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

PAUL PENKALSKI,

Plaintiff,

v.

UW BOARD OF REGENTS, MARK GUTHIER, SUSAN RISELING, UW-MADISON POLICE DEPT., THE WISCONSIN UNION, DANE COUNTY DISTRICT ATTORNEY'S OFFICE, JOHN D. WILEY, ISMAEL OZANNE, and DANE COUNTY CIRCUIT COURT,

Defendants.

OPINION AND ORDER

12-cv-168-wmc

In this proposed civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Paul Penkalski alleges that a variety of individuals and public entities violated a number of his constitutional rights. Plaintiff asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit provided to the court, it previously concluded that plaintiff is unable to prepay the fee for filing this lawsuit. The next step is determining whether plaintiff's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For the reasons that follow, Penkalski will be granted leave to proceed on Fourth Amendment claims against Officer Gerstner, but in all other respects, he will be denied leave and his claims will be dismissed.

ALLEGATIONS OF FACT[1]

A. The Parties

For all times relevant to the present complaint, Paul Penkalski has been a student at the University of Wisconsin in Madison, Wisconsin, or otherwise engaged in research and other activities at the University. Beginning in 2004, Penkalski alleges that he has been subjected to a "relentless campaign of harassment and civil rights violations," including "(a) some 30 baseless and malicious citations, three of them criminal; (b) numerous other instances of harassment by UW police; (c) at least six illegal bans, which effectively prevent him from being in public areas of campus; and (d) at least one unlawful, unconstitutional arrest by police." (Compl. (dkt. #1) p.1.)

Penkalski asserts claims against (1) Mark Guthier, the Director of the University of Wisconsin Memorial Union, and the Union itself; (2) John D. Wiley, the former Chancellor of UW-Madison, and the UW Board of Regents; (3) Susan Riseling, the Chief of the UW-Madison Police Department, and the UW-Madison Police Department; (4) Ismael Ozanne, the District Attorney of Dane County, and the DA's Office; and (5) the Dane County Circuit Court.

[1] In addressing any pro se litigant's complaint, the court must read the allegations generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). The following factual summary represents the court's best effort at capturing in a favorable light the detailed allegations in Penkalski's 39-page complaint, which spans events from 2004 until the end of 2011.

B. Revocation of UW Union Membership and Banning from the Union and other UW buildings

Plaintiff alleges that his UW Union Membership was unlawfully revoked in June 2004, reinstated in August 2004, and then unlawfully revoked again in September 2005. (Compl. (dkt. #1) ¶¶ 8, 11, 17.)[2] During this same period of time and extending to late 2011, Penkalski was ordered repeatedly to leave the premises and surrounding area of the Union by Union employees and members of the UW Police Department, at times under threat of arrest; he was also issued trespassing citations by the UW Police Department. (*Id.* at ¶¶ 10, 16, 40-41, 51, 77, 81, 83-85, 89-90, 102, 111, 123.) Penkalski contends that this harassment was unlawful because the building is open to the general public and he was never "being disorderly or violating *any* rule of law." (*Id.* at ¶¶ 41-43, 77, 91.) Penkalski was similarly denied access to UW libraries, ordered to leave under threat of arrest, and issued citations for trespassing. (*Id.* at ¶¶ 12, 26, 31, 62.) Penkalski alleges that he also received threatening letters from Guthier and others about his access to University buildings. (*Id.* at ¶ 93.)

For some dates, Penkalski provides more specific details about defendants' conduct. In the summer of 2006, Penkalski enrolled as a student to regain his access to the libraries and Union. (*Id.* at ¶ 36.) A UW attorney told Penkalski that he could

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[2] Penkalski brought a lawsuit in this court in 2008 against Guthier, alleging that his Union membership was revoked without due process. *Penkalski v. Guthier*, No. 08-cv-544-wcg (W.D. Wis. Sept. 30, 2008). The court granted summary judgment to defendant, finding that Penkalski's due process claim was precluded by his filing of small claims court actions against Guthier challenging the revocation. *Penkalski v. Guthier*, No. 08-cv-544, 2009 WL 3379157 (W.D. Wis. Oct. 19, 2009). Penkalski acknowledges both the state and federal lawsuits in his complaint. (Compl. (dkt. #1) ¶ 17.)

access the libraries, but could not be at the Union. (*Id.*) Despite this instruction, on July 27, 2006, Penkalski was at Memorial Union when he was approached by a UW Police Department officer and ordered to leave the premises under threat of arrest. (*Id.* at ¶ 37.) Penkalski left for fear of a public arrest.[3] (*Id.*) After that event, Penkalski was repeatedly ordered to leave the Union in late 2006 and early 2007 based on a standing order (which Penkalski contends is illegal). (*Id.* at ¶ 41 (listing dates).) Penkalski contends that he had a right to access the building because it is open to the general public. (*Id.* at ¶ 44.)

In late February 2007, Penkalski received four more citations for trespassing at Memorial Union and for criminal disorderly conduct. (*Id.* at ¶ 56.) On February 26, 2007, the Dane County Circuit Court issued a "bond condition" prohibiting Penkalski from being within one block of Memorial Union "unless [he] had written permission of the director of the building [he] wished to be in." (*Id.* at ¶ 58.) The bond condition remained in effect until April 30, 2008. (*Id.* at ¶ 61.) At some point, Penkalski received permission from the director of Memorial Library to be in the library, but that permission was subsequently revoked once a UW Police Department officer informed the director of the library that he was violating a court order. (*Id.* at ¶ 61.) Penkalski alleges that this bond condition violated his due process rights. (*Id.* at ¶ 58)

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[3] In 2009, Penkalski acknowledges that he filed suit against the officer Nick Banuelos in this court, but the case was dismissed on the merits. (Compl. (dkt. #1) ¶ 37.) *See Penkalski v. Banuelos*, No. 09-cv-0471, 2009 WL 4350255 (W.D. Wis. Nov. 24, 2009) (denying plaintiff leave to proceed against University of Wisconsin officials on the basis that those claims are precluded by state court action and against Banuelos because he would be entitled to qualified immunity).

C. Alleged Failure to Investigate and Charge UW Employees

Penkalski also complains about the UW Police Department's refusal to investigate and the Dane County District Attorney's office refusal to charge Guthier and others for alleged violations. (*Id.* at ¶¶ 18, 19, 44-45, 49, 53, 65, 67, 78-79, 85, 93, 96, 103, 107, 113.) In particular, Penkalski contends that: (1) Guthier committed criminal disorderly conduct and criminal obstruction by blocking Penkalski's access to a public meeting; (2) UW Police Department refused to investigate; and (3) the then Dane County D.A., Brian Blanchard, and the current D.A., Ismael Ozanne, refused to charge Guthier and other Union employees. (*Id.* at ¶¶ 20, 122.) He further complains that the UW's then-Chancellor, John Wiley, also refused to discipline Guthier. (*Id.* at ¶ 21.) Penkalski also faults the Dane County Circuit Court (apparently, Judge David Moeser) for refusing to issue a TRO against one Union employee for ongoing harassment. (*Id.* at ¶ 46.)

In 2006, 2007, 2008, 2009, and 2012, Penkalski also applied for a Hoofer sailing instructor position, but his applications were intercepted by Guthier. (*Id.* at ¶ 38.) Guthier turned one of the applications over to the UW Police Department for investigation. Penkalski alleges that he attempted to file a complaint with the UW Madison anti-discrimination office, but a UW attorney told him that that office would not investigate his complaint and instructed him not to contact the office for any reason. (*Id.* at ¶ 39.)

D. Prosecution of Penkalski in Circuit Court and Issuance of Injunctions Against Him[4]

As far as the court can surmise, Penkalski's complaints are connected to his prior affiliation with the UW Hoofer's Sailing Club. In July or August 2005, UW Police Department investigated an unofficial, anonymous newsletter sent to some members of the Hoofer Sailing Club. In connection with that investigation, Penkalski was charged with violating UWS 18.46(e) (intentional computer harassment -- attempting to conceal identity). (*Id.* at ¶ 23.) Penkalski contends that this charge violated his rights under the First Amendment. (*Id.*) In March 2006, Penkalski was subsequently prosecuted in Dane County Circuit Court for that charge, as well as other charges, including trespassing. (*Id.* at ¶ 24.) Penkalski contends that he was coerced into pleading no contest to a disorderly conduct and harassment charge. (*Id.* at ¶¶ 25, 29.) Penkalski also alleges that Judge Moeser of the Dane County Circuit Court refused to provide him a jury trial because he could not afford to pay the jury fee and refused to reopen the case after Penkalski discovered allegedly exculpatory evidence. (*Id.* at ¶¶ 26, 30.)

In April 2006, two Union staff members individually petitioned for TROs against Penkalski, and Judge John C. Albert of the Dane County Circuit Court issued injunctions, barring Penkalski from any premises occupied by the two employees for a period of two years. (*Id.* at ¶ 32.)[5] While the injunction was in place, Penkalski

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[4] In a description of his "general claims," Penkalski contends that 30 charges were brought against him, resulting in five convictions, but contends that those convictions were "coerced." (*Id.* at ¶ 125.)

[5] Penkalski appealed and represents that both injunctions were reversed two years later, although it appears they simply expired by their terms. (Compl. (dkt. #1) ¶ 33.) *See*

encountered one of the Union employees at a coffee shop not on University property. (*Id.* at ¶ 34.) Penkalski alleges that he gathered his belongings and immediately left, but the Union employee filed a false police report against him. (*Id.*) Penkalski asked then D.A. Blanchard to charge the employee with making a false police report, but he refused to do so. (*Id.* at ¶ 35.)

In early 2007, Penkalski received 12 citations from the UW Police Department. (*Id.* at ¶ 68.) The district attorney refused to prosecute one of them, Penkalski plead no-contest to one count of trespassing forfeiture charge and the ten remaining charges were dismissed. (*Id.*) Penkalski contends that he was coerced into pleading no contest based on the Assistant D.A.'s representation that he would bring a criminal charge against him unless he did so. (*Id.*) Penkalski also claims that the Assistant D.A. and his public defender violated a plea agreement in a criminal case. (*Id.* at ¶ 69.) When Penkalski sought to have the public defender replaced, Judge Moeser refused his request. (*Id.*)

On June 12, 2009, Penkalski was served with a TRO based on "a falsified petition filled out and sworn to by Union Director Mark Guthier." (*Id.* at ¶ 104.) The TRO was granted on July 3, 2009, "based on perjured testimony by Guthier and five of his student building managers." (*Id.*) At the hearing, Penkalski claims that Judge Flanagan refused to provide him counsel, and refused to let Penkalski admit evidence. (*Id.* at ¶ 105.) Judge Flanagan stated, "I will accept that your intent is not to harass. I conclude, though, that the effect of what you do is to harass. That's the important thing." (*Id.*)

Rogers v. Penkalski, No. 2008WIApp135, 2008 WL 2833929 (Wis. Ct. App. July 24, 2008).

Penkalski claims that the issuance of the TRO was contrary to the law, which requires intent to harass. (*Id.*)[6]

Judge Flanagan also refused to consider evidence that Guthier and his staff had harassed Penkalski. (*Id.* at ¶ 106.) Penkalski alleges that Judge Flanagan's "overall conduct was a gross violation of [his] constitutional rights." (*Id.*) The injunction was in place for two years, expiring on July 3, 2010. *Guthier v. Penkalski*, No. 2009AP2312, 2010 WL 4751774, at *1 (Wis. Ct. App. Nov. 24, 2010).

E. Penkalski's Initiation of Actions in Circuit Court

At some point in time, Penkalski filed small claims cases seeking damages caused by defendants' harassment. At a January 24, 2007, trial on six of these claims, Penkalski alleges that two UW Police Department officers showed up at the trial to intimidate him. (*Id.* at ¶ 55.) After the trial, Penkalski further alleges that the officers "detained me against my will for about 30 minutes," during which they issued eight more "baseless" citations and issued a written warning for "felony stalking." (*Id.*)

In December 2007, Penkalski filed five more small claims cases against Union employees. (*Id.* at ¶ 70.) The circuit court consolidated these five cases. Judge O'Brien denied Penkalski's request for appointment of counsel, which Penkalski alleges violated

[6] Penkalski raised this challenge in an appeal to the Wisconsin Court of Appeals. That court rejected his challenge, explaining that: "we understand the trial court to have meant that, while Penkalski did not go to the Union for the *purpose* of harassing anyone, he should certainly have been *aware* that the effect of his pattern of yelling at student building managers who approached him in the course of their job duties would be to intimidate or harass them." *Guthier v. Penkalski*, No. 2009AP2312, 2010 WL 4751774, at *3 (Wis. Ct. App. Nov. 24, 2010).

his civil rights. (*Id.*) Given his lack of legal knowledge and experience, Penkalski claims that he could not present his case resulting in Judge O'Brien dismissing it, an act Penkalski alleges was "capricious, abusive and illegal." (*Id.* at ¶ 71.)[7] Penkalski contends that after Judge O'Brien dismissed his case, other circuit court judges have refused to approve filing fee waivers. (*Id.* at ¶¶ 74, 109, 110.)

In June 2008, Penkalski filed a John Doe action against a Union employee asking the court to issue obstruction charges. (*Id.* at ¶ 100.) Judge Albert refused to do so, finding that Penkalski was attempting to retaliate against the Union employee for a small claims case he had filed against the employee. (*Id.*) Penkalski contends that this ruling was "negligent and/or malicious, and it violated my right to equal protection." (*Id.*)[8]

In 2009, Penkalski filed another John Doe action against a different Union employee asking that the circuit court charge this individual for various criminal acts. (*Id*. at ¶ 86.) The judge assigned to the case allegedly found that there was probable cause to charge the individual, but then "turned around and accused [Penkalski] of 'abusing the system' (by trying to get criminal charges against someone who had committed crimes) and dismissed the case!" (*Id.* (emphasis in original)).

In late 2011, Penkalski filed yet another John Doe case in circuit court requesting charges against Guthier and several of his staff based on alleged perjury committed at the

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[7] Penkalski apparently appealed Judge O'Brien's decision, but claims he was unable to file his appellant brief because of Guthier's June 2009 "malicious pursuit of a harassment injunction." (*Id.* at ¶ 73.)

[8] Penkalski represents that he could not appeal this decision because he was overwhelmed by ongoing abuse. (*Id.* at ¶ 100.)

2009 injunction hearing. (*Id.* at ¶ 119.) Judge Markson refused to consider Penkalski's evidence and dismissed the case. (*Id.*) Judge Markson also disregarded Penkalski's allegations of stalking by Union employees. (*Id.* at ¶ 120.)

F. Registration Hold

Penkalski also alleges that Guthier conditioned his Union membership on Penkalski paying a fee to the Union that he contends was not owing. (*Id.* at ¶ 93.) During the summer of 2007, Penkalski contacted all members of the Board of Regents to inform them of a "$348 hold" placed on his registration and records by Guthier. (*Id.* at ¶ 96.) The Board of Regents did nothing. (*Id.*)[9]

Eventually, Penkalski sent a letter to Wiley at his home address to "put an end" to the ongoing harassment by Union employees and the UW Police Department, as well as to remove the $348 hold. (*Id.* at ¶ 97.) Instead, Wiley added a "second hold," allegedly because Penkalski's contact of Wiley at his home address violated the student code of conduct. (*Id.* at ¶ 98.) In late 2008, Penkalski again wrote to Wiley for assistance, but his was advised by "UW Legal" that his case was closed and Penkalski should not contact Wiley anymore. (*Id.* at ¶ 99.)

[9] Penkalski alleges that this hold was released in September 2010. (*Id.* at ¶ 118.)

G. May 19, 2010, Arrest

On May 19, 2010, UW police officers arrested Penkalski at his home. (*Id.* at ¶ 114.)[10] Penkalski alleges that the officers came to his apartment and asked if he would step outside so they could ask him some questions. (*Id.*) When Penkalski refused, the officers asked if they could come inside. (*Id.*) Penkalski again refused and asked them to leave. (*Id.*) At this point, UW Police Officer Gerstner allegedly "leaped up the last few steps, forced the door back open, stepped completely inside by apartment, grabbed [Penkalski] by the arm as [he] retreated toward [his] bedroom, yanked [him] back into [his] foyer, and handcuffed [his] wrists." (*Id.*) Gerstner then informed Penkalski that he was being arrested for violating a 2009 injunction. (*Id.*)

Penkalski contends that the officers refused to look at a map that he had showing where he was prohibited to be by the injunction in order to demonstrate that the place he was accused of riding his bicycle was not prohibited. (*Id.*) Instead, Penkalski alleges that he was placed in one of their squad cars and taken to jail. (*Id.*) Penkalski further alleges that the officers had no arrest warrant and forced their way into his home to arrest him anyway. (*Id.*) Penkalski was released the next day without any charges being filed. (*Id.* at ¶ 115.)

[10] Penkalski was also arrested on September 16, 2005, outside of Memorial Library by UW Police Department for disorderly conduct. (*Id.* at ¶ 18.)

H. Alleged Harm and Requests for Relief

Penkalski alleges that the defendants' unlawful conduct caused: (1) mental anguish; (2) termination of his doctoral program and harm to his career; (3) loss of friendships; (4) harm to many other relationships with people who have heard about these events; (5) harm to his ability to develop new friendships; (6) damage to his reputation; and (7) lost income for more than seven years. (*Id.* at ¶ 135.)

For relief, Penkalski seeks: (1) an order preventing defendants from continuing to harass him, illegally barring him from University buildings, and issuing citations against; (2) an order directing the district attorney to bring charges against Guthier and other Union employees; (3) an order reinstating his Union membership; (4) an order requiring the Union to stop publicizing events as open to the general public if they are not truly open; (5) a letter from the Chancellor to all library directors informing them that the 2006 library ban was illegal; (6) a letter of apology from the Board of Regents or Chancellor; and (7) compensatory damages in the sum of $1.5 million and additional compensation for pain and suffering. (*Id.* at p.39.)

OPINION

I. General Limitations on Penkalski's Claims

Penkalski acknowledges in his complaint that some of his claims may be barred by the statute of limitations. (Compl. (dkt. #1) ¶ 4.) Since plaintiff filed the present lawsuit on March 9, 2012, any claims arising from activities occurring on or before March 9, 2006, are barred. *Wudtke v. Davel*, 128 F.3d 1057, 1061 (7th Cir. 1997)

(applying the six-year statute of limitations for injury to personal rights in Wis. Stat. § 893.53 to § 1983 claims). Specifically, any claims premised on Guthier's actions prior to March 2006, including the revocation of Penkalski's union membership and placement of an academic hold, and the charges associated with the anonymous newsletter fall outside of the statute of limitations.

In addition, Penkalski's frequent involvement in state court actions -- both as a defendant and as a plaintiff -- pose significant barriers to his pursuant of § 1983 claims in this court. For example, Penkalski's earlier lawsuit against Guthier in this court was dismissed because his state small claims actions precluded any claim against Guthier involving the revocation of his Union membership in a subsequent proceeding. *Penkalski v. Guthier*, No. 08-cv-544, 2009 WL 3379157, at *3-4 (W.D. Wis. Oct. 19, 2009) (finding claim preclusion applied to § 1983 action). Similarly, to the extent Penkalski's claims concern injuries caused by state court judgments entered against him, the *Rooker-Feldman* doctrine deprives this court of jurisdiction to reconsider those decisions. *See Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (explaining that the doctrine developed in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), applies to "cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments"). Finally, to the extent Penkalski attempts to assert claims which would call into question the validity of any criminal conviction, those claims also are barred unless

Penkalski can demonstrate that the conviction was reversed on appeal or otherwise expunged. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

Moreover, there are also general limitations on plaintiff's proposed claims against specific defendants. Plaintiff attempts to sue a circuit court, a district attorney's office, and various department or organizations of a state university. These entities are not subject to suit under § 1983. *See generally Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (explaining that "[s]tates or governmental entities that are considered 'arms of the State'" are not subject to suit under § 1983); *see Bach v. Milwaukee Cnty. Circuit Court*, No. 13-CV-370, 2013 WL 4876303, at *5 (E.D. Wis. Sept. 11, 2013) (dismissing claims against circuit court because it is an arm of the state); *Griffin v. City of Milwaukee*, No. 10-C-243, 2010 WL 4723420, at *9 (E.D. Wis. Nov. 15, 2010) ("With respect to the Milwaukee County District Attorney's office, it is not a suable entity; each Wisconsin county is a 'prosecutorial unit' headed by an elected district and staffed by deputy or assistant district attorneys, who are state, and not county, employees."); *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 694 (7th Cir. 2007) (concluding that a public university's athletic department "is not a legal entity apart from the University," and therefore "is not capable of being sued").

Finally, plaintiff also purports to assert claims against individual state court judges (although the entire Dane County Circuit Court is listed as a defendant in the caption) and the current District Attorney. Judges are absolutely immune from damage awards in civil rights cases for acts taken in their judicial capacities. *Stump v. Sparkman*, 435 U.S. 349 (1978). Similarly, prosecutors are absolutely immune for all their actions in

"initiating a prosecution and presenting the state's evidence." *Imbler v. Pachtman*, 424 U.S. 409 (1975); *see also Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

II. Merits of Individual Claims

With those general limitations in mind, the court can swiftly deny leave to all of Penkalski's claims, except an unlawful arrest claim and false arrest claim against Officer Gerstner.[11]

A. Claims concerning Revocation of Penkalski's Union Membership

Penkalski's Union membership was revoked in June 2004 and September 2005. Any claim premised on the revocation of his Union Membership is, therefore, time barred. Moreover, these claims are subject to claim preclusion for the reasons provided in Penkalski's prior lawsuit against Guthier in this court. *See Penkalski v. Guthier*, No. 08-cv-544, 2009 WL 3379157 (W.D. Wis. Oct. 19, 2009).

B. Claims concerning Denial of Access to University Buildings, Harassment by Union employees, and Citations for Disorderly Conduct and Trespassing

As explained above, the only properly proposed defendants for these claims are Guthier and Riseling.[12] All claims against Guthier concerning the same "factual

[11] Officer Gerstner is not named as a defendant in Penkalski's caption, but is identified in his complaint. Accordingly, the court will amend the caption to add Gerstner as a defendant.

[12] Penkalski also purports to bring claims against the former Chancellor John Wiley apparently based on his refusal to discipline Guthier for his alleged harassing conduct. (Compl. (dkt. #1) ¶ 21.) For Penkalski to allege a claim against Wiley as Guthier's

situation" as that alleged in Penkalski's 2009 lawsuit are barred by claim preclusion. *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 554, 525 N.W.2d 723, 729 (1995) (holding that claim preclusion bars any challenge that was brought or could have been brought in the earlier action). Moreover, for a significant portion of Penkalski's complaint, a court order was in place barring Penkalski from the Union, its grounds, and possibly other University buildings (although that is not clear). Any claim challenging the validity of the court order (or orders) would also implicate both the *Rooker Feldman* doctrine (if premised on civil claims Penkalski "lost" in state court) and *Heck v. Humphrey* (if the injunction were the result of a criminal conviction). These jurisdictional and procedural bars place significant barriers to any claim premised on Penkalski being barred, harassed or subject to citations for being in and around University property.

Even putting aside these issues, the court can discern no constitutional violation based on defendants' alleged actions. *First*, Penkalski fails to state a viable claim for violation of his due process rights. Procedural due process analysis is a two-step inquiry, requiring the court to determine: (1) whether plaintiff was deprived of a protected interest in life, liberty, or property; and (2) what process is constitutionally required with respect to that deprivation. *Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996). Generally, due process entitles an individual to notice and a hearing before the state may

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supervisor, he would have to allege that Wiley not only had knowledge of Guthier's misconduct, but also that Wiley "want[ed] the forbidden outcome to occur." *Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir. 2011) (*en banc*). Penkalski does not allege that Wiley intended for his rights to be violated. Even if he did, his failure to allege a constitutional violation against Guthier obviously precludes any claim against Wiley premised on Guthier's misconduct.

permanently deprive him of property. *See e.g.*, *Miller v. City of Chicago*, 774 F.2d 188, 191 (7th Cir. 1985) (noting that "pre-deprivation notice and hearing represent the norm").

As best as the court can discern, Penkalski is alleging that he has a liberty interest in accessing the Union and University libraries, primarily relying on his contention that these buildings are open to the public. The Seventh Circuit, however, has held that the fact that a place is open to the public does not create a liberty interest to access that place. *See Hannemann v. S. Door Cnty. Sch. Dist.*, 673 F.3d 746, 757 (7th Cir. 2012) (finding no liberty interest at stake for the right to loiter at certain public places, including parks, public schools, and libraries). Moreover, Penkalski received some process in the form of TRO hearings and prosecutions for trespassing and disorderly conduct citations before being deprived of any liberty interest in accessing these public places.

Second, Penkalski has no viable "class of one" equal protection claim. "An equal-protection claim brought by a 'class of one' can succeed only if the plaintiff proves that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment." *Jordan v. Cockroft*, No. 12-1633, 2012 WL 3104876, at *2 (7th Cir. Aug. 1, 2012) (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). At this stage, Penkalski must at least plead "intentionally discriminatory treatment lacking a rational basis." *Jordan*, at *2 (citing *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 899 (7th Cir. 2012) (*en banc*) (Posner, J., leading opinion) ("The plaintiff must plead and prove both the absence of a rational basis for the defendant's action and some improper personal

motive ... for the differential treatment."); *id.* at 913 (Wood, J., dissenting) (arguing that plaintiff must plead and prove that a state actor lacked a rational basis for singling him out)). In his complaint, Penkalski actually *provides* a rational basis for defendants' treating him differently -- namely, that he was subject to court orders barring him from University buildings.

C. Claims concerning the Police Department's Refusal to Investigate and the District Attorney's Office Refusal to Charge University Employees

As for any claims against the Dane County District Attorney or his office, it is well settled that prosecutors are entitled to absolute immunity in determining "whether charges should be brought and initiating a prosecution." *Lewis v. Mills*, 677 F.3d 324, 330 (7th Cir. 2012) (citing *Buckley*, 509 U.S. at 270). As for Penkalski's claims against the UW Chief of Police Susan Riseling or other individual UW Police Department officials, it is not clear how any duty on the part of the police to investigate Penkalski's complaints of harassment implicates his constitutional rights. Penkalski neither alleges that they ignored his complaints because of some protected status to implicate the equal protection clause, nor that he was arrested without probable cause because these officers failed investigate his side of the story. Absent more, the court cannot discern a constitutional violation to support a § 1983 claim.

D. Claims concerning Penkalski's Treatment in State Court

Penkalski complaints about his treatment in Dane County Circuit Court, both as a defendant and as a plaintiff, by both the district attorney's office and by the circuit

court are similarly meritless. Specifically, Penkalski complains about his prosecution on trespass and disorderly conduct citations, the court's issuance of TROs against him, the denial of TROs sought by Penkalski against Union employees, and the dismissal of his small claims actions. These claims are all barred for the reasons discussed above. Indeed, the District Attorney, other prosecutors in his office, and any judges sitting in the Dane County Circuit Court are absolutely immune from suit for actions relating to their official responsibilities. *See Stump*, 435 U.S. 349; *Imbler*, 424 U.S. 409; *Buckley*, 509 U.S. 259. As alleged, all of Penkalski's complaints against former D.A. Brian Blanchard, D.A. Ismael Ozanne, and various judges concern actions taken within their respective official capacities. Even if these defendants were not immune from suit, any claims challenging the validity of Penkalski's criminal convictions for trespassing or disorderly conduct would be barred by *Heck v. Humphrey*,[13] and any claims challenging the circuit court's entry of temporary restraining orders against him, denial of TROs against Union employees, or dismissal on the merits of his small claims actions are barred by the *Rooker-Feldman* doctrine.

[13] To the extent that Penkalski intends to challenge one or more of his underlying criminal convictions, requests for relief are governed by the federal habeas corpus statutes and are not actionable under 42 U.S.C. § 1983. *See, e.g., Prieser v. Rodriguez*, 411 U.S. 475 (1973). As such, the court does not construe the complaint as one for habeas relief.

E. May 29, 2010, Arrest

This leaves us only with Penkalski's claim that he was arrested on May 19, 2010, in violation of the Fourth Amendment. Penkalski appears to allege that he was arrested unlawfully without a warrant and without probable cause.

1. Unlawful Arrest

"[P]olice officers may constitutionally arrest an individual in a public place (*e.g.*, outside) without a warrant, if they have probable cause." *Harney v. City of Chi.*, 702 F.3d 916, 924 (7th Cir. 2012) (quoting *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 688 (7th Cir. 2001)). In contrast, a "warrantless entry into a residence to effect an arrest is presumptively unreasonable under the Fourth Amendment." *United States v. Walls*, 225 F.3d 858, 862 (7th Cir. 2000). Penkalski alleges that in arresting him, UW Police Officer Gerstner "leaped up the last few steps, forced the door back open," and entered Penkalski's apartment without his consent. (Compl. (dkt. #1) ¶ 114.)[14] At least on its face, this allegation appears to state an unlawful arrest claim under the Fourth Amendment.

2. False Arrest

Penkalski also appears to challenge whether Officer Gertsner had probable cause to arrest him. "Probable cause exists if 'at the time of the arrest, the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person, or one of reasonable caution, [to believe] . . . that the suspect has committed, is

[14] With respect to his May 29, 2010, arrest, Penkalski only identifies one officer in his complaint. To the extent another officer was involved in his arrest, Penkalski may seek leave to amend his complaint to add the name of the second officer.

committing, or is about to commit an offense.'" *Mucha v. Vill. of Oak Brook*, 650 F.3d 1053, 1056 (7th Cir. 2011) (quoting *Gonzalez v. City of Elgin*, 578 F.3d 526, 537 (7th Cir. 2009)). "Probable cause does not require that the existence of criminal activity is more likely true than not, rather (true to its label) probable cause simply requires 'a probability or substantial chance of criminal activity exists.'" *Harney*, 702 F.3d at 922 (quoting *Mucha*, 650 F.3d at 1056).

From the proposed complaint, the court infers that Gerstner arrested Penkalski for riding his bicycle in an area prohibited by a state court injunction. Penkalski contends both that (1) the area where he was riding his bicycle was not in a prohibited area, and (2) Gerstner would have realized that had he simply looked at Penkalski's map. While an officer need not conduct a further investigation once probable cause exists, *see Matthews v. City of East St. Louis*, 675 F.3d 703, 707 (7th Cir. 2012), the court will infer at this early stage that the complaint is alleging a reasonable officer in Gerstner's position would have lacked sufficient knowledge to conclude that Penkalski had violated the injunction and, thus, lacked probable cause to arrest him. Accordingly, Penkalski will be allowed to proceed with his Fourth Amendment claims against Gerstner for unlawful and false arrest.

ORDER

IT IS ORDERED that:

(1) the clerk of court shall unseal this case and amend the caption of this case going forward consistent with the order below;

(2) plaintiff Paul Penkalski's request to proceed on unlawful arrest and false arrest claims under the Fourth Amendment against University of Wisconsin Police Officer Gerstner is GRANTED;

(3) plaintiff's request to proceed against all other defendants on all other proposed claims is DENIED;

(4) defendants UW Board of Regents, UW-Madison Police Department, John D. Wiley, Mark Guthier, The Wisconsin Union, Ismael Ozanne, Susan Riseling, Dane County District Attorney's Office, and Dane County Circuit Court are DISMISSED;

(5) for the time being, plaintiff must send defendant Gerstner a copy of every paper or document he files with the court, but once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than defendant;

(6) the court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney;

(7) plaintiff should keep a copy of all documents for his own files, but he may send out identical handwritten or typed copies of his documents if he does not have access to a photocopy machine; and

(8) pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant and the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer, move or otherwise respond to plaintiff's complaint if it accepts service for defendant.

Entered this 14th day of March, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge