN in any of the instances when it has refused to

deliver materials from PLN.

22. Such censorship and lack of notice continue to the present day. As recently as March 2008, prison officials, in accordance with Defendants' policies and practices, refused to deliver two books from PLN to a prisoner at Souza-Baranowski Correctional Center. No notice was sent to PLN, which learned of the censorship from the prisoner.

23. Since 2003, PLN has made multiple requests to Defendants to permit it to distribute its books to DOC inmates. On each occasion, PLN has requested that the DOC eliminate the pre-approved vendor policy or that, at a minimum, it add PLN to the list of approved vendors.

24. Defendants have either ignored these requests or provided groundless reasons for denying them. In 2003, Defendant Marshall wrote, *inter alia*, that he could not consider the request without a copy of PLN's "foreign registration certificate for the Commonwealth of Massachusetts," even though mail-order businesses like PLN, which do not have a physical presence in Massachusetts, are not required to file any such certificate. In 2005, Defendant Marshall, acting on Defendant Dennehy's behalf, denied the request based on the incorrect assertion that all of the books in PLN's inventory were available from other, approved sources. PLN has received no response to its most recent request to be added to the approved vendor list, which was sent in December 2007 to Defendant Clarke.

25. Defendants have not promulgated a standardized means, mechanism, or set of criteria for approving book and magazine vendors at DOC institutions. The DOC has no uniform guidelines for vendors seeking approved status, there are no procedures to notify vendors of a time frame within which a decision will be made, and there are no procedures for notifying

vendors how to appeal the denial of approved vendor status. Defendants typically do not even notify vendors that their requests have been denied.

26. On information and belief, Defendants do not have or do not follow uniform procedures to notify publishers and distributors of DOC correctional institutions' refusal to deliver publications, nor do they have sufficient, or perhaps any, procedures in place that allow publishers and distributors to appeal such refusals.

27. PLN has an interest, protected by the First and Fourteenth Amendments, in communicating with DOC prisoners who have subscribed to its magazine and with prisoners who have ordered, or would like to order, titles from its inventory of books. Plaintiff has been harmed and continues to be harmed by Defendants' interference with that communication. Plaintiff has also been harmed and continues to be harmed by the loss of revenue and good will, and damage to its business reputation, as DOC prisoners are deterred and prevented from ordering PLN publications and deterred from subscribing to *Prison Legal News*.

28. Defendants continue to engage in the foregoing actions and omissions as of the date of this complaint. Plaintiff PLN is suffering irreparable harm as a result of Defendants' continued violations of its constitutional rights, and therefore Plaintiff has no adequate remedy at law. These violations are continuing and will continue until enjoined by this Court.

CLAIMS FOR RELIEF

Count I: 42 U.S.C. § 1983, for Violations of the First and Fourteenth Amendments, Against All Defendants

29. Plaintiff incorporates all of the above paragraphs by reference.

30. Defendants' refusal to deliver publications from Plaintiff to prisoners in

Defendants' custody violates Plaintiff's rights to freedom of speech and freedom of the press as guaranteed by the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution.

31. As a direct and proximate result of Defendants' conduct in violation of Plaintiff's First Amendment rights as set forth above, Plaintiff has suffered, and continues to suffer, financial and reputational harm including lost business income and lost business good will, as well as irreparable harm to its right to expression.

32. Defendants' actions have been committed with reckless indifference to Plaintiff's federally protected rights.

33. The law establishing the illegality of Defendants' actions was clearly established at the time such actions were taken.

**Count II: 42 U.S.C. § 1983, for Violations of the Fourteenth Amendment,
Against All Defendants**

34. Plaintiff incorporates all of the above paragraphs by reference.

35. By failing to give notice of the censorship of publications sent by PLN to DOC prisoners, and an opportunity to be heard with respect to this censorship, Defendants have deprived and continue to deprive Plaintiff of liberty and property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

36. As a direct and proximate result of Defendants' conduct in violation of Plaintiff's due process rights as set forth above, Plaintiff has suffered, and continues to suffer, financial and reputational harm including lost business income and lost business good will, as well as irreparable harm to its right to liberty and property interests.

37. Defendants' actions have been committed with reckless indifference to Plaintiff's federally protected rights.

38. The law establishing the illegality of Defendants' actions was clearly established at the time such actions were taken.

WHEREFORE, Plaintiff respectfully requests that this Court

- (a) enter judgment declaring that the acts, conduct, and omissions of Defendants violate the First Amendment and the Fourteenth Amendment to the United States Constitution;
- (b) enter an order enjoining Defendants CLARKE, BENDER, and MARSHALL, and their employees, agents, and any and all persons acting in concert with them, from further violation of Plaintiff's First Amendment and Fourteenth Amendment rights;
- (c) award compensatory, punitive and nominal damages against all Defendants subject to proof at trial;
- (d) award Plaintiff reasonable attorney's fees, litigation expenses, and costs pursuant to 42 U.S.C. § 1988, and any other applicable law; and
- (e) grant any additional relief as may be necessary and proper.

A JURY TRIAL IS HEREBY DEMANDED ON PLAINTIFF'S CLAIMS FOR MONETARY DAMAGES.

RESPECTFULLY SUBMITTED,

PRISON LEGAL NEWS,
By its attorneys,

/s/ Howard Friedman

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