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United States District Court,
W.D. Wisconsin.

Nathaniel Allen LINDELL, and all others similarly situated, Petitioner,
v.
Jon E. LITSCHER, Secretary of the Wisconsin Department of Corrections; Cindy O'Donnell, Deputy Secretary to Litscher; John Ray, Corrections Complaint Examiner ("C.C.E."); Sandy Hautamaki, C .C.E.; Gerald Berge, Warden at Supermax Correctional Institution; Peter Huibregtse, Deputy Warden of Supermax; Captain Reed Richardson, a Captain at Supermax; Captain S. Blackbourn, a Captain at Supermax; Lieutenant Julie Biggar, a Lt. at Supermax; Tim Haines, Manager of Echo Unit at Supermax; Gary Boughton, Security Director at Supermax; Dianne Bennisch, Inmate Complaint Examiner ("I.C.E.") at Supermax; Ellen Ray, I.C.E.; Kelly Coon, I.C.E.; Sgt. Janzen; Sgt. Boyelson; Sgt. Mason; C.O. Wetter; C.O. S. Grondin; C.O. Mueller; C .O. Lomen; C.O. Heizn; C.O. Smith; C.O. Clark, all guards at Supermax; Karen Solomon, Supermax law librarian; John Sharpe, Manager Foxtrot Unit at Supermax, Respondents.

No. 02–C–21–C. | May 28, 2002.

Attorneys and Law Firms

Nathaniel Lindell, pro se, for Plaintiff.

Jody J. Schmelzer, Assistant Attorney General, Madison, WI, for Defendants.

Opinion

ORDER

CRABB, J.

***1** This is a proposed civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. *See Haines v. Kerner,* 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Massey v. Helman,* 196 F.3d 727 (7th Cir.1999); *see also Perez v. Wisconsin Dept. of Corrections,* 182 F.3d 532 (7th Cir.1999).

Petitioner has structured his lengthy complaint in an extremely complex fashion that makes it exceedingly difficult for the court to address it. Instead of describing his allegations fully in numbered paragraphs in the body of his complaint, he simply incorporates by reference dozens of "exhibits" consisting of various institutional complaints and appeals that he has filed and forces the court to rummage back and forth to cull the facts relating to each claim. With considerable effort, I have made out the following allegations of fact in the complaint and its attachments.

ALLEGATIONS OF FACT

Petitioner Lindell is a Wisconsin prisoner presently confined at the Supermax Correctional Institution in Boscobel, Wisconsin. Respondents Litscher and O'Donnell are secretary and deputy secretary, respectively, of the Wisconsin Department of Corrections. Respondents Hautamaki and John Ray are corrections complaint examiners. The rest of the respondents work at Supermax in various capacities. Respondents Berge and Huibregtse are warden and deputy warden, respectively. Respondents Richardson and Blackbourn are captains and respondent Biggar is a lieutenant at the prison. Respondents Haines and Sharpe manage Supermax's

Echo and Foxtrot units, respectively. Respondent Boughton is security director and respondents Bennisch, Ellen Ray, and Coon are inmate complaint examiners at Supermax. Respondents Janzen, Boyelson, Mason, Wetter, Grondin, Mueller, Lomen, Heizn, Smith and Clark are prison guards. Respondent Solomon is the prison's law librarian.

***2** Both the Department of Corrections and the Supermax Correctional Institution receive federal funds.

A. *First Amendment*

1. *Free expression—writing paper and typewriter*

On March 20, 2001, respondent Berge wrote petitioner to inform him that he (Berge) would not read any correspondence from petitioner written on legal loan paper. Petitioner is unable to write family, friends and the media because he does not have an adequate supply of paper. When petitioner first arrived at Supermax, prison policy was to provide inmates only one piece of paper each week. In November 2001, prisoners began to receive two pieces of paper each week, which is still not enough for petitioner to write even one letter. To this day, petitioner has insufficient paper for matters unrelated to pending litigation.

On March 26, 2001, petitioner wrote the Alpha Unit manager at Supermax asking that his "kith/kin" be allowed to mail him writing paper. Even though petitioner is indigent and thus has no money to buy his own paper, his request was denied.

On April 23, 2001, respondent Mueller threatened to discipline petitioner if he did not sign a property disposition slip allowing Mueller to destroy writing paper that an attorney had mailed to him. Petitioner signed the slip but only after making note of his objections. The paper was never given to petitioner and was eventually destroyed. On November 18, 2001, petitioner filed a complaint objecting to the fact that paper sent to him by a friend was not given to him. When petitioner wrote respondent Berge to ask that he be allowed to have the paper, Berge told him that prison policy limited inmates to purchasing paper from the prison canteen. Petitioner has no money with which to purchase paper at the canteen.

On July 21, 2001, petitioner filed a complaint objecting to the fact that he is not allowed to possess a typewriter in his cell.

2. *Mail censorship*

a. Gang-related letter

On September 21, 2001, respondent Haines demoted petitioner from level three to level one, which resulted in petitioner's losing access to various privileges. Respondent Haines demoted petitioner on the same day that respondent Richardson issued petitioner a warning for "group resistance" based on a letter petitioner wrote that did not constitute a security threat. The letter was written to another inmate who had killed the son of one of petitioner's friends. In the letter, petitioner told the inmate he was an idiot for affiliating with the "Bloods" gang. Respondent Richardson refused to send petitioner's letter because of its content.

b. Magazine and newspaper clippings

On October 12, 2001, respondent Grondin notified petitioner that he would not be allowed to receive four pages of magazine pictures that had been mailed to him by his father. On October 16, 2001, respondent Wetter notified petitioner that he would not be allowed to receive certain newspaper articles that had been mailed to him. Petitioner was told by respondent Berge that prisoners are prohibited from receiving items cut, pulled or photocopied from books, magazines or newspapers.

c. Postcards with "meaningful content"

***3** On July 7, 2001, petitioner filed a complaint objecting to a search of his cell that led to the confiscation of approximately 15 postcards from his cell by respondent Mueller and another guard. Petitioner was told that respondent Boyelson had ordered the search because petitioner is allowed to keep only 5 postcards in his cell at a time. Petitioner wants to possess the confiscated cards because they have meaningful content.

d. Outgoing mail

On June 28, 2001, petitioner filed a complaint objecting to the fact that he received a warning from respondent Clark because petitioner tried to mail a letter to a pen pal service that, in addition to his own name, contained the name of two other inmates who had requested that their names be included in the letter. Respondent Clark had no security reason for refusing to mail petitioner's letter.

On August 16, 2001, petitioner filed a complaint objecting to the fact that respondent Janzen refused to mail one of petitioner's letters because he wrote a short message on the back of the envelope.

3. ***Free exercise of religion and the Religious Land Use and Institutionalized Persons Act***

a. Writing paper
Petitioner is a "Heathen" and his religious beliefs compel him to draw and write religious poetry and "spellcraft." Petitioner has been unable to practice his religion because he has an inadequate supply of paper.

b. Phone calls for religious counseling or communion
Petitioner is an Odinist and because no Odinist services are available at Supermax, petitioner can get religious counseling only over the phone. Petitioner's inability to phone his co-religionists has hindered his ability to practice his religion because unlike monotheistic religions, the Odinist religion places a high value on communion with fellow Odinists.

B. ***Fourteenth Amendment***

1. ***Equal protection and familial association***
On April 1, 2002, petitioner filed an inmate complaint objecting to the fact that he is not allowed to phone people who are not on his visiting list and that he is not allowed to make at least as many phone calls as prisoners on level five. These rules are particularly burdensome on petitioner because his family lives too far away to visit. Since petitioner has been at Supermax he has been allowed no more than two 12–minute phone calls per month. At various points during his stay at Supermax, petitioner has been allowed even fewer calls. Petitioner's limited access to the phone has isolated him from his family, the media and others.

2. ***Procedural due process***

a. Demotion to level one – deprivation of liberty
Petitioner was demoted to level one because of a letter he wrote to another prisoner in which he told the prisoner that he was an idiot for joining the "Bloods" gang. Petitioner was not given a hearing or afforded due process protections before he was demoted, yet the demotion forced petitioner to spend 20 days on level one and to wait 105 days before being reviewed for possible advancement to level three and a further 105 days before being reviewed for possible transfer from Supermax.

b. Theft of postage stamps – deprivation of property
***4** On October 18, 2001, petitioner filed an inmate complaint objecting to the fact that 30 stamps mailed to him by a friend were stolen or misplaced by prison staff. Although prison officials told petitioner they had no record of the receipt of any stamps, it is obvious that whoever stole the stamps was not going to volunteer the information that they had arrived. Prison officials did not conduct a fair investigation into the theft.

C. ***Denial of Court Access***

1. ***Denial of paper, envelopes and postage from May 21—June 5, 2001***
From approximately May 21, 2001, through June 5, 2001, respondent Berge denied petitioner legal supplies such as paper, envelopes and postage and as a result petitioner was forced to dismiss a pending case. Respondent Berge denied petitioner his requested legal materials and respondent Ellen Ray did not timely address the inmate complaint that petitioner filed relating to the denial of those materials because she wanted to thwart petitioner's pending case.

2. ***Denial of legal materials, legal loan disbursements and library time***
On April 4, 2001, petitioner filed an inmate complaint objecting to the fact that respondents Berge and Wetter (along with various other persons not named as respondents) refused to deliver to petitioner 260 sheets of paper, 20 postcards, 10 manila envelopes and five envelopes containing copies of case law and legal papers bearing titles such as "Habeas Corpus," "Mandamus," and "Certiorari." These items were not delivered to petitioner because respondents wanted to hinder his legal work.

On June 25, 2001, petitioner filed an inmate complaint objecting to the fact that the prison law librarian (presumably respondent Solomon) refused to put him on the library priority list even though petitioner had four pending cases. Petitioner received only 17 cases in a 15–day period from the library, even though he was entitled to more by prison regulations. Petitioner was forced to seek extensions of time in three of his pending cases.

On July 24, 2001, petitioner filed an inmate complaint, objecting to the fact that his legal loan disbursement requests were being denied by someone in the warden's office. Petitioner expected that he would be injured by these denials because he had several cases pending at the time. He filed a similar inmate complaint on October 18, 2001.

On October 25, 2001, petitioner filed an inmate complaint, alleging that the first shift staff, including respondents Lomen, Heizn and Mason, refused to take him to the law library more than one time each week, although petitioner had requested to be taken there three or four times each week and was on the court deadline list. Respondents Lomen, Heizn and Mason lied to petitioner, telling him his name was not on the list. Petitioner complained to respondent Sharpe about these matters, but to no avail. This made it difficult for petitioner to prosecute his three pending cases. Petitioner had to complain constantly in order to get access to legal research materials that he needs in order to properly state a claim.

***5** On November 22, 2001, petitioner filed an inmate complaint, objecting to the fact that he was receiving fewer than the four copies of legal opinions he is entitled to each day. This delayed petitioner from filing various lawsuits.

3. ***Legal route system***
A Supermax policy prevents inmates from sending other inmates copies of legal materials through the "legal route" system. On April 13, 2001, respondent Smith refused to route copies of legal materials from petitioner to another inmate whose help petitioner needed in pursuing a post-conviction action. Respondent Smith told petitioner that he could not route photocopies of legal materials, but instead would need to handwrite the materials, even though the materials consisted of hundreds of pages of briefs and transcripts. Because petitioner could not secure assistance from his fellow inmate, he was unable to file a post-conviction motion until just recently and missed some issues and presented others improperly. This threatened to cause the dismissal of petitioner's post-conviction motion as untimely. In addition, the legal route policy prevented petitioner from getting help from another inmate, which resulted in the dismissal of a case petitioner had filed in this court (number 01–C–209–C). Legal materials can be routed only on Fridays, which means that petitioner cannot file group lawsuits with other inmates. The legal route policy is designed to deny inmates access to the courts.

D. ***Retaliation for Exercise of Constitutional Rights***

1. ***Shackles and handcuffs in library***
On May 3, 2001, petitioner filed an inmate complaint, objecting to the fact that he was shackled and handcuffed while using the prison law library. The handcuffs and shackles cause petitioner pain and difficulty when he writes and when he reads books. Inmates are not handcuffed and shackled when they engage in physical recreation. The handcuff and shackles policy was instituted to retaliate against litigious inmates, to discourage other inmates from filing lawsuits and to burden those who have filed suits.

2. ***Heizn and Solomon***
On October 30, 2001, petitioner filed an inmate complaint, objecting to the fact that respondent Heizn retaliated against him because of his legal work. Although petitioner told respondent Heizn that he had an active case and showed Heizn his briefing schedule, Heizn told petitioner "I'm not responsible, nor will I assist you in filing lawsuits, you're not on the list, you're not going" to the prison law library. Petitioner told respondent Heizn that the law librarian had verified that he was on the list, but Heizn ignored petitioner. Respondent Heizn's behavior was clearly retaliation for petitioner's legal work. On November 12, 2001, petitioner filed an inmate complaint, objecting to the fact that respondent Solomon had joined a conspiracy to deny him access to the courts in retaliation for his legal work by refusing to send him his Shepard's listings and giving him a warning for complaining to her about first shift staff's refusal to take him to the law computer.

3. ***Demotion to level one in November 2001***
***6** On November 14, 2001, petitioner filed an inmate complaint in which he objected to the fact that he was demoted to level one in retaliation for his complaints about not being given sufficient access to legal materials and because he was successfully litigating a case that petitioner maintains he is "bound to win, as the AAG refused to reply to [petitioner's] arguments and [in which he] sought sanctions on Ellen Ray and Pam Knicks for maliciously misfiling the return and on Gary McCaughtry, SM Pucket, and Jon Litscher for condoning an illegal decision in order to oppress and retaliate against [him]." It is apparent to petitioner that his complaints and successful litigation are the reasons he was demoted to level one. On level one, petitioner has lost access to a host of privileges.

OPINION

A. ***First Amendment***

1. ***Free expression—writing paper and typewriter***
I understand petitioner to contend that various

respondents are depriving him of his First Amendment right to free expression because 1) he is not allowed to receive writing paper mailed to him from friends and relatives and instead must buy paper from the prison canteen even though he is indigent; 2) he is provided only one or two sheets of writing paper (other than legal loan paper) each week, which is insufficient to write his friends, family and the media; and 3) he is not allowed to have a typewriter in his cell.

In general, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The Supreme Court has held that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* at 90. Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they engage in "censorship of ... [the] expression of 'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate." ' *Procunier v. Martinez,* 416 U.S. 396, 415, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

The allegation that respondents give indigent inmates only one or two pieces of paper a week for non-legal purposes does not implicate the First Amendment because "there is no constitutional entitlement to subsidy." *Lewis v. Sullivan,* 279 F.3d 526, 528 (7th Cir.2002). Although petitioner may not be able to write as much as he would like on free paper provided by the state, his allegations do not suggest that the policy operates in a discriminatory fashion. In addition, I am unaware of any constitutional provision that requires states to provide prison inmates with as much writing paper as they desire. Therefore, petitioner will be denied leave to proceed on that claim and his claim that he is not allowed to keep a typewriter in his cell. Petitioner does not allege that he is prevented from writing, but instead suggests that a typewriter might help him write more quickly and efficiently. I am aware of no constitutional provision that requires prison authorities to allow petitioner to have a typewriter in his cell.

***7** Petitioner argues that if the state will not give him unlimited paper, at the least he should be allowed to keep writing paper mailed to him by persons outside the prison so that he can communicate with his family, friends and the media. Although respondents' policy to deny petitioner unsubsidized writing paper may be supported by a legitimate penological interest, I cannot make that finding at this early stage of the litigation. (Petitioner is not entitled to an unlimited supply of such paper; prison officials have legitimate reasons to impose limits on the quantity of paper or other items an inmate may have in his cell at any one time). Accordingly, petitioner will be granted leave to proceed on this claim against both respondent Mueller, who allegedly refused to give petitioner writing paper that was mailed to him from outside the prison, and against respondent Berge, who told petitioner he was not allowed to keep paper mailed to him because prison policy allows inmates to acquire paper only from the prison canteen. Petitioner will also be granted leave to proceed against respondents Ellen Ray, Huibregtse, John Ray, O'Donnell and Litscher, who were all allegedly involved in rejecting petitioner's inmate complaints regarding the refusal to give him the paper. *See Verser v. Elyea,* 113 F. Supp 2d. 1211, 1215–16 (N.D.Ill.2000) ("personally denying or concurring in the denial of a grievance or appeal is personal responsibility" for purposes of § 1983) (citing *Black v. Lane,* 22 F.3d 1395, 1401 (7th Cir.1994)).

2. ***Mail censorship***

a. Gang-related letter

Petitioner alleges that he was demoted to level one because of a letter he wrote to another prisoner in which he told the prisoner that he was an idiot for joining the "Bloods" gang. I understand petitioner to contend that this violated his First Amendment right to free expression. I will dismiss this claim as legally frivolous. Prison regulations restricting inmate-to-inmate correspondence concerning gang-related matters are constitutional. *Turner,* 482 U.S. at 93. Prison officials have a legitimate security interest in preventing one inmate from writing a letter calling another inmate an idiot because of his alleged gang affiliation.

b. Magazine and newspaper clippings

Petitioner alleges that his First Amendment rights were violated when respondents refused to deliver mail to him that contained newspaper articles and pictures torn from a magazine. According to petitioner, his mail was withheld in accordance with a prison policy prohibiting prisoners from receiving item cut out of magazines, newspapers, books or photocopies of such materials. "Regulations affecting the sending of a 'publication' ... to a prisoner ... are 'valid if [they are] reasonably related to legitimate penological interests." ' *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (citations omitted). In *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court upheld a prison regulation prohibiting receipt of *hardback* books unless they were mailed from publishers, book clubs or bookstores. The Court noted that "hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons may easily be secreted in the bindings." *Id.* at 551. However, the Court

expressed no view as to the validity of a regulation that would impose similar restrictions on soft-cover books or magazines. *Id.* at 550 n. 31. Indeed, the Court's decision was influenced by the fact that the regulation in question "allow[ed] soft-bound books and magazines to be received from any source." *Id.* at 552.

***8** Other courts have noted that a broad ban on all publications not mailed from a publisher might not survive a First Amendment challenge. *Keenan v. Hall,* 83 F.3d 1083, 1093 (9th Cir.1996) ("state interest in prison security that justified the hardback rule in *Bell* may not justify a ban on other reading materials"); *Allen v. Coughlin,* 64 F.3d 77 (2nd Cir.1995) (reversing district court grant of summary judgment for defendant prison officials because record was insufficient to establish validity of a publishers-only rule for newspaper clippings as a matter of law). On the other hand, some courts have upheld publishers-only rules that apply to magazines, newspapers and soft-cover books in the face of First Amendment challenges. *Ward v. Washtenaw County Sheriff's Dep't,* 881 F.2d 325, 329 (6th Cir.1989); *Kines v. Day,* 754 F.2d 28 (1st Cir.1985). It does not appear that the Court of Appeals for the Seventh Circuit has ruled on this precise issue, although at least one district court in the Seventh Circuit has held that a publishers-only rule violated the First Amendment. *See Green v. Peters,* No. 71 C 1403, 1997 WL 769458, at *1 (N.D.Ill.Dec.5, 1997) (citing *Green v. Sielaff,* No. 71 C 1403 (N.D.Ill. Jan. 9, 1976)). Petitioner's allegation is sufficient to state a claim at this stage of the proceedings. Petitioner will be allowed to proceed on this claim against respondents Wetter, Grondin and Berge, who allegedly enforced the policy against petitioner, as well as respondent Litscher, who refused to respond to petitioner's letter complaining about the policy.

c. Postcards with "meaningful content"

Petitioner also alleges that his First Amendment rights were violated when respondents confiscated approximately fifteen postcards from his cell because he was allowed to keep only five postcards at a time according to prison regulations. Petitioner claims that this violated his First Amendment rights because the pictures on the cards were meant to convey a message. Petitioner has not explained how his inability to keep as many postcards as he wants in his cell, rather than a limited number of such cards, violates his First Amendment rights. Accordingly, this claim will be dismissed as legally frivolous.

d. Outgoing mail

Petitioner alleges that his First Amendment rights were violated when respondents refused to mail two letters he wrote. I understand petitioner to allege that one of the letters was to a pen pal service in which petitioner requested a pen pal for himself and two other prisoners who had asked him to write the service on their behalf and that his letter was not sent because it requested pen pals for the other inmates. An inmate's interest in sending mail is protected by the First Amendment. Regulations affecting outgoing inmate correspondence to non-prisoners must further "one or more of the substantial governmental interests of security, order, and rehabilitation" and be "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier,* 416 U.S. at 413; *Thornburgh,* 490 U.S. at 413 ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude that the implications of incoming materials."). Respondents may have a substantial interest that justifies preventing inmates from ordering services at the request of other inmates, but I cannot infer one from the face of petitioner's complaint. Accordingly, petitioner will be granted leave to proceed against respondent Clark, who allegedly refused to send petitioner's letter, as well as respondents O'Donnell, Huibregtse, Ellen Ray and John Ray, who allegedly dismissed petitioner's inmate complaints and appeals regarding the undelivered letter.

***9** Petitioner alleges also that a second letter he tried to send on August 16, 2001, was returned to him unmailed because he wrote a short message on the back of the envelope. For the same reasons discussed above, petitioner will be granted leave to proceed on this claim against respondent Janzen, who allegedly refused to mail the letter, as well as respondents O'Donnell, Huibregtse, Ellen Ray and John Ray, who allegedly dismissed petitioner's inmate complaints and appeals regarding the matter.

3. *Free exercise of religion and the Religious Land Use and Institutionalized Persons Act*

a. Writing paper

I also understand petitioner to allege that his rights under the First Amendment's free exercise clause are violated because petitioner is a "Heathen" or "Odinist" and that this affiliation requires him to draw and write religious poetry and "spellcraft," a practice that is hindered because of respondents' policy of providing inmates with only one or two pieces of paper a week. "[T]he Free Exercise Clause does not require states to make exceptions to neutral and generally applicable laws even when those laws significantly burden religious practices." *Goshtasby v. Board of Trustees of Univ. of Ill.,* 141 F.3d 761, 769 (7th Cir.1998) (citing *Employment Division Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 887, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)); *see also*

City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (Scalia, J., concurring) ("Religious exercise shall be permitted so long as it does not violate general laws governing conduct."); *Sasnett v. Sullivan,* 91 F.3d 1018, 1020 (7th Cir.1996), vacated on other grounds, 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d 1007 (1997) ("After *Smith* the only way to prove a violation of the free-exercise clause is by showing that government discriminated against religion, or a particular religion, by actually targeting a religious practice, rather than accidentally hit it while aiming at something else.... [O]nly intentional discrimination ... is actionable under *Smith."*). In other words, the restrictions about which petitioner complains must target Heathens alone or amount to intentional discrimination against Heathens. In his complaint, petitioner alleges that it is the prison's general policy to provide indigent inmates with only one or two pieces of paper each week and to destroy paper mailed to prisoners from friends or family. Petitioner has not alleged that the policy applies only to Heathens or was enacted in order to specifically target them. Accordingly, petitioner has failed to state a First Amendment free exercise claim.

Petitioner's Religious Land Use and Institutionalized Persons Act claim presents a more difficult question. The act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1. The rule

> ***10** applies in any case in which -
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Petitioner alleges that both the Department of Corrections and the Supermax prison receive federal funds. To the extent petitioner challenges respondents' refusal to provide him with more than one or two pieces of paper a week, he fails to state a claim under the act. Petitioner admits that he is given some paper every week free of charge. Although petitioner would like the state to subsidize the practice of his religion more generously than it does, the Act imposes no such requirement. However, it is possible that the prison regulation prohibiting petitioner from receiving paper mailed to him by family or friends states a claim under the rigorous standard of review established by the Act. Accordingly, petitioner will be granted leave to proceed against respondent Berge, who allegedly told petitioner that prison policy prevented even indigent prisoners from receiving writing paper from friends or relatives, as well as respondents Huibregtse, O'Donnell, Ellen Ray, John Ray and Litscher, who allegedly denied petitioner's inmate complaints and appeals regarding this matter. *See Verser,* 113 F.Supp.2d at 1215–16 ("personally denying or concurring in the denial of a grievance or appeal is personal responsibility" for purposes of § 1983). However, because the question of the Act's constitutionality is presently being litigated in this court in another case, *Charles v. Verhagen,* No. 01–C–0253–C, this claim will be stayed pending resolution of that question.

b. Phone calls for religious counseling or communion

I understand petitioner to allege that the limited access he has to the phone has hindered the exercise of his religion in violation of the First Amendment's free exercise clause. As explained above, because the prison rules limiting petitioner's access to the phone are neutral regulations of general applicability and not targeted at preventing Heathens or Odinists from communicating with spiritual advisers or fellow devotees, petitioner's free exercise claim must fail. *Goshtasby,* 141 F.3d at 769.

However, petitioner's allegation that the prison's rules regulating phone access have prevented him from exercising his religion because there are no Odinist religious services or counselors available to Supermax inmates states a claim under the Religious Land Use and Institutionalized Persons Act at this early stage of the proceedings. Petitioner will be granted leave to proceed on this claim against respondents Litscher and Berge, to whom plaintiff alleges he complained about the impact the phone regulations were having on his religious exercise, as well as respondent Biggar, who dismissed petitioner's inmate complaint on this matter. However, as with petitioner's other claim under the Act, this claim will be stayed pending resolution in *Charles* of the Act's constitutionality.

B. *Fourteenth Amendment*

1. *Equal protection and familial association*

***11** I understand petitioner to allege that his equal protection rights have been violated because he is not allowed as many phone calls as are inmates on level five. The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Statutes or regulations that allegedly violate the equal protection clause are subject to varying levels of

court scrutiny. Only if the statute or regulation either interferes with a fundamental right or discriminates against a suspect class will it have to withstand strict scrutiny. Otherwise a statute or regulation will generally survive an equal protection challenge if "the legislative classification ... bears a rational relation to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Petitioner's complaint identifies no fundamental right at stake and does not identify petitioner as a member of a suspect class. Therefore, petitioner's equal protection claims must be evaluated under the rational basis test. Under rational basis review, classifications "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

There can be little doubt that prison administrators may rationally implement behavior modification programs that provide disparate access to privileges to prisoners at different levels within the program. There is no constitutional imperative that prison administrators adopt a one-size-fits-all approach to managing prisoners in varying levels of confinement. Because various prisoners will react to their situation differently, prison officials can rationally provide incentives for good behavior or punishment for bad behavior based on those reactions. Petitioner will not be allowed to proceed on this equal protection claim because it is legally frivolous.

I also understand petitioner to allege that the phone restrictions make it difficult for him to communicate with his family. The United States Supreme Court has long recognized that the right to familial association is encompassed within the concept of liberty of the Fifth and Fourteenth Amendments. *See, e.g., Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Although incarcerated individuals do not enjoy the same rights to familial association as those with no restrictions on their liberty, prisoners do not surrender all rights to family relations upon incarceration. *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 465, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (Kennedy, J. concurring) (prison regulation forbidding all visits would implicate due process clause although "precise and individualized restrictions" do not). Rather, prison officials have the right to limit an inmate's access to visitation, phone calls and mail to the extent that such limitations are designed to achieve legitimate penological interests. *See Turner,* 482 U.S. at 89 ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). Petitioner has not alleged that he is not allowed to call his family members; instead, he alleges that he cannot call them as often as he would like to and that it is inconvenient to do so. That is not enough to support a constitutional claim. The Constitution does not entitle prisoners to unlimited phone calls to their family members.

2. *Procedural Due Process*

a. Demotion to level one – deprivation of liberty

***12** Petitioner contends that his Fourteenth Amendment due process rights were violated when he was demoted to level one without a hearing for writing a letter to another inmate mentioning gang-related activities. A claim that government officials violated an inmate's procedural due process rights requires proof of both inadequate procedures and interference with a liberty or property interest. *Kentucky Dept. of Corrections,* 490 U.S. at 460. In *Sandin v. Conner,* 515 U.S. 472, 483–484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which ... imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After *Sandin,* in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. *Wagner v. Hanks,* 128 F.3d 1173, 1176 (7th Cir.1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, *Sandin* does not allow suit complaining about deprivation of liberty).

The level system at Supermax (and the related increase or decrease in access to various privileges) does not implicate a liberty interest. Under *Sandin,* the demotion and attendant loss of privileges do not impose atypical and significant hardships on petitioner; they do not create a loss of good time credits or otherwise lengthen petitioner's sentence. Petitioner will not be allowed to proceed on this due process claim.

b. Theft of postage stamps – deprivation of property

I understand petitioner to allege deprivation of property without due process when respondents allegedly misplaced or stole three books of postage stamps mailed to him by his girlfriend. As long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. *See Daniels v. Williams,* 474 U.S. 327 (1986); *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In *Hudson,* the Supreme Court held that an inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In *Daniels,* the Court concluded that a due process claim does not arise from a state official's negligent act that

causes unintended loss of property or injury to property.

The state of Wisconsin provides several post-deprivation procedures for challenging the taking of property. According to Article I, § 9 of the Wisconsin Constitution,

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without delay, conformably to the laws.

Sections 810 and 893 of the Wisconsin Statutes provide plaintiff with replevin and tort remedies. Section 810.01 provides a remedy for the retrieval of wrongfully taken or detained property. Section 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. The existence of state remedies defeats any claim petitioner might have that respondents deprived him of his property without due process of law.

C. *Denial of Court Access*

***13** Petitioner alleges that various respondents denied him access to the courts on multiple occasions. It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. *Campbell v. Miller,* 787 F.2d 217, 225 (7th Cir.1986) (citing *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)); *Wolff v. McDonnell,* 418 U.S. at 539, 578–80 (1974); *Procunier v. Martinez,* 416 U.S. 396, 419, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). The right of access is grounded in the due process and equal protection clauses of the Fourteenth Amendment. *Murray v. Giarratano,* 492 U.S. 1, 6, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). To insure meaningful access, states have the affirmative obligation to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." *Bounds,* 430 U.S. at 828.

To have standing to bring a claim of denial of access to the courts, a plaintiff must allege facts from which an inference can be drawn of "actual injury." *Lewis v. Casey,* 518 U.S. 343, 349, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). The plaintiff must have suffered injury "over and above the denial." *Walters v. Edgar,* 163 F.3d 430, 433–34 (7th Cir.1998) (citing *Lewis,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606). At a minimum, the plaintiff must allege facts showing that the "blockage prevented him from litigating a nonfrivolous case." *Id.* at 434; *Sanders v. Sheahan,* 198 F.3d 626, 630 (7th Cir.1999) (prisoner must "allege injury or prejudice to state" a claim of denial of access to the courts).

1. *Denial of paper, envelopes and postage from May 21—June 5, 2001*

Petitioner alleges that from May 21, 2001, through June 5, 2001, respondent Berge denied him access to rudimentary legal supplies such as paper, envelopes and postage. Petitioner alleges that he was forced to dismiss a pending case as a result of both Berge's actions and respondent Ellen Ray's failure to give prompt attention to petitioner's inmate complaint regarding the matter. If the case petitioner was forced to dismiss was nonfrivolous, these allegations are sufficient to state a claim. However, in his complaint petitioner does not identify the case he was forced to dismiss. Petitioner's bare allegation that he was forced to dismiss an unidentified case does not give respondents adequate notice of his claim and necessarily undermines their ability to answer the complaint. Accordingly, I will reserve a decision on whether petitioner will be allowed to proceed on this claim until he has identified the case he was forced to dismiss as a result of respondents' failure to provide him with basic legal supplies from May 21 to June 5, 2001. Petitioner may have until June 13, 2002, in which to identify that case.

2. *Denial of legal materials, legal loan disbursements and library time*

Petitioner alleges that he was denied access to the courts as a result of several other incidents. First, petitioner alleges that respondents Berge and Wetter refused to deliver paper, post cards, envelopes and copies of case law and legal papers to him in order to hinder his legal work. He alleges also that at one point he was not put on the prison library priority list and received only 17 cases from the library in a 15–day period, even though he was entitled to more. These actions forced petitioner to seek extensions of time in three pending cases. Petitioner also was denied legal loan disbursement requests during a two week period in July 2001, when he had several cases pending, leading petitioner to "expect" that he might be injured. In addition, petitioner alleges that in October 2001, several respondents refused to take petitioner to the prison law library more than one time each week even though petitioner was on the court deadline list and had asked to be taken there three or four times each week. This made it difficult for petitioner to litigate three pending cases. Finally, at some point in November 2001, petitioner received fewer than the four copies of cases that he is entitled to each day, which delayed his filing of various lawsuits. All these allegations have one thing in common: petitioner alleges that he was inconvenienced in pursuing his litigation-related activities, but has not

alleged actual injury or prejudice with respect to ongoing or contemplated litigation. Therefore he fails to state a claim. *See Sanders,* 198 F.3d at 630 (dismissal of claim appropriate where prisoner did "not identify any defense that he may have been able to raise had he been given more time in the library" and failed "to specify how he was prejudiced as a result of being allegedly denied access to" copy of prison's disciplinary rules); *Gentry v. Duckworth,* 65 F.3d 555, 559 (7th Cir.1995) (mere delay without more does not establish actual injury). Accordingly, petitioner will be denied leave to proceed on these claims.

3. ***Legal route system***

***14** Finally, petitioner alleges that the prison's "legal route" policy, which requires inmates to handwrite legal documents that they want routed internally to another prisoner, delayed his filing of a post-conviction motion. However, as noted above, mere delay does not rise to the level of actual injury. Petitioner also alleges that the legal route system caused the dismissal of an earlier case petitioner filed in this court, *Lindell v. John/Jane Does,* 01–C–209–C, (Order entered May 3, 2001), because petitioner "could not get help from another prisoner." In that case, petitioner's Fourteenth Amendment due process and Fourth Amendment claims were dismissed as legally frivolous. Petitioner cannot show that he was actually injured as a result of being prevented from litigating frivolous claims. Petitioner's First Amendment and Fourteenth Amendment equal protection claims in that case were dismissed not because they were frivolous, but because they failed to state a claim. However, "[i]t is a right of access that is in question and if access is not blocked, the right is not infringed." *Walters,* 163 F.3d at 435. Petitioner's bare allegation that he could not "get help from" another anonymous prisoner is not sufficient to show actual injury. In addition, his allegation that the legal route system is depriving him of access to the courts is belied by the fact of this lawsuit (in which petitioner has already filed numerous motions and briefs) and two other voluminous complaints he has filed with this court that are awaiting screening pursuant to the Prison Litigation Reform Act. Petitioner will be denied leave to proceed on this claim.

D. ***Retaliation for Exercise of Constitutional Rights***

Petitioner alleges that he has been the victim of retaliation on several occasions. Prison officials may not retaliate against inmates for the exercise of a constitutional right. *Babcock v. White,* 102 F.3d 267, 275 (7th Cir.1996). To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, petitioner need not present direct evidence in the complaint. Nor is it necessary, the Court of Appeals for the Seventh Circuit recently decided, for inmates to allege a chronology of events from which retaliation may be inferred. *Walker v. Thompson,* No. 01–2361, 2002 WL 818853, at *2 (7th Cir. May 1, 2002). However, it is insufficient simply to allege the ultimate fact of retaliation. *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir.2002).

1. ***Shackles and handcuffs in library***

In May 2001, petitioner filed an inmate complaint, alleging that the prison policy requiring him to wear shackles in the law library "amounts to punishing [inmates] for attempting to access the courts and litigate our cases" and that the policy "was just retaliation against those who litigate, making us suffer for seeking justice." In *Higgs,* the Court of Appeals for the Seventh Circuit noted that if the plaintiff in that case had "merely alleged that the defendants had retaliated against him for filing a suit, *without identifying the suit* or the act or acts claimed to have constituted retaliation, the complaint would be insufficient because the defendants would not have known how to respond." *Id.* (emphasis added). Here, petitioner has specified an act of retaliation (making him wear shackles in the law library) but has not identified any particular suit that sparked the retaliation. Instead, plaintiff asserts only that he, along with other prisoners, was retaliated against for attempting to gain access to the courts and litigate their cases. Even under the liberal pleading requirements of notice pleading, this fails to state a claim for retaliation. *Id.*

2. ***Heizn and Solomon***

***15** On October 30, 2001, petitioner told respondent Heizn that he had an active case and showed Heizn his briefing schedule, but Heizn told petitioner, "I'm not responsible, nor will I assist you in filing lawsuits, you're not on the list, you're not going." In addition, petitioner told respondent Heizn that the law librarian had verified that he was on the list, but Heizn ignored petitioner. Petitioner alleges that respondent Heizn's behavior was "meant to harass and retaliate due to [petitioner's] legal work." Again, beyond generally invoking his "legal work," petitioner has failed to identify a particular suit which got the retaliatory ball rolling. *Id.* at *5 (At a minimum, a plaintiff must identify the suit or grievance spawning the retaliation and the acts constituting retaliatory conduct.) (Ripple, J., concurring). The same is true of petitioner's claim that on November 12, 2001, respondent Solomon denied him access to the courts in retaliation for his legal work by refusing to send him his Shepard's listings and giving him a warning for complaining to her about first shift staff's refusal to take him to the law computer.

3. ***Demotion to level one in November 2001***
On November 14, 2001, petitioner was informed by respondent Sharpe that he was being demoted to level one for lying about staff. The night before petitioner was demoted, he complained to the "Ed. Director" about his lack of access to legal research materials and asked that copies be made of his reply brief in a pending case, # 01–CV–1757, which petitioner maintains he is "bound to win." Construing plaintiff's complaint liberally, I find he has stated a claim that he was demoted to level one in retaliation for complaining to the "Ed. Director" about his lack of access to legal materials and for pursuing the pending case he identified. Petitioner has not named the "Ed. Director" as a defendant in his complaint, but he will be allowed leave to proceed on this claim against respondent Sharpe, who allegedly issued the memorandum explaining petitioner's demotion. Also, he will be allowed to proceed against respondents Ellen Ray, Huibregtse, John Ray, and O'Donnell, all of whom were involved allegedly in rejecting petitioner's inmate complaints regarding his retaliatory demotion.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed *in forma pauperis* on his First Amendment free expression claims that respondents Litscher, Berge, Mueller, Huibregtse, O'Donnell, Ellen Ray and John Ray refused to allow him to keep writing paper mailed to him is GRANTED;

2. Petitioner's request for leave to proceed *in forma pauperis* on his claim that respondents Litscher, Berge, Grondin and Wetter violated his First Amendment rights by enforcing a prison policy prohibiting prisoners from receiving items cut out of magazines, newspapers or books, or photocopies of such materials, is GRANTED;

3. Petitioner's request for leave to proceed *in forma pauperis* against respondents Clark, Janzen, O'Donnell, Huibregtse, Ellen Ray and John Ray on his First Amendment claim that he was not allowed to send mail on two occasions is GRANTED;

***16** 4. Petitioner's request for leave to proceed *in forma pauperis* against respondents Berge, Huibregtse, O'Donnell, Ellen Ray, John Ray and Litscher on his Religious Land Use and Institutionalized Persons Act claim that he was not allowed to keep writing paper mailed to him is GRANTED; however, any proceedings related to the merits of this claim are STAYED until this court has ruled on the constitutionality of the Religious Land Use and Institutionalized Persons Act in *Charles v. Verhagen,* No. 01–C–0253–C;

5. Petitioner's request for leave to proceed *in forma pauperis* against respondents Litscher, Berge and Biggar on his Religious Land Use and Institutionalized Persons Act claim that prison regulations controlling telephone access have interfered with his exercise of religion is GRANTED; however, any proceedings related to the merits of this claim are STAYED until this court has ruled on the constitutionality of the Religious Land Use and Institutionalized Persons Act in *Charles v. Verhagen,* No. 01–C–0253–C;

6. A decision on petitioner's request for leave to proceed *in forma pauperis* on his Fourteenth Amendment claim that respondent Berge and Ellen Ray denied him access to the courts by denying him paper, envelopes and postage between May, 21, 2001 and June 5, 2001, is RESERVED and petitioner is directed to identify the case he was forced to dismiss as a result of respondents' failure to provide him with basic legal supplies from May 21 to June 5, 2001. Petitioner may have until June 13, 2002, in which to identify that case;

7. Petitioner's request for leave to proceed *in forma pauperis* against respondents Sharpe, Huibregtse, O'Donnell, John Ray and Ellen Ray on his claim that he was retaliated against on November 14, 2001, for pursuing a pending lawsuit is GRANTED;

8. Petitioner's request for leave to proceed *in forma pauperis* on all other claims is DENIED.

9. Respondents Sandy Hautamaki, Captain Reed Richardson, Captain S. Blackbourn, Tim Haines, Gary Boughton, Dianne Bennisch, Kelly Coon, Sgt. Boyelson, Sgt. Mason, C.O. Lomen, C.O. Heizn, C.O. Smith and Karen Solomon are DISMISSED from this case.

10. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers; and

11. The unpaid balance of petitioners' filing fee is $139.26; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2) when the funds become available.