

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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GARRY ALLEN BORZYZCH,

Plaintiff,

v.

MATTHEW J. FRANK, STEVE CASPERSON,  
ANA M. BOATWRIGHT, GERALD BERGE,  
GARY BOUGHTON, PETER HUIBREGTSE,  
JUDITH HUIBREGTSE, RICHARD RAEMISCH,  
LEBBEUS BROWN, and TODD OVERBO,

Defendants.  
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OPINION AND  
ORDER

04-C-0632-C

In this civil action brought under 42 U.S.C. § 1983, plaintiff Gary Allen Borzych contends that defendants Matthew Frank, Steve Casperson, Ana Boatwright, Gerald Berge, Gary Boughton, Peter Huibregtse, Richard Raemisch, Judith Huibregtse, Lebbeus Brown and Todd Overbo denied him copies of the books *The NPKA Book of Blotar*, *Temple of Wotan* and *Creed of Iron* in violation of his First Amendment right to exercise his religion freely, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, the First Amendment's establishment clause, the Fourteenth Amendment's equal protection clause and Wis. Admin. Code §§ DOC 309.61(1)(a) and (b). Plaintiff contends also that

defendants Boatwright and Judith Huibregtse retaliated against him for sending complaints to prison officials.

Both parties have moved for summary judgment and submitted proposed findings of fact. For a variety of reasons, including the parties' failure to follow this court's summary judgment procedures, I have not considered certain proposed facts. For example, I have not made any findings of fact about plaintiff's exhaustion of administrative remedies because defendants proposed no facts on this subject. Instead, they merely listed a series of complaints and the disposition of them, without saying what issue plaintiff raised in each complaint. Apparently they expected the court to search through each of the listed complaints to identify the particular subject of each despite the clear warning in the procedures that the court is not inclined to make such searches.

Also, I have allowed defendants to support their motion with copies of *The NPKA Book of Blotar*, *Temple of Wotan* and *Creed of Iron*, which were filed under seal for *in camera* examination. See Order, Feb. 1, 2004, dkt. #36, at 2. Taking into consideration the proposed findings of fact that comply with the court's summary judgment procedures and my *in camera* review of the three texts, I conclude that defendants' refusal to allow plaintiff to possess copies of the books *The NPKA Book of Blotar*, *Temple of Wotan* and *Creed of Iron* does not violate plaintiff's First Amendment rights or his rights under the Fourteenth Amendment's equal protection clause, state law or the Religious Land Use and

Institutionalized Persons Act, because defendants have shown that the compelling state interests in security and the rehabilitation of prisoners outweigh plaintiff's interest in having the books and that a ban on the books is a legitimately restrictive means of furthering the state's interests. Furthermore, I conclude that defendants have not violated plaintiff's rights under the Fourteenth Amendment's establishment clause because the evidence shows that defendants' religious book policies do not favor one religion over another. Finally, I conclude that defendants are entitled to judgment in their favor on plaintiff's retaliation claim because plaintiff has adduced no evidence to show that the decision to deny him *The NPKA Book of Blotar* was motivated by a desire to punish him for having written letters of complaint to prison officials on May 28, 29 and 30, 2004.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

## UNDISPUTED FACTS

### A. Parties

The Wisconsin Secure Program Facility is a maximum security institution located in Boscobel, Wisconsin. Plaintiff Garry Borzych was incarcerated at the facility from June 19, 2003 to December 29, 2004.

At all relevant times, defendant Ana Boatwright was employed as Deputy Warden at

the Oakhill Correctional Institution. In addition, defendant Boatwright was the Department of Corrections' Policy Advisor and Coordinator for Religious Matters. In that capacity, she was responsible for providing leadership to all Department of Corrections chaplains in the area of policy development and implementation, receiving and processing inmate requests for new religious practices, providing advice to institutions regarding religious property and religious diet issues and researching faith groups to determine the activities required of adherents of the particular faiths and how they can be accommodated in the correctional setting.

At all relevant times, defendant Gary Boughton was Security Director at the Wisconsin Secure Program Facility. In this capacity, Boughton was responsible for all security activities within the facility. He has significant experience and training regarding the safe and secure operation of Wisconsin's correctional institutions.

Defendant Lebbeus Brown has been employed by the Department of Corrections as a Supervising Officer 2 (Captain) at the Wisconsin Secure Program Facility since December 2003. In addition to his duties as a captain, defendant Brown has been the Disruptive Groups Coordinator since April 3, 2003. His experience and responsibilities as Disruptive Groups Coordinator include tracking disruptive groups and their members in the institution and documenting their activities, reviewing incoming and outgoing mail and property for gang-related content, preparing reports regarding group and gang activities for facility

security staff and disruptive groups coordinators at other department institutions, instructing facility staff regarding disruptive group and gang identification and management strategies, meeting on a regular basis to exchange information with the facility's gang intelligence unit and disruptive groups coordinators from other department institutions and assessing ongoing disruptive group and gang activity within the institution. Defendant Brown has received training on the identification and operation of prison and street gangs and has the ability to recognize gang-related activities. In the course of his experience and training at the facility, he has become familiar with the facility's security policy and with white supremacy issues in the prison system.

Defendant Judith Huibregtse has been employed as a correctional sergeant at the Wisconsin Secure Program Facility since March 24, 2001. She is responsible for the security of inmates, insuring inmate, staff and community protection, proper treatment of inmates, inspection of the institution and inmates for proper security, health and safety precautions, reporting to supervisors and disciplinary committees regarding inmates and incidents, maintenance of the institution's record keeping system and the direction of correctional officers as a lead worker.

Defendant Peter Huibregtse has been employed by the Department of Corrections since April 2000. As Deputy Warden, Wisconsin Secure Program Facility, defendant Huibregtse's responsibilities include but are not limited to assisting in the development,

implementation and administration of the security, treatment, and oversight of the support services for the 500-bed facility. In the warden's absence, he is responsible for the overall administration and operation of the facility.

From September 27, 1998 to December 27, 2004, defendant Gerald Berge was employed as Warden, Wisconsin Secure Program Facility. Defendant Berge was responsible for the overall administration and operation of the facility and was responsible at the institution level for implementing all department policies and directives and legislative and judicial mandates.

Defendant Richard Raemisch has been employed as Deputy Secretary of the Department of Corrections since April 4, 2004. Prior to his current appointment, defendant Raemisch was employed as Administrator for the Division of Community Corrections from February 3, 2003 to April 4, 2004.

Defendant Steven Casperson has been employed by the Department of Corrections as Administrator of the Division of Adult Institutions since July 1, 2001. In this capacity, defendant Casperson oversees all maximum, medium and minimum security adult institutions in the State of Wisconsin.

Defendant Todd Overbo has been employed by the Department of Corrections as a chaplain at the Wisconsin Secure Program Facility since July 31, 2000. Defendant Overbo's duties and responsibilities include filling requests for religious library loans from inmates and

processing inmate requests for religious material from outside the institution. In the course of his duties, he has become familiar with the department's Internal Management Procedures.

Since January 2003, defendant Matthew Frank has been employed as Secretary of the Department of Corrections.

#### B. Plaintiff's Religious Beliefs

Plaintiff has been a sincere follower of Odinism since 1998. He believes that there are 8 essential "blots," or religious holidays, that he must observe each year and that he must perform daily and nightly rites. Plaintiff believes that the sincere practice of Odinism requires knowledge and observation of "sumbels," rituals, meditative guidelines and ritual writing. Plaintiff believes that in order to communicate with the Odinist gods and goddesses, he must possess and master runes. In the past several years, plaintiff has identified his religious preference as Wotanist/Odinist/Asatru. Asatru is recognized as a Pagan religion at the Wisconsin Secure Program Facility.

#### C. Religious Accommodations in Wisconsin Correctional Facilities

Under the Department of Corrections' Internal Management Procedure 6, the department recognizes that religious beliefs can provide support to inmates that may aid in

their adjustment to institutional life and may lead to the development of community ties and values that can be helpful in reintegrating them successfully into the community after they are released. However, the department does not permit activity that advocates racial or ethnic supremacy or purity, attacks a racial, religious or ethnic group, promotes hate crimes, jeopardizes the security and order of the institution or violates federal or state law or the department's rules, policies and procedures.

From September 3, 2002 until May 17, 2004, Internal Management Procedure 6A was in effect and addressed the subject of inmates' opportunities to possess religious property. On May 17, 2004, it was incorporated into Internal Management Procedure 6. Internal Management Procedure 6 was designed to insure that inmates had opportunities to pursue lawful practices of the religion of their choice consistent with security practices and principles, rehabilitative goals, health and safety, allocation of limited resources and the responsibilities and needs of the correctional institutions.

Under Internal Management Procedure 6, inmates are asked periodically to express a religious preference on form DOC 1090. A number of inclusive religious groups are recognized at the facility. These "umbrella religion groups" are designed to appeal to a wide range of religious beliefs within a given faith group, such as Protestant, Islam, Native American, Catholic, Jewish, Buddhist and Pagan (Wiccan). The Department of Corrections provides opportunities for inmates to practice their religious faith through umbrella religion



group religious services and study groups, which are led by outside spiritual leaders or volunteers approved by the institution.

In addition, the department allows inmates to practice their religion individually, through individual study, personal meditation, religious books and literature, approved religious property, pastoral visits, other approved individual religious observances in their living quarters and correspondence with fellow believers. Inmates may request a new religious practice that is not offered at the institution by submitting form DOC 2075. In reviewing requests for new religious practices, defendant Overbo applies the Internal Management Procedures. He makes a recommendation and the Division of Adult Institutions Religious Policy Advisor/Coordinator (at the time relevant to this suit, defendant Boatwright) reviews the request and makes a recommendation. Finally, the request goes to the warden, who makes a final decision.

Internal Management Procedure 6 provides in part that religious literature is subject to inspection to insure it is consistent with security policies and procedures. The procedure states that "[l]iterature that advocates racial or ethnic supremacy or purity, or that attacks a racial, religious or ethnic group, promotes hate crimes, jeopardizes the security and order of the institution, violates federal or state laws or Department administrative rules, policies and procedures will not be permitted."

At the Wisconsin Secure Program Facility, the Asatru religion is recognized under the

umbrella group known as Wiccan/Pagan. Individuals incarcerated at the facility who follow Asatru may obtain books and engage in private worship in their living quarters. “General population” inmates may attend Wiccan group services. (Defendants do not explain who qualifies as a general population inmate at the Wisconsin Secure Program Facility.) There is not any single sacred text of Asatru or Odinism as there is for Christianity or Islam. However, the library at the facility has had for years a fair representation of books from a variety of religions available to inmates. The library includes a number of books in the category of Wiccan/Pagan that concern the practice of Asatru. All religious texts are donated by outside organizations and distributed to the inmates upon request.

Inmates incarcerated at the Wisconsin Secure Program Facility are permitted to possess approved religious property associated with their designated religious preference, unless the item presents a threat to the order and safety of the institution. For example, Christian inmates are allowed to possess the Bible and Muslim inmates are allowed to possess the Koran. Religious items are subject to regulations applicable to the location and storage of personal property. Religious objects, apparel, emblems, head coverings and literature are subject to inspection to insure conformity to property regulations concerning size limits, approved colors, etc. Inmates may receive religious property items from an approved retail vendor or from the institution canteen.

#### D. Plaintiff's Request

In May 2004, plaintiff filed a request for a new religious practice. After reviewing his request, defendant Overbo wrote a memo to the Division of Adult Institutions central office, dated June 17, 2004, in which he noted a number of concerns. Defendant Boatwright reviewed plaintiff's request and concluded that she could not recommend approval of it as requested because plaintiff stated that he had no spiritual leader. This meant that the information he provided regarding practices, diet and publications could not be verified. Also, plaintiff listed over 50 books in his request but did not state how any of them were necessary to his religious practice.

Defendant Boatwright advised defendant Overbo and defendant Peter Huibregtse of her conclusion in a memo dated June 28, 2004. She completed a form recommending denial of plaintiff's request as stated. Also, she indicated that Odinism is considered to fall under the Pagan umbrella religious group and that plaintiff may engage in individual practice and have literature and property that comply with department regulations. Plaintiff received a copy of this recommendation. The joint recommendation of defendants Boatwright and Overbo was submitted to defendant Berge, who concurred in it. Consistent with Internal Management Procedures 6 and 6A, defendant Berge informed plaintiff that alternative means of practicing his religion were available to him. Specifically, he informed plaintiff that he "[m]ay engage in individual practice, have literature and property within those that are

in compliance with Department of Corrections & Institution regulations." Plaintiff remained free to refine his request for religious practice and provide more support for his request for books.

E. Temple of Wotan, Creed of Iron and The NPKA Book of Blotar

Paul Hestekind is employed by the Department of Corrections as a housing unit sergeant at the Jackson Correctional Institution in Black River Falls, Wisconsin. He has been employed by the department since 1998 and began studying gang behavior in the prison system at the outset. He attended a 24-hour block of training in 2001 at the National Gang Crime Research Center at Loyola University in Illinois and is a member of the Midwest Gang Investigators Association and the Great Lakes International Gang Investigators Coalition. In 2003, Hestekind assisted in developing a program within the department to train certain employees in gang behavior and certify specialists or coordinators in disruptive groups. He was involved personally in developing the white supremacist portion of the program.

Hestekind has been trained to identify signs that an inmate has aligned himself with a white supremacist group and to understand the degree to which those signs are recognized as challenges by individuals in other racial groups. In Hestekind's opinion, among the signs that are readily recognized by inmates as associated with white supremacy are depictions of

Thor's hammer, the making of the "hammer sign," depictions of runes, depictions of the swastika, mention of the Aryan folk or Aryan race, mention of the phrase "14 words," depictions of the Celtic cross, and possession of certain books, including *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar*. In Hestekind's opinion, the mention or display of any of these items in the setting of a correctional institution presents a danger to the safety and security of the staff and inmates at the institution.

Thomas Laliberte has been employed by the Department of Corrections since 1976. In approximately December 1996, Laliberte was promoted to an administrative captain position at the Oshkosh Correctional Institution. He still serves in that position. Laliberte has also held the Disruptive Group Gang Coordinator position at Oshkosh since 1987. In this capacity, he is responsible for instructing staff regarding gang identification and gang management strategies, meeting on a regular basis with members of the gang intelligence unit and assessing ongoing gang activity. Laliberte also performs the duties of Disruptive Group Agency Trainer for the Department of Corrections, which maintains a certification program and provides training to staff responsible for the identification, control and management of disruptive group activities. In his capacity as a Disruptive Group Agency Trainer, Laliberte provides training to department staff who have been assigned duties of disruptive group coordinators in correctional institutions. Laliberte meets with other agency trainers on a regular basis to review gang related issues and to update training programs related to gang

identification and management strategies. Through his training and experience, Laliberte has become familiar with the books *Temple of Wotan*, *Creed of Iron* and *The NPKA Book of Blotar* and has learned the following.

*Temple of Wotan* and *Creed of Iron* are published by 14 Word Press, a company started by David Lane. Lane is currently serving a sentence in a Colorado prison for his part in the murder of a Jewish radio talk show host. Lane coined the fourteen-word phrase that is the inspiration for the name, 14 Word Press: "We must secure the existence of our people and a future for white children." The author and illustrator of *Temple of Wotan* and *Creed of Iron* is Ron McVan, a former member of the World Church of the Creator, a white supremacist group. *The NPKA Book of Blotar* is published by Himminbjorg Publishing, Inc., which was founded by John Post. In 2002, Post and his wife ran 14 Word Press.

All three books contain rituals, symbols, names of gods and their dwellings, definitions, and worship instructions, as well as statements advocating racial purity, evincing anti-semitic views and advocating or justifying violence to advance those views. Each contains symbols associated with the white supremacist movement. In particular, a Celtic cross appears on the cover of *The NPKA Book of Blotar*. Swastikas appear on at least two pages. Descriptions, drawings and references to a hammer or the "sign of a hammer" appear on at least 42 pages. Drawings including runes appear on at least 7 pages. In *Creed of Iron*, a Celtic cross appears on at least 20 pages, a swastika appears on at least 6 pages, and Thor's Hammer appears on at least 13 pages. In every chapter heading of *Temple of Wotan* the Celtic Cross appears as a substitute for the letter "o." A "Flyfot," also known as a swastika, appears throughout the book, as does Thor's Hammer. There are several references to the 14 Words, and a chapter devoted to runes.

On or about March 31, 2004, defendant Judith Huibregtse inspected a copy of *The NPKA Book of Blotar*, which had been sent to plaintiff from Himminbjorg Publishing. After reviewing the book and consulting with defendant Overbo, defendant Judith Huibregtse

determined that the book should not be delivered to plaintiff.

Defendant Overbo reviewed *The NPKA Book of Blotar* in April 2004. He concluded that the book should not be allowed in the institution because it violates Internal Management Procedure 6A's prohibition against literature "that advocates racial or ethnic supremacy or purity, or that attacks a racial, religious or ethnic group, promotes hate crimes, [or] jeopardizes the security and order of the institution." To illustrate his concerns, defendant Overbo wrote a memo dated April 15, 2004 to defendant Boatwright in which he listed a few passages from the book he believed were objectionable and noted that the book contained symbols such as swastikas and the Celtic cross.

In the course of his duties, defendant Overbo has become familiar with the books *Creed of Iron* and *Temple of Wotan*. He believes that these books advocate white supremacy and are well known among individuals who espouse white supremacist beliefs. He and Laliberte agree that a substantial number of inmates at the facility would readily recognize *The NPKA Book of Blotar*, *Creed of Iron* and *Temple of Wotan* as white supremacist books.

#### F. Risks Posed by White Supremacist and Other Disruptive Groups

Although plaintiff possessed *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar* at one time, these texts are no longer allowable property for any Department of

Corrections inmate because prison officials have determined that the content and teaching of these books are contrary to the department's goals and jeopardize the safety and security of department staff and inmates.

Over the past 20 years, the inmate population within the Department of Corrections has quadrupled, without a corresponding increase in correctional institution staff. During this time, there has been a growth of disruptive groups along racial lines, including white supremacist groups espousing racial hatred.

At various times in the past and at present, the state faces significant budget deficits that have necessitated staff reductions or hiring freezes. At the same time, more inmates are serving lengthy sentences or life without parole. Together with an increase in gang activity, these factors have placed security, administrative and financial pressures on state correctional institutions and staff and have affected corrections operations in all areas.

The Wisconsin Secure Program Facility has a population of inmates who have a history of non-conforming and disruptive behavior while incarcerated, including gang activity, engaging in the delivery of unlawful substances, assaults against other inmates and staff, rioting, and taking hostages. Inmates at the facility have the opportunity to converse with other inmates who live in the same range as they do, to learn about what property they have and to observe mail that other inmates receive when it is delivered. In any of these ways they could learn whether plaintiff or any other inmate possessed *The NPKA Book of*



*Blotar, Creed of Iron or Temple of Wotan.*

It is the view of Thomas Laliberte that inmates who live by the ideals professed in *Creed of Iron, Temple of Wotan* and *The NPKA Book of Blotar* will be less likely to follow the rules of the facility and society. Laliberte believes that these books encourage inmates to act on their divisive beliefs through violence without concern about whether their actions violate social standards. In his view, *Creed of Iron, Temple of Wotan* and *The NPKA Book of Blotar* reduce antisocial and racist beliefs to writing, promote them as religion and legitimize inmates' problematic and dangerous behaviors.

Inmates are not allowed to possess symbols associated with white supremacy. Among the prohibited symbols are swastikas, Celtic crosses, and Thor's Hammer. The department does not allow Runes, an ancient form of writing consisting of angular characters typically associated with Northern Europeans, because of their potential use as a code. However, plaintiff is allowed to possess religious texts that are devoted to runes.

Some white supremacy groups have attempted to cloak themselves in legal protection by claiming they are a religious group. Some of these white supremacist groups in the community have attempted to recruit members in prisons. *The NPKA Book of Blotar* was compiled for the National Prison Kindred Alliance. Pursuant to Wis. Admin. Code § DOC 309.05 (2)(c), the department may not prohibit a publication on the basis of its appeal to a particular ethnic, racial or religious audience or because of the political beliefs expressed

therein. However, from his experience and training, defendant Boughton believes that a significant security concern would arise if inmates were allowed access to certain publications that advocate violence and hatred based on views of racial supremacy or purity. In 2002, defendant Boughton reviewed the book *Creed of Iron*, concluded that it was such a publication and recommended that it not be permitted.

Kurt Linjer is the Disruptive Groups Coordinator at the Wisconsin Secure Program Facility. In this capacity, Linjer has been trained in the identification and operations of street gangs, militia groups, cultist activity and similar groups. He has extensive knowledge and training on the topic of gangs and the ability to recognize and identify individual gangs and gang-related activities. In Linjer's experience, institution security is threatened by the presence of disruptive groups because of the direct threat of violence and because the groups undermine prison authority by providing a support system for opposition to prison administration. Linjer has observed inmates group themselves according to race and has seen tensions between them rise when one of them is viewed by the other as promoting superiority because of race. Linjer reviewed the book *Temple of Wotan*. In a memorandum dated June 17, 2002, he stated his opinion that allowing this book into the prison would increase the danger of violence because it promotes white supremacy and racial hatred.

The mission of the Department of Corrections is to incarcerate convicted felons and attempt to rehabilitate them so that they and society do not have to bear the costs of

criminal behavior. The fact that many institutions are overcrowded and above capacity makes this mission a difficult and complex task. Any incitement to attack authority or minority inmates presents a clear danger in these institutions. In Laliberte's view, the safety and security of staff, inmates, and the prison could easily be lost if the teachings in *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar* are followed by inmates.

Race hatred and associated violence are particular security concerns within the prison system. White supremacist groups are not sanctioned or approved under Wis. Admin. Code § DOC 309.365.

The presence of disruptive groups in prison is detrimental to individual prison inmates and to the prison system as a whole. Affiliation with these groups in the correctional setting is not in the best interests of the inmate and his rehabilitation. Group members are themselves endangered physically by the presence of rival groups. In addition, their chances of rehabilitation are compromised because many of these groups are antisocial and are frequently involved in criminal activities. Controlling or eliminating disruptive group activities in the facility is imperative to maintaining a safe and secure environment for staff, inmates and visitors. The prison accomplishes this by educating staff, searching inmates' property and living areas and monitoring telephone conversations and incoming and outgoing mail. Inmate property that may pose a threat to the security of the Wisconsin Secure Program Facility includes literature that is recognized by inmates as advocating a

white supremacist ideology and literature that advocates racial supremacy and violence.

#### G. Retaliation

On May 28, 2004, plaintiff filed a complaint with defendants Frank, Casperson, Berge, Boughton, Overbo, Brown, and Judith Huibregtse, stating that he was unable to practice his religion without access to *Creed of Iron*, *The NPKA Book of Blotar* and *Temple of Wotan*. On May 29, 2004, plaintiff filed a complaint with defendants Frank, Casperson and Berge in which he contended that Internal Management Procedure 6 is unconstitutional and overbroad and that the policy favors Christian and Muslim religions. On May 30, 2004, plaintiff filed complaints with defendants Frank, Casperson and Berge, asking them to provide him a means to practice his religion.

On June 29, 2004, defendant Boatwright sent a memo to plaintiff, acknowledging that his letters of May 28, 29 and 30 had been forwarded to her for a response and informing him that the issues he raised were being addressed through the inmate complaint system. Defendant Boatwright's receipt and review of plaintiff's letters was something she did in the ordinary course of her business. Defendant Boatwright reviewed many letters of complaint from inmates on a daily basis. She has never met plaintiff and had no animosity toward him when she reviewed his letters.

Earlier, in March 2004, defendant Judith Huibregtse determined that *The NPKA Book*

*of Blotar* should not be delivered to plaintiff because of its white supremacist ideology. She advised plaintiff of the non-delivery of the book by issuing him a Property Receipt/Disposition form. On the form, she wrote that plaintiff had “thirty days to notify prop. dept. of your choice of below listed options. If you fail to do this, the contraband will be disposed of according to policy. This is the only notice you will receive.” The listed options were to mail the book out, send it out with a visitor, allow it to be destroyed or appeal. Defendant Huibregtse took no other action and made no other decision regarding the disposition of *The NPKA Book of Blotar*. A stamp on the property receipt/disposition form indicates that plaintiff exercised the option to appeal the decision on April 1, 2004. Another stamp on the form contains an entry by “S.G.,” revealing that the book was destroyed on June 29, 2004.

## OPINION

Before turning to the merits of plaintiff’s case, it is necessary to explain the procedure followed in this case to evaluate the books at issue. It is not the usual practice for courts to base decisions on evidence that is not available to both parties. In cases such as this, however, when inmate prisoners are contesting the validity of a prison decision to prevent their access to a particular publication or writing, allowing the inmate to possess or even read the publication would defeat the purpose of the prison’s prohibitory ruling. To avoid this

result, I require the defendants to submit the materials to the court for an in camera review, identify pages of the publication that contains objectionable content, describe the content and explain why they believe it poses a threat to a legitimate penological interest, all in sufficient detail to allow the inmate plaintiff an opportunity to respond, despite his lack of access to the contested materials. Having the defendants set forth their reasons for denying access to any particular publication gives the plaintiff a reasonable opportunity to contest the reasons and requires the defendants to articulate and defend the reasons for their decisions. In this case, I have reviewed the books at issue and have considered the texts in light of the parties' representations about them, their meaning, their purpose and their probable effect upon prisoners.

A. Religious Land Use and Institutionalized Persons Act, First Amendment  
and Equal Protection Claims

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Plaintiff contends that defendants violated his rights under the Religious Land Use and Institutionalized Persons Act, the First Amendment free exercise clause and the Fourteenth Amendment equal protection clause when they refused to allow him to have the Odinist texts *Creed of Iron*, *Temple of Woton* and *The NPKA Book of Blotar*. He contends also that Wisconsin Department of Corrections Internal Management Procedure #6 suppresses speech protected by the First Amendment because it allows defendants to justify banning

Odinist literature. Because defendants' heaviest burden is under the Religious Land Use and Institutionalized Persons Act, I will consider plaintiff's statutory claim first. If defendants meet their burden under the act, they will have met the less stringent burden of showing that their conduct was reasonably related to a legitimate penological interest under the First Amendment. Turner v. Safley, 482 U.S. 78 (1987). This will resolve plaintiff's equal protection claim as well.

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-1. Plaintiff has put in little evidence revealing what his religious exercise requires. It is undisputed that he is Odinist or Asatru and that he believes that to practice his religion he must obtain knowledge of and observe "sumbels," rituals, meditative guidelines and ritual writing. In addition, he believes he must possess and master "runes." However, it is not clear whether to do all these things, plaintiff must possess the books *Creed of Iron*, *The NPKA Book of Blotar* and *Temple of Wotan*. Indeed, the parties dispute whether these books are religious texts at all. Plaintiff maintains that *Temple of Wotan* contains religious text "essential to practice Odinism, runic studies, rites, blots, mystery of the blood, destiny, fate," that *Creed of Iron* is a religious text that "contains essential curriculum to the practicing of Odinism, i.e. symbolic meaning, the calendar of

festivals, the half-months and their runic correspondences to said months, daily invocations to the gods and goddesses and incantations” and that the “sumbels,” rituals, meditative guidelines and ritual writings contained in *The NPKA Book of Blotar* are essential for an Odinist to know and observe. Defendants argue that *Temple of Wotan* is not a religious text and that its ceremonies are not represented as being essential to the practice of Odinism or Wotanism, that *Creed of Iron* is not a religious text but rather, a secular work emphasizing Wotansfolk, an ideology overwhelmingly concerned with racial separatism and white supremacy, and that *The NPKA Book of Blotar* is a compilation of rituals from a wide array of Odinist and heathen revival groups, that the section of rituals in the book are excerpted directly from *Temple of Wotan*, that many of the rituals express racist philosophies of the Wotansfolk group and that even the book’s author states that the rituals do not constitute a set liturgy and should not be considered authoritative.

The Religious Land Use and Institutionalized Persons Act is to be construed broadly to favor the protection of inmates' religious exercise. 42 U.S.C. § 2000cc-3(g). To that end, the Supreme Court has adopted a broad definition of “religion” that includes non-theistic and atheistic beliefs, as well as theistic ones, Kaufman v. McCaughtry, \_\_\_ F.3d \_\_\_, 2005 WL 1994106 \*2 (7th Cir. Aug. 19, 2005) (citing cases). The Court of Appeals for the Seventh Circuit has suggested that “when a person sincerely holds beliefs dealing with issues of ‘ultimate concern’ that for her occupy a ‘place parallel to that filled by . . . God in



traditionally religious persons,' those beliefs represent her religion.” Id. (citing Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 688 n.5 (7th Cir. 1994)). Therefore, I will assume without deciding that plaintiff’s inability to possess the books at issue places a substantial burden on the practice of his religion.

A substantial burden is permissible if it furthers a compelling governmental interest. At the outset, I note that the opinions of defendant Lebbeus Brown, Thomas Laliberte, Paul Hestekind and Kurt Linjer are entitled to deference in light of the training and experience these men have in the field of gang and disruptive group identification and the effects of white supremacist ideology in the prison setting. Also entitled to deference is their conclusion that the white supremacist ideology encourages the formation of disruptive groups, that inmates who live by the ideals professed in *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar* will be less likely to follow the rules of the institution and society and that the books encourage violence without concern for social standards and compromise plaintiff’s chances of rehabilitation. Finally, I must defer to the opinions of defendant Brown and Kurt Linjer, Thomas LaLiberte and Paul Hestekind that members of disruptive groups are physically endangered by the presence of rival groups, that race hatred and violence associated with it are particular security concerns within the prison system, controlling or eliminating disruptive group activities in prisons is imperative to maintaining a safe and secure environment for staff, inmates and visitors and that allowing inmates to

display signs widely known to be associated with white supremacy would present a danger to the safety and security of the staff and inmates at the institution.

In Lindell v. McCallum, 352 F.3d 1107, 1110 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit suggested that Wisconsin prison authorities may demonstrate a compelling interest in suppressing Wotanism if they can show that the religion is racist. Whether plaintiff Borzych is Wotanist, Odinist or Asatru, it is undisputed that the *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar* contain statements that advocate racial purity. In addition, these texts repeatedly reproduce the Celtic cross, swastikas and Thor's Hammer, symbols typically associated with white supremacy. I have found from an *in camera* examination of the texts that the assessments of defendant Brown, Kurt Linjer and Thomas LaLiberte about the content of the texts are not arbitrary or irrational and that defendants have reached a reasonable conclusion that the books advocate racial purity and violence to achieve that end. Furthermore, I agree with defendants that the state's interest in maintaining a safe and secure multi-racial prison environment is served by minimizing plaintiff's ability to flaunt his kinship with a disruptive group whose philosophical ideology promotes racial superiority, encourages violence and disregards social standards.

Also, I agree with defendants that the state will be hindered in preparing plaintiff for his eventual emergence into a society whose laws require racial equality if plaintiff is allowed to feed upon writings that espouse racial hatred. Effectuating the rehabilitation of prisoners

is a substantial state interest that has been held to justify restrictions on inmate correspondence. Thornburgh v. Abbott, 490 U.S. 401, 408 (1989). Therefore, I conclude that defendants have shown a compelling state interest in preventing plaintiff from possessing *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar*.

The next question is whether the state must prove that a ban on plaintiff's religious texts is the least restrictive means of furthering its interests. The plain language of the Religious Land Use and Institutionalized Persons Act seems to require such a demonstration. However, the Court of Appeals for the Seventh Circuit has interpreted identical language in the Religious Freedom Restoration Act less strictly. In United States v. Israel, 317 F.3d 768, 772 (7th Cir. 2003), a practicing Rastafarian argued that the government had imposed a substantial burden on his religion by prohibiting him from using marijuana. Id. at 771. The court of appeals found that although the government had imposed a substantial burden, it had a compelling interest in preventing drug abuse; requiring plaintiff to abstain from marijuana use was a "legitimately restrictive means" to further that interest. Id. at 772. The court did not explore alternative means that might balance the interest in preventing drug abuse with plaintiff's religious practice. Id.

Like the argument presented in Israel, defendants' argument in this case is that denying plaintiff's request to possess the religious texts at issue is the least restrictive means of furthering the state's interest in prison security and rehabilitation. I agree. It may be that

in Israel, the court omitted any discussion of less restrictive alternatives because none was imaginable. In the present case, defendants have suggested no less restrictive alternative than banning racist literature as a legitimate solution to the state's security and rehabilitative concerns about these items and I can conceive of none. Forbidding plaintiff from having *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar* is a legitimately restrictive means for containing or eliminating disruptive group activity and fostering plaintiff's rehabilitation. Id. ("Any judicial attempt to carve out a religious exemption [to the rule forbidding the use of marijuana] would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions."). Defendants are entitled to summary judgment on plaintiff's claim that his rights under the Religious Land Use and Institutionalized Persons Act are being violated by defendants' refusal to allow him to possess *Creed of Iron*, *Temple of Wotan* and *The NPKA Book of Blotar*.

The conclusion that prison officials have shown a compelling state interest in refusing to permit plaintiff to possess *The NPKA Book of Blotar*, *Creed of Iron* and *Temple of Wotan* dooms plaintiff's First Amendment and equal protection claims. The First Amendment prohibits prison regulations that burden an inmate's right to freely exercise the religion of their choosing unless the regulation is reasonably related to the prison's legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). The equal protection clause prohibits governmental

actors from denying privileges to adherents of one religion while granting it to others. Native American Council of Tribes, 691 F.2d 382, 384 (8th Cir. 1982) (citing Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967)). Again, however, the differential treatment will be upheld if it is reasonably related to the prison's legitimate penological interests. Defendants have shown compelling state interests in security and rehabilitation in preventing plaintiff from possessing *The NPKA Book of Blotar, Creed of Iron* and *Temple of Wotan*. Therefore, defendants are entitled to summary judgment on plaintiff's First Amendment and Fourteenth Amendment equal protection claims.

#### B. Establishment Clause Claim

The First Amendment to the United States Constitution prohibits Congress from enacting laws "respecting an establishment of religion." Although it is now well settled that the clause applies to any government action and not just to laws of Congress, Glassroth v. Moore, 335 F.3d 1282, 1294 (11th Cir. 2003) (citing cases), the Supreme Court has struggled to give meaning to the establishment clause in a way that accurately reflects its purpose and does not clash with the protections of the free exercise clause of the First Amendment. In Everson v. Board of Education, 330 U.S. 1, 16 (1947), the Supreme Court adopted the view of Thomas Jefferson in concluding that the clause "was intended to erect 'a wall of separation' between church and State."

In Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), the Court adopted a more specific test in determining whether the government has violated the establishment clause: whether the government has acted with a sectarian purpose, whether the primary effect of the conduct is to advance or inhibit religion and whether the conduct fosters "an excessive government entanglement with religion." Id. Recently, it reaffirmed the utility of the Lemon test in McCreary County v. American Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005).

The facility's book policy satisfies all three prongs of the Lemon test. Plaintiff adduces no evidence to show that the book policy favors one religion or another. It is undisputed that defendants allow inmates to possess holy books such as the Bible, Koran or an equivalent religious text. In addition, it is undisputed that plaintiff's religion does not have a recognized "holy book" equivalent to the Bible or Koran. Finally, the books that inmates can have in the institution have been obtained through donations from outside organizations. Plaintiff has offered no evidence to show that defendants solicited donations from one type of religion and not another.

At the Wisconsin Secure Program Facility, the Asatru religion is recognized as being a part of the umbrella group known as Wiccan/Pagan. Individuals incarcerated at the facility who follow Asatru have access to a number of books in the prison's library in the category of Wiccan/Pagan that concern the practice of Asatru. The defendants' conclusion that *Creed of Iron*, *Temple of Wotan*, and *The NPKA Book of Blotar* contain material that threatens the

security of the institution and impedes plaintiff's rehabilitation does not show a preference by defendants for certain religions over others. In light of the undisputed evidence showing that defendants' book policy gives equal treatment to all religions, has a secular purpose, does not advance or inhibit religion and does not foster excessive entanglement between the prison and religion, I will grant defendants' motion for summary judgment as it relates to plaintiff's establishment clause claim.

### C. Retaliation Claim

In his complaint, plaintiff alleged that defendants Judith Huibregtse and Ana Boatwright destroyed his copy of *The NPKA Book of Blotar* in retaliation for his having sent letters to defendants Frank, Casperson, Berge, Boughton, Overbo, Brown and Huibregtse on May 28, 29 and 30, 2004, complaining about the ban on Odinist texts. Defendants argue that they are entitled to judgment in their favor on plaintiff's retaliation claim for two reasons: 1) plaintiff failed to exhaust his administrative remedies on this claim; and 2) the facts show that defendants Huibregtse and Boatwright did not retaliate against plaintiff for his exercise of a constitutional right.

The Court of Appeals for the Seventh Circuit has held that a prisoner's failure to exhaust administrative remedies is an affirmative defense that defendants have the burden of pleading and proving. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999). "[A] suit filed

by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). As I explained at the outset of this opinion, defendants did not propose facts on exhaustion sufficient to meet their burden.

I turn then to defendants' alternative argument that they are entitled to judgment in their favor on the merits of plaintiff's retaliation claim. A state official who takes action against an inmate to retaliate against him for exercising a constitutional right, such as filing inmate complaints, may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To prevail on a retaliation claim, a prisoner must prove that his constitutionally protected conduct was a substantial or motivating factor behind the prison official's actions, that is, that the prisoner's protected conduct was one of the reasons the official took the adverse action against him. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Johnson v. Kingston, 292 F. Supp. 2d 1146, 1153 (W.D. Wis. 2003). "Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant . . . to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct." Spiegla v. Hull, 371 F.3d 928, 943 (7th Cir. 2004).

In this case, plaintiff has not produced any evidence that would allow a reasonable jury to find in his favor on his retaliation claim. The undisputed facts reveal that defendant



Huibregtse made his decision not to deliver *The NPKA Book of Blotar* to plaintiff well before May 28, 2004, the date on which plaintiff wrote the first of his complaint letters. The book arrived at the institution on March 31, 2004, at which time defendant Huibregtse inspected it and in consultation with defendant Overbo deemed it impermissible for entry into the prison. Sometime before April 1, 2004, Huibregtse issued plaintiff a property receipt/disposition form indicating that the book was being withheld and giving plaintiff 30 days to advise the property department whether he wanted to mail the book out, send it out on a visit, allow it to be destroyed or appeal the decision to withhold.

The parties dispute whether defendant Boatwright ultimately ordered the destruction of *The NPKA Book of Blotar*. Nevertheless, even assuming that Boatwright directed the destruction of the book, plaintiff has presented no evidence that Boatwright did so because plaintiff wrote letters of complaint to several prison officials. The facts reveal that at the time defendant Boatwright received and reviewed plaintiff's letters she was at another institution (the Oakhill Correctional Institution), had never met plaintiff, and had no animosity toward him. It was her job as the Department of Corrections' Policy Advisor and Coordinator for Religious Matters to review letters from prisoners concerning religious matters and she responded to plaintiff's letters by noting that plaintiff's concerns were being addressed through the inmate complaint review system. Without more, these facts do not support an inference that even if Boatwright made the decision to destroy plaintiff's book,

she was motivated by an improper purpose. Defendants are entitled to summary judgment on plaintiff's retaliation claim.

#### D. State Law Claim

In his complaint, plaintiff alleged that defendants violated Wis. Admin. Code § DOC 309.61(1)(a) and (b) by not allowing him to possess his religious texts.

Wis. Admin. Code § DOC 309.61(1)(a) and (b) prohibit discrimination against inmates on the basis of their religion. Plaintiff has failed to establish either that defendants discriminated against him on the basis of his religion or that his requests are consistent with orderly confinement and the security of the institution. Therefore, I will grant defendants' motion for summary judgement as it pertains to this claim.

The facts show that officials of the Wisconsin Secure Program Facility did not refuse to allow plaintiff access to *Creed of Iron*, *Temple of Wotan*, and *The NPKA Book of Blotar* because these texts are Odinist; they did so because those texts are at odds with the objectives of the institution and the Department of Corrections. An inmate of any other faith would have been denied access to the same books. Moreover, as noted above, although plaintiff was not given access to the texts that he requested, he did have access to other texts under the Odinist/Pagan umbrella. Defendants did not discriminate against a religion. They discriminated against books that contain material that clashes against the facility's legitimate

penological goals.

The regulation at issue states that inmates may pursue lawful religious activities as long as they are consistent with orderly confinement, institutional security and fiscal limitations. Reading a book is generally a lawful activity, no matter how odious the book's contents may be. In this case, however, undisputed facts establish that the books in question encourage antisocial behavior, racial divisiveness and disregard for authority. All of these factors weigh against permitting plaintiff or any other inmate to possess the books. Therefore, although defendants have prevented plaintiff from pursuing a religious practice, the regulation at issue permits them to do so.

#### ORDER

IT IS ORDERED that plaintiff Garry Borzych's motion for summary judgment is DENIED on all claims. Defendants' cross motion for summary judgment is GRANTED on

all claims. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 9th day of September, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge