

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

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ALGENONE WILLIAMS,

Petitioner,

ORDER

v.

02-C-0070-C

GERALD BERGE, PETER HUIBREGTSE,  
JOHN SHARPE, LOMEN, CARPENTER,  
DAWSON, PRIMMER, HILGER, ECK, HAUSER,  
KARNOPP, FLANNERY, HUIBREGTSE,  
BROWN, FRIEDRICH, HEISZ, GEBHART,  
LEFLAR, VICKI SHARPE, LINDA TRIPP,  
SANDY HAUTAMAKI, ELLEN RAY, KELLY  
COON, GARY BOUGHTON, JOHN RAY, DIANA  
BENISCH, STOLSON, JON LITSCHER, CRIS  
O'DONNELL and JOHN BELL, in their individual/  
personal and official capacities,

Respondents.

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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Algenone Williams, who is currently an inmate at Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents violated his constitutional rights by (1) denying him a breakfast or lunch meal because he was not wearing his pants; (2) giving false statements at a level hearing review and retaining him on level three; (3)

confiscating two sports magazines, three personal hygiene items and a legally related memo; (4) retaliating against him by failing to investigate several inmate complaints; and (5) confiscating religious books. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. See 42 U.S.C. § 1915e.

As a preliminary matter, because petitioner alleged similar conditions of confinement violations at Supermax in another case pending before the court, see Williams v. Berge, Case No. 02-C-0010-C, I will not address these allegations in this cause of action.

Because I find that petitioner's denial of meals, level review hearing, deprivation of property and retaliation claims are legally frivolous, he will be denied leave to proceed in forma pauperis as to these claims. However, petitioner will be granted leave to proceed in forma pauperis as to his claim of deprivation of religious books in violation of the First Amendment against respondents Lomen, Heisz, Karnopp and Gebhart. I decline to exercise supplemental jurisdiction over petitioner's state law claims. In addition, petitioner filed a "motion to supplement complaint" in which he argues that his level review hearing was

unconstitutional. Because I am denying petitioner's request for leave to proceed as to this issue, I will deny his motion to supplement his complaint.

In his complaint and attachments, petitioner makes the following material allegations of fact.

#### ALLEGATIONS OF FACT

Petitioner is an inmate at the Supermax Correctional Institution in Boscobel, Wisconsin. The identities of the 30 named respondents are as follows:

1. Gerald Berge, warden of Supermax
2. Peter Huibregtse, deputy warden
3. John Sharpe, unit manager
4. Lomen, correctional officer II
5. Carpenter, sergeant
6. Dawson, correctional officer II
7. Primmer, sergeant
8. Hilger, correctional officer I
9. Eck, correctional officer I
10. Hauser, correctional officer I
11. Karnopp, correctional officer I
12. Flannery, sergeant
13. Huibregtse, sergeant
14. Brown, sergeant
15. Friedrich, correctional officer I
16. Heisz, correctional officer I
17. Gebhart, sergeant
18. Leflar, sergeant
19. Vicki Sharpe, program director
20. Linda Tripp, unit manager
21. Sandy Hautamaki, corrections complaint examiner

22. Ellen Ray, inmate complaint examiner
23. Kelly Coon, inmate complaint examiner
24. Gary Boughton, security director
25. John Ray, corrections complaint examiner
26. Diana Benisch, inmate complaint examiner
27. Stolson, sergeant
28. Jon Litscher, secretary of the Department of Corrections
29. Chris O'Donnell, corrections complaint examiner
30. John Bell, inmate complaint examiner

On August 23, 24, 25 and 27, September 7, 8, 9, 10, 11, 13-19, 21-25 and 27, 2001, plaintiff was denied his breakfast or lunch meal because he was not wearing his pants. Petitioner suffered weight loss, extreme hunger and “insult to his person.” Because of the extreme heat, plaintiff wore underwear only while confined in his cell. The level handbook states, “When meals are delivered you will be required to stand in the middle of the cell in full view of the officer with your light on. The officer will instruct you when you may move to the trap door and retrieve your meal tray. Failure to do so will be considered a meal refusal.” Prior to meal service, a correctional officer announced over the intercom that trousers had to be worn in order to receive a meal.

On August 21, 2001, during an random cell search, respondent Lomen took petitioner’s ESPN/NFL preview issue in which Eddie Curry and Tyson Chandler were featured on the cover, a copy of Sporting News and a memo he had obtained through a discovery request in another lawsuit. Inmates are allowed to possess only two publications. Respondent Lomen told petitioner that these items constituted three publications in

violation of the rules. Petitioner complained to respondent Sharpe. Petitioner believes the confiscation was in retaliation for filing a lawsuit.

During April 2001, petitioner attended a level review hearing. Respondent Tripp put “false statements” into the written record. Respondents Tripp’s and Huibregtse’s decision to retain petitioner on level three was arbitrary and capricious. On June 22 and July 29, 2001, petitioner wrote respondent Tripp requesting that she correct the record. On July 18, and 31, 2001, respondent Tripp replied and refused to correct the false statements.

On October 17, 2000, and March 23, April 4, May 9, and October 17, 2001, petitioner filed complaints complaining of “perpetual harassment and retaliation” because complaint examiners refused to “investigate” his complaints.

On an unspecified date, respondents Lomen, Heisz, Karnopp and Gebhart took petitioner’s Holy Qur’an and Islamic literature books, which include Belief and Islam, The Sunni Path, Why Did They Become Muslims, Endless Bliss-First Fascicle and Endless Bliss-Second Fascicle. Petitioner filed complaint SMCI-2001-34725. On November 21 and 28, and December 5, 2001, petitioner requested that his books be returned but respondent Lomen refused. Petitioner told respondent Lomen, “I’ll get them back anyway,” and Lomen responded, “As long as I’m the property officer, you’re never getting your books back.”

On an unspecified date, respondent Primmer destroyed petitioner’s Close-Up toothpaste and two containers of Suave deodorant.

(The remaining 30-plus pages of petitioner’s proposed complaint includes a date-by-date account of his filing of dozens of inmate complaints and appeals regarding these issues. All of petitioner’s inmate complaints and appeals were denied either on the merits or because they were untimely. It is unnecessary to recount each filing in this order because they do not shed any light on the substance of petitioner’s claims.)

## DISCUSSION

### A. Pants at Mealtime

I understand petitioner to allege that his Eighth and Fourteenth Amendment rights were violated when respondents denied petitioner his breakfast or lunch meals because he failed to put on his pants. Petitioner argues that he is subject to written rules only and those rules do not state that pants are required. Petitioner is incorrect. Prison officials have a legitimate penological interest in maintaining order and discipline, which includes requiring inmates to put on their pants when receiving their meals. See Jackson v. Elrod, 881 F.2d 441, 446 (“Penal regulations impinging upon inmates’ constitutional rights are valid when reasonably related to legitimate penological interests.”). Petitioner has been told that he must wear pants in order to receive his meals and prison staff announces this rule over the intercom to all inmates prior to meal service. Moreover, petitioner has been told in an earlier lawsuit in this court, that “the institution has the right to enforce its rules, no matter

how picayune or idiosyncratic they seem to [petitioner]. . . . [Petitioner] is not in charge of the dress code or meal service at the institution. If [petitioner] wants his breakfast, he should put his pants on. It's that simple." Order, Williams v. Mink, Case No. 00-C-0451-C, dkt # 29, at 4. Accordingly, petitioner's request for leave to proceed will be denied as legally frivolous.

#### B. Level Review Hearing

I understand petitioner to allege that respondents violated his right to due process under the Fourteenth Amendment by failing to advance him from level three. Before petitioner is entitled to Fourteenth Amendment due process protections, he must first have a protected liberty or property interest at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995) (citations omitted). However, the level-review decision about which petitioner complains does not implicate a liberty interest. Prisoners do not have a liberty interest in not being moved from one level to another. See Meachum v. Fano, 427 U.S. 215 (1976) (due process clause does not limit interprison transfer even when the new institution

is much more disagreeable). Because petitioner's level status does not implicate a liberty interest under Sandin, I will deny his leave to proceed as to this claim.

### C. Deprivation of Property

I understand petitioner to allege deprivation of property without due process when respondents allegedly took three personal hygiene items, two sports magazines and a legally related memo. As petitioner is well aware from other litigation in this court, see case no. 01-C-0241-C, as long as state remedies are available for the loss of property, neither intentional nor negligent deprivation of property gives rise to a constitutional violation. See Daniels v. Williams, 474 U. S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). In Hudson, the Supreme Court held that an inmate has no due process claim for the intentional deprivation of property if the state has made available to him a suitable post-deprivation remedy. In Daniels, the Court concluded that a due process claim does not arise from a state official's negligent act that causes unintended loss of property or injury to property.

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

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

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

#### D. Retaliation

Petitioner alleges in a conclusory manner that he suffered “perpetual harassment and retaliation” by various inmate complaint examiners because they failed to “investigate” his complaint. A mere conclusory allegation is not enough to state a claim upon which relief can be granted. See Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985) (ultimate fact of retaliation insufficient to state claim). Accordingly, I will deny petitioner’s request for leave to proceed on this claim.

#### E. Deprivation of Religious Books

Petitioner alleges that his First Amendment rights were violated when respondents Lomen, Heisz, Karnopp and Gerbhart confiscated his Holy Qur’an and five other Islamic-related books (Belief and Islam, The Sunni Path, Why Did They Become Muslims, Endless

Bliss-First Fascicle and Endless Bliss-Second Fascicle). Inmates retain protections afforded by the First Amendment, including the directive that no law shall prohibit the free exercise of religion. When a prison regulation impinges on an inmate's constitutional right to exercise his religion, the regulation must be reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U. S. 342, 349 (1987) (citing Turner v. Safly, 482 U.S. 78, 89 (1987)); Woods v. O'Leary, 890 F.2d 883, 885 (7th Cir. 1989). To support a regulation, prison officials must advance security considerations that are directly implicated by the protected activity and sufficiently articulated to permit meaningful constitutional review. Caldwell v. Miller, 790 F.2d 589, 599 (7th Cir. 1986). Once prison officials have satisfied this burden by introducing evidence of this nature, the court will defer to the judgment of prison officials unless the inmate can demonstrate that prison officials have exaggerated their response. Id. at 599-600. Petitioner's allegation that he was denied his holy books while he was confined is sufficient to permit the drawing of an inference that these respondents violated his First and Fourteenth Amendment rights to the free exercise of his religion. Petitioner's complaint does not suggest any reason for the denial of his books. Nonetheless, at this early stage of the proceedings, I will grant leave to proceed on this claim as to respondents Lomen, Heisz, Karnopp and Gerbhart only.

#### F. State Claims

Petitioner alleges that respondents violated various state laws. However, these state law claims are based on different facts from the First Amendment free exercise of religion claim on which I am granting petitioner leave to proceed. The state law claims do not form part of the same case or controversy as the First Amendment claim. See 28 U.S.C. § 1367(a) (district courts have supplemental jurisdiction over claims so related to claims in action that they form part of same case or controversy). Accordingly, I decline to exercise supplemental jurisdiction over petitioner's state law claims.

#### ORDER

IT IS ORDERED that

1. Petitioner Algenone Williams's request for leave to proceed in forma pauperis on his Eighth and Fourteenth Amendment claims that he was denied meals improperly because he was not wearing pants is DENIED as legally frivolous;

2. Petitioner's request for leave to proceed in forma pauperis on his Fourteenth Amendment due process claim because respondents failed to advance him from level three is DENIED as legally frivolous;

3. Petitioner's request for leave to proceed in forma pauperis on his deprivation of personal property claim is DENIED as legally frivolous;

4. Petitioner's request for leave to proceed in forma pauperis on his retaliation claim is DENIED as legally frivolous;

5. Petitioner's request for leave to proceed in forma pauperis on his First Amendment free exercise of religion claim is GRANTED as to respondent Lomen, Heisz, Karnopp and Gerbhart only

6. All respondents except respondents Lomen, Heisz, Karnopp and Gebhart are DISMISSED from this cause of action;

7. Petitioner's motion to supplement his complaint is DENIED;

8. I decline to exercise supplemental jurisdiction over petitioner's state law claims;

9. The unpaid balance of petitioner's filing fee is \$147.62; petitioner is obligated to pay this amount in monthly payments according to 28 U.S.C. § 1915(b)(2);

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

respondents or to respondents' lawyers.

Entered this 3rd day of April, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge