IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARRY A. BORZYCH,

ORDER

Plaintiff,

03-C-0575-C

v.

MATTHEW J. FRANK, Secretary of Wisconsin
Department of Corrections (DOC);
STEVE CASPERSON, Administrator of
Wisconsin's Department of Adult Institutions (DAI);
CINDY O'DONNELL, Office of the Secretary (OOS);
SANDRA HAUTAMAKI, Corrections Complaint Examiner;
DANIEL BERTRAND, Warden of Green Bay Corr. Inst.;
PETE ERICKSON, Security Director of G.B.C.I.;
LT. WAYNE NATZKE, Lieutenant at G.B.C.I.;
GLEN RIPLEY, Inmate Complaint Examiner (ICE); and
KATHLEEN BIERKE, Reviewer of Rejected Complaints,

Defendants.

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This is a proposed civil action for monetary, declaratory and injunctive relief, brought under 42 U.S.C. §§ 1983, 1985(3) and 1986. Plaintiff Garry A. Borzych is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He has paid the $150 filing fee. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation Reform Act. Under the act, plaintiff cannot proceed with this action unless the

court grants him permission to proceed after screening his complaint pursuant to 28 U.S.C. § 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss plaintiff's case on its own motion for lack of administrative exhaustion, but if defendants believe that plaintiff has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Garry A. Borzych is currently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He was incarcerated at the Green Bay Correctional Institution in Green Bay, Wisconsin from June 1999 through June 2003. Defendant

Matthew J. Frank is Secretary of the Wisconsin Department of Corrections. Defendant Steve Casperson is Administrator of the Wisconsin Department of Adult Institutions. Defendant Cindy O'Donnell is employed at the Office of the Secretary and is empowered to review complaints appealed to the Secretary of the Wisconsin Department of Corrections. Defendant Sandra Hautamaki is a Corrections Complaint Examiner and makes recommendations to the Office of the Secretary about appealed inmate complaints. At the Green Bay Correctional Institution, defendant Daniel Bertrand is the warden, defendant Pete Erickson is the security director, defendant Wayne Natzke is the lieutenant in charge of the segregation unit, defendant Glen Ripley is an inmate complaint examiner and defendant Karen Bierke reviews rejected inmate complaints.

A. Religious Freedom

Plaintiff's religion is Odinism, which is also known as Asatry or Wotanism. Odinists do not worship a god but instead attempt to achieve "godhead." In June of 1999, the Green Bay facility's security staff approved the book "Creed of Iron" and the facility's property staff gave a copy of this book to plaintiff. On November 19, 2002, facility property staff gave plaintiff a copy of the book "Temple of Wotan" after the security staff approved it. Both of these books are religious texts that plaintiff must have in order to practice his religion. The books describe the eight major blots (holidays), eight minor blots and rites that plaintiff

must observe in order to achieve "godhead." Plaintiff does not have access to any other religious texts describing the blots and rites.

On March 16, 2003, plaintiff was sent to the facility's segregation unit. According to the segregation unit handbook, "no personal books are permitted in segregation with the exception of one soft-covered religious text." Plaintiff wrote to defendant Natzke, asking him to send plaintiff his copy of "Temple of Wotan," which was being kept in storage with plaintiff's other possessions. Defendant Natzke denied this request on March 29, 2003.

Also on March 29, 2003, plaintiff filed an inmate complaint about defendant Natzke's refusal to let him have his book. Defendant Ripley recommended that the complaint be dismissed, stating that the segregation handbook defines religious materials as either a Bible or a Koran. Defendant Bertrand accepted defendant Ripley's recommendation and dismissed plaintiff's complaint. Plaintiff appealed this dismissal on April 9, 2003. Defendant Hautamaki recommended dismissal of the appeal and defendant O'Donnell accepted this recommendation. Defendants O'Donnell and Hautamaki then retaliated against plaintiff for filing this grievance by authorizing defendant Erickson to confiscate plaintiff's copies of "Temple of Wotan" and "Creed of Iron" from his stored possessions.

On April 21, 2003, plaintiff wrote to defendants Bertrand and Natzke, asking them to reconsider their position or provide him with an alternate means of practicing his religion. Additionally, plaintiff wrote letters to defendants Frank and Casperson, requesting that they

intervene and help plaintiff obtain his copy of "Temple of Wotan." Plaintiff did not receive a response from defendants Bertrand, Natzke or Casperson. On May 12, 2003, defendant Frank responded by directing defendant Bertrand to confiscate the books.

On May 11, 2003, plaintiff wrote to defendant Erickson, inquiring whether he planned to take plaintiff's texts on the authorization of defendants O'Donnell and Hautamaki. On May 29, 2003, defendant Erickson replied by threatening to destroy plaintiff's copies of "Temple of Wotan" and "Creed of Iron" unless plaintiff sent them out of the facility. None of the defendants have told plaintiff what pages or passages in the books advocate racism, ethnic supremacy, hatred or violence. Furthermore, defendants have not proven to petitioner that these books jeopardize the security and order of the facility or that they violate state law, federal law, the department of correction's rules or the facility's policies and procedures.

On May 19, 2003, plaintiff filed another inmate complaint about the confiscation of his books. In his recommendation that the complaint be dismissed, defendant Ripley stated that he would not revisit the issue raised in the complaint. Defendant Bertrand took defendant Ripley's advice and dismissed the complaint on May 28, 2003. Plaintiff appealed this decision and defendant Hautamaki recommended that the appeal be dismissed. Accordingly, defendant O'Donnell dismissed plaintiff's appeal on June 14, 2003.

On May 29, 2003, the same day that he filed his appeal, plaintiff submitted two new

inmate complaints, both questioning the authority of facility staff to require him to send his copies of "Temple of Wotan" and "Creed of Iron" out of the prison without first identifying the passages or pages of either book that advocated racism, hatred or violence. On May 30, 2003, defendant Ripley rejected one of the complaints, stating that he believed that the subject matter of the complaint had been addressed numerous times in resolving plaintiff's prior inmate complaints. He denied the second complaint for the same reason three days later. Plaintiff appealed the first dismissal on June 2, 2003 and the second dismissal on June, 4, 2003. On June 9, 2003, defendant Bierke determined that both complaints had been rejected appropriately.

On June 6, 2003, before defendant Bierke made a decision about plaintiff's appeals, plaintiff filed another inmate complaint. In it he complained that staff had sent his two books out of the facility even though he was appealing the dismissal of his May 19th complaint. On June 4, 2003, defendant Ripley dismissed the complaint on the ground that the subject matter of the complaint had been raised and addressed numerous times. On June 10, 2003, plaintiff filed an appeal that defendant Bierke dismissed on June 13, 2003.

At some point between June 6, 2003, and July 21, 2003, plaintiff was transferred to the Wisconsin Secure Program Facility in Boscobel, Wisconsin. On July 21, 2003, he filed a complaint to give the department of corrections an opportunity to correct the situation. On July 22, 2003, inmate complaint examiner Ellen Ray recommended that the complaint

be dismissed. Gerald Berge, the warden at the secure program facility, dismissed the complaint on August 14, 2003. Plaintiff appealed this dismissal on August 18, 2003. On August 23, 2003 defendant O'Donnell accepted defendant Hautamaki's recommendation and dismissed this appeal.

B. Right to Exercise & Right to Access the Court

On numerous occasions between March 16, 2003, and June 19, 2003, plaintiff was forced to choose between using the law library or going to recreation. Plaintiff filed an inmate complaint, alleging that he had both a right to exercise and a right to reasonable access to the courts and should not have to sacrifice one to invoke the other. Defendant Ripley recommended that the complaint be dismissed because inmates are not entitled to a specified amount of recreation time. Defendant Bertrand dismissed the complaint on May 8, 2003. Ten days later, plaintiff appealed this dismissal. Defendant Hautumaki recommended that the appeal be dismissed. On May 25, 2003, defendant O'Donnell dismissed the appeal.

DISCUSSION

A. First Amendment

1. Free exercise of religion

Plaintiff contends that all defendants denied him the right to possess two Odinist texts, "Temple of Wotan" and "Creed of Iron," which he needs in order to observe the blots and rites required for his religious pursuit of "godhead." In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court set out the standard to be applied in considering a prisoner's First Amendment free exercise claims. The Court held that prison restrictions that infringe on an inmate's exercise of his religion will be upheld if they are reasonably related to a legitimate penological interest. Id. at 349. The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard:

> 1. Whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule;
>
> 2. Whether there are alternative means of exercising the right in question that remain available to prisoners;
>
> 3. The impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and
>
> 4. Although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Al-Alamin v. Gramley, 926 F.2d 680, 685 (7th Cir. 1991) (quoting Williams v. Lane, 851 F.2d 867, 877 (7th Cir. 1988)) (quotation marks omitted). Although defendants may be able to satisfy the rational basis standard by showing that they have a legitimate penological

interest in denying plaintiff these texts, e.g., Haff v. Cooke, 923 F. Supp. 1104 (E.D. Wis. 1996) (upholding confiscation of material that could incite racial hostility or violence), it would be improper to characterize plaintiff's claim as legally frivolous or malicious or as failing to state a claim in the absence of evidence that the restriction is reasonable. Alston v. DeBruyn, 13 F.3d 1036, 1039-40 (7th Cir. 1994) (concluding that district court abused its discretion by dismissing plaintiff's free-exercise complaint as frivolous where record did not contain evidence of prison's need for restriction). Plaintiff's allegation that defendants denied him two Odinist religious texts is sufficient to support a First Amendment claim at this stage. He will be granted leave to proceed against defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson, Natzke, Ripley and Bierke on this claim.

2. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act affords prisoners engaged in religious conduct federal statutory protections above and beyond those embodied in the First Amendment. Charles v. Verhagen, 220 F. Supp. 2d 937, 943 (W.D. Wis. 2002), aff'd, 348 F.3d 601 (7th Cir. 2003) (upholding act's constitutionality). The act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §

2000cc-1. The rule

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

The act is to be construed broadly to favor the protection of inmates' religious exercise. 42 U.S.C. § 2000cc-3(g).

Although there is little case law interpreting the act's key terms, its predecessor, the Religious Freedom Restoration Act, had an analogous requirement that plaintiffs demonstrate a "substantial burden" on their exercise of religion before defendants were called upon to show a compelling interest furthered by the least restrictive means available. In Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996), judgment vacated and remanded by O'Leary v. Mack, 522 U.S. 801 (1997), the Court of Appeals for the Seventh Circuit elaborated on what the Religious Freedom Restoration Act meant by "substantially burdening" a person's exercise of religion. Although the court of appeal's decision in that case was vacated after the Supreme Court invalidated the RFRA as it applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997), the court of appeals' reasoning in Mack is instructive nonetheless. Charles, 348 F.3d at ___ (congressional intent behind both RLUIPA and RFRA is protecting inmates from substantial burdens in practicing their

religions). In Mack, the court of appeals held that

> a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

80 F.3d at 1179; but see Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001) (rejecting this definition of "substantial burden" as "read[ing] out of RFRA the condition that only *substantial* burdens on the exercise of religion trigger the compelling interest requirement") (emphasis added). Plaintiff claims that defendants denied him access to two religious texts, "Temple of Wotan" and "Creed of Iron." I understand plaintiff to allege that he is unable to attain his religious goal of achieving "godhead" unless he is allowed to possess these two texts. An act that prevents an inmate from achieving his ultimate religious goal meets the "substantial burden" test set forth in Mack, 80 F.3d at 1179; Lindell v. McCallum, 2003 WL 22937729 (denial of Odinist literature states claim under RLUIPA). Because plaintiff has alleged that the acts of defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson, Natzke, Ripley and Bierke imposed a substantial burden on his exercise of the Odinist faith, plaintiff will be allowed to proceed against them on his claim under RLUIPA.

3. Retaliation for exercising right to free speech

Prison officials may not retaliate against inmates for the exercise of a constitutional

right. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Filing an inmate complaint is protected by the First Amendment. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002). Although it is insufficient for an inmate simply to allege the ultimate fact of retaliation, Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002), an inmate need not allege a chronology of events from which retaliation may be inferred. Walker, 288 F.3d at 1009. To state a claim that officials retaliated against an inmate for filing a grievance, the plaintiff need only identify the act of retaliation and the grievance that sparked the retaliatory act. Higgs, 286 F.3d at 439. Plaintiff alleges that defendants O'Donnell and Hautamaki retaliated against him for filing a grievance about defendant Natzke's refusal to allow him to possess his copies of "Temple of Wotan" and "Creed of Iron" in the segregation unit (inmate complaint GBCI-2003-11536) when they authorized defendant Erickson to confiscate the two texts from plaintiff's stored possessions. Because plaintiff has identified the act of retaliation and the grievance that triggered the retaliation, he will be allowed to proceed on this claim against defendants O'Donnell and Hautumaki.

4. Establishment clause

The establishment clause of the First Amendment is violated when "the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 592 (1989) (citations omitted).

The fact that government may not "endorse" religion means that it is precluded "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Id. at 593 (citations omitted); Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (Supreme Court "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Plaintiff contends that all defendants violated the establishment clause by permitting inmates in the segregation unit to have copies of the Bible or Koran but not literature from non-mainstream religions such as Odinism.

Although plaintiff has stated a claim under the establishment clause, he will be allowed to proceed against only some of the defendants. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. See Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. It is not necessary that a defendant participate directly in the deprivation; the official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge

and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985).

Plaintiff will be allowed to proceed against defendants Franks, Casperson and Bertrand in their official capacities to obtain relief from an alleged unconstitutional policy enacted and carried out under their official authority. Monell v. New York City Department of Social Services, 436 U.S. 658, 690 (1978) ("the touchstone of the 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution"). However, plaintiff will be denied leave to proceed against all other defendants on his establishment clause claim, because he does not allege that they were involved personally in the promulgation of the segregation unit policy.

B. Eighth Amendment

I understand plaintiff to allege that defendants violated his right to be free from cruel and unusual punishment under the Eighth Amendment by forcing him to choose between exercise and use of the law library. Denial of exercise may constitute an Eighth Amendment violation in extreme circumstances where lack of movement causes muscle atrophy, threatening the health of the prisoner. See Thomas v. Ramos, 130 F.3d 754, 763 (7th Cir. 1997). (Plaintiff has alleged only that on numerous occasions he was forced to choose between exercising or using the law library and not that he was deprived of one right *because* he chose to exercise the other. Thus, he has not stated a claim of retaliation. Walker, 288 F.3d at 1008-09 (plaintiff states retaliation claim when he alleges that he was denied out of

cell exercise *because* he sought access to courts).)

In Thomas, 130 F.3d at 764, the Court of Appeals for the Seventh Circuit held that a prisoner's Eighth Amendment rights were not violated when he could not exercise out of his cell for seventy days; the court noted that the prisoner could do exercises in his cell. Similarly, in Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988), the court of appeals held that a prisoner's rights were not violated when he spent twenty-eight days in confinement during which the only exercise was activity that he could do in a cell, such as push-ups or running in place: "Unless extreme and prolonged, lack of exercise is not equivalent to a medically threatening situation." See also Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986) (no Eighth Amendment violation even though inmates confined to cells twenty-four hours a day for a one-month period after a lockdown). Plaintiff alleges only that he must choose between exercise and use of the law library and not that he never has an opportunity to exercise. Although plaintiff has a right to exercise and a right of access to the courts, these rights are not violated merely because he is forced to allocate a set amount of time to each. Walker, 288 F.3d 1008-09. Because plaintiff has not alleged that he was unable to exercise within his cell, such as by doing push-ups or running in place, or that lack of movement has caused muscle atrophy that threatens his health, see Thomas, 130 F.3d at 764, he will be denied leave to proceed on his Eighth Amendment claim.

C. Right to Access Courts

It is well established that prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)); Wolff v. McDonnell, 418 U.S. at 539, 578-80 (1974); Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access is grounded in the due process and equal protection clauses. Murray v. Giarratano, 492 U.S. 1, 6 (1989). However, an inmate's right of access to the courts is not unconditional. Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983). The constitutionally relevant benchmark is "meaningful" access, not total or unlimited access. Bounds, 430 U.S. at 823. Meaningful access has been interpreted as having access to an adequate law library or access to adequate legal representation. Id. at 817; see also Gometz v. Henman, 807 F.2d 113, 116 (7th Cir. 1986) (prison officials may eliminate one kind of protection — be it inmate writ-writers or prison libraries — if they supply adequate substitutes, such as lawyers); Caldwell, 790 F. 2d at 606.

Moreover, the Supreme Court has clarified the elements necessary to state a claim of denial of access to the courts: a plaintiff must allege facts from which an inference can be drawn of "actual injury." Lewis v. Casey, 518 U.S. 343, 349 (1996). This principle derives ultimately from the doctrine of standing and requires that a plaintiff demonstrate that he

is or was prevented from litigating a non-frivolous case. Id. at 352-53; Walters v. Edgar,163 F.3d 430, 434 (7th Cir. 1998). A plaintiff must plead at least general factual allegations of injury resulting from defendants' conduct or suffer dismissal of his complaint for failure to state a claim upon which relief may be granted. Walters, 163 F.3d at 434.

Plaintiff has alleged only that he was forced to allocate a certain amount of time between use of the law library and recreation. He has not alleged any facts suggesting that this situation prevented him from pursuing a non-frivolous suit. Although this is a shortcoming, the court of appeals has instructed district courts to give a pro se claimant an opportunity to identify the claim or claims that he would have brought had he not been denied adequate access to the law library. Alston, 13 F.3d at 1041. Denying a pro se plaintiff leave to proceed without first providing him an opportunity to particularize his claim to conform with governing legal standard would be premature. Id. Accordingly, plaintiff will have until January 20, 2004, in which to submit a supplement to his complaint, identifying the specific claim or claims he has been unable to pursue because of his alleged inadequate access to the law library. If plaintiff fails to specify the basis for his claim by this date, he will be denied leave to proceed on it.

D. Ninth Amendment

Plaintiff contends that defendants' conduct is in violation of his rights under the

Ninth Amendment, but this argument is misplaced. The Ninth Amendment does not protect any independent right. Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982). Accordingly, plaintiff will be denied leave to proceed on this claim.

E. Fourth Amendment: Unreasonable Search and Seizure

Plaintiff contends that his Fourth Amendment rights were violated when defendant Erickson confiscated his copies of "Temple of Wotan" and "Creed of Iron." The Fourth Amendment protects individuals from unreasonable searches and seizures by the state. See, e.g., Boyd v. United States, 116 U.S. 616 (1886); Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998). People have a right to be secure in their "persons, houses, papers and effects." Oliver v. United States, 466 U.S. 170, 176-77 (1983). However, the Fourth Amendment is implicated only when the state intrudes upon an interest in which a person has a "reasonable expectation of privacy." New York v. Class, 475 U.S. 106, 112 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Although prisoners do not forfeit all of their rights under the Fourth Amendment, their expectation of privacy while in custody is significantly diminished. See Hudson v. Palmer, 468 U.S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell). Specifically, prisoners have no expectation of privacy with respect to their property under the Fourth Amendment. Id. at 530 ; Sparks v. Stutler, 71 F.3d 259, 260

(7th Cir.1996). Accordingly, plaintiff will be denied leave to proceed on his claim under the Fourth Amendment.

F. Conspiracy

Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under 42 U.S.C. §1983 or §1985(3). In pleading a conspiracy, it is sufficient for a plaintiff to indicate "the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." Walker, 288 F.3d at 1007. Although plaintiff will need to prove that there was "an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage'" to succeed on his claim, Hampton, 600 F.2d at 621 (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)), it is not necessary that he plead the overt act in order to state a valid claim. Walker, 288 F.3d at1007.

Plaintiff contends that defendants Bertrand, Ripley and Beirke were engaging in a class-based conspiracy to deprive him of his two religious texts because he is an Odinist when they refused to identify passages in either books that promote hatred or violence, rejected his inmate complaints (specifically GBCI-2003-18647, GBCI 2003-19003 and GBCI-2003-19743) and dismissed his appeals. Because plaintiff has identified the parties, general purpose and the approximate time frame of the alleged conspiracy, he will be permitted to

proceed on his claim of conspiracy under both 42 U.S.C. §§ 1983 and 1985(3).

Although plaintiff has met the minimal pleading requirements for stating a claim of conspiracy, Walker, 288 F.3d at 1007-08, he should be aware that conspiracy claimants bear a heavy burden of proof. To succeed on his claim under § 1983, plaintiff will need to adduce evidence showing that defendants reached an understanding to deprive him of his constitutional rights. Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003). In order to succeed on his claim under §1985(3), plaintiff will need to prove "(1) the existence of a conspiracy, (2) a purpose of depriving a person or class of persons of equal protection of the laws, (3) an act in furtherance of a conspiracy, and (4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens." Green v. Benden, 281 F.3d 661, 665 (7th Cir. 2002) (citing Hernandez v. Joliet Police Department, 197 F.3d 256, 263 (7th Cir.1999)). Specifically, plaintiff will need to adduce evidence to show that defendants' acts were motivated by discriminatory animus towards plaintiff's religion. Majeske v. Fraternal Order of Police, Local Lodge No. 7, 94 F.3d 307, 311 (7th Cir.1996). Under either section, plaintiff may be able to prove the existence of an agreement through circumstantial evidence, "but only if it is sufficient to permit a reasonable jury to conclude that a meeting of the minds had occurred and that the parties had an understanding to achieve the conspiracy's objectives." Green, 281 F.3d at 666. See also Williams, 342 F.3d at 785.

G. Equal Protection

The equal protection clause of the Fifth Amendment prohibits state actors from treating similarly situated individuals differently because of their membership in a suspect class or "definable minority" or because of the exercise of a fundamental right. Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996); see also Smith on behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997). If a plaintiff "suggests [that] discriminatory motives impelled discriminatory treatment of him, he has stated an equal protection claim." Antonelli v. Sheehan, 81 F.3d 1422, 1433 (7th Cir. 1996). In this case, I understand plaintiff to allege that he was denied possession of two religious texts because he is a follower of Odinist beliefs. These allegations are sufficient to state an equal protection claim under the minimum pleading requirements of Fed. R. Civ. P 8(a). See Shah v. Inter- Continental Hotel Chicago Operating Corp., 314 F.3d 278, 282 (7th Cir. 2002); Walker, 288 F.3d at 1007 ("[T]here is no requirement in federal suits of pleading the facts or the elements of a claim."). Accordingly, plaintiff will be allowed to proceed on this claim against defendants Natzke, Ripley, Hautamaki, Bertrand, Casperson, Frank, Bierke, Erickson and O'Donnell.

H. Due Process

Plaintiff suggests that defendants actions violated his rights under the Fourteenth Amendment but he does not develop this claim. A procedural due process claim against

government officials requires proof of inadequate procedures and interference with a liberty or property interest. Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460 (1989). Plaintiff has alleged that certain defendants prevented him from possessing two of his books. However, "the deprivation by the state of a constitutionally protected interest in life, liberty, or property is not in and of itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Doe v. Heck, 327 F.3d 492, 526 (7th Cir. 2003) (citations and quotations omitted). 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. 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. Because the existence of state remedies defeats any claim plaintiff might have that defendants deprived him of his property without due process of law, plaintiff will be denied leave to proceed on this claim.

I. State Law Claims

Plaintiff contends that all defendants disregarded Wis. Admin. Code §§ DOC 309.61(1)(a), 309.61(1)(b), 303.70(2)(d), 303.69(2)(d) 309.05, 309.05(2)(c), Wis. Stat. §301.33(3) and the Green Bay Correctional Institution Segregation Rules. In addition, plaintiff alleges that all defendants except defendant Bierke violated Wis. Admin. Code DOC § 309.155; 303.69(9) and 303.70(7).

Wis. Stat. §301.33(3) provides that "every inmate who requests it shall have use of the Bible." Plaintiff will be denied leave to proceed on his claim under this provision because he has not alleged that he was denied a copy of the Bible.

Wis. Admin. Code §§ DOC 303.69(2)(d), 303.70 (2)(d) requires corrections

institutions to provide inmates being held in either adjustment or program segregation access to "holy books." Wis. Admin. Code § DOC 309.61(1)(a) forbids the department of corrections from discriminating against an inmate or a group of inmates on the basis of their religion and § 309.61 (1)(b) allows inmates to pursue lawful religious practices. Wis. Admin. Code § DOC 309.05 requires the department to "facilitate inmate reading of publications" and subsection (c) provides that "the department may not prohibit a publication on the basis of its appeal to a particular ethnic, racial, or religious audience." Because plaintiff's claims under these sections arise from the same facts governing the federal claims on which he will be allowed to proceed, I will exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367(a). See Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims).

Wis. Admin. Code § DOC 303.69(9), requires that inmates being held in adjustment segregation be given an opportunity to exercise outside at least once every eight days and Wis. Admin. Code § DOC 303.70(7) mandates that institutions provide inmates in program segregation with an opportunity to exercise in their cells. Because plaintiff will not be permitted to proceed on his federal exercise deprivation claim, I will decline to exercise supplemental jurisdiction over plaintiff's claims under these sections. Id.

Wis. Admin. Code § DOC 309.155 provides inmates with a right of access to the

courts and requires the department of corrections to make reasonable efforts to ensure that inmates have access to adequate legal materials and assistance. If plaintiff is able to particularize his federal access to the courts claim sufficiently by the January 20, 2004, deadline, I will exercise supplemental jurisdiction over his related state law claim. However, if he fails to identify the particular suit he was unable to pursue because of inadequate access to the law library, he will be denied leave to proceed on his federal claim and I will not exercise supplemental jurisdiction over his claim under Wis. Admin. Code § DOC 309.155.

Finally, plaintiff will not be allowed to proceed on his claim that all defendants disregarded the Green Bay Correctional Institution Segregation Rules. The rules provide that "no personal books are permitted in segregation with the exception of one soft-covered religious text." They do not provide that inmates have a right to possess one soft-covered religious text but instead restrict inmates from possessing any other books. Thus, the rules do not create a right on which a claim could be made.

ORDER

IT IS ORDERED that:

1. Plaintiff is GRANTED leave to proceed on his claims that

    (a) defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson,

Natzke, Ripley and Bierke violated his right under the First Amendment to freely exercise his religion by depriving him of his copies of "Temple of Wotan" and "Creed of Iron;"

(b) defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson, Natzke, Ripley and Bierke violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, by depriving him of his copies of "Temple of Wotan" and "Creed of Iron;"

(c) defendants O'Donnell and Hautamaki violated plaintiff's rights under the First Amendment by retaliating against him for filing a grievance by authorizing defendant Erickson to confiscate two of plaintiff's books;

(d) defendants Franks, Casperson and Bertrand on his claim that the facility policy of allowing inmates in the segregation unit to keep copies of the Bible or Koran but not Odinist literature violates the establishment clause of the First Amendment;

(e) defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson, Natzke, Ripley and Bierke violated his right to equal protection under the law by denying him religious texts because he adheres to Odinism;

(f) defendants Bertrand, Ripley and Bierke conspired to deprive him of his two religious texts;

(g) defendants Frank, Casperson, O'Donnell, Hautamaki, Bertrand, Erickson, Natzke, Ripley and Bierke violated Wis. Admin. Code §§ DOC 303.69(2)(d), 303.70(2)(d),

309.611(1)(a), 309.61 (1)(b), 309.05 and 309.05(c).

2. Plaintiff is DENIED leave to proceed on his claims that

(a) he was denied adequate opportunities to exercise in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment because he has not alleged that it caused him any physical injury;

(b) defendants violated Wis. Admin. Code §§ DOC 303.69(9) and 303.70(7) because I decline to exercise supplemental jurisdiction over these claims;

(c) defendants violated his rights under the Ninth Amendment because plaintiff has no rights under that amendment;

(d) defendants violated his Fourth Amendment right to be free from unreasonable search and seizure by confiscating his two texts because plaintiff has no reasonable expectation of privacy with respect to his property;

(e) defendants violated Wis. Stat. § 301.33(3) because he has not alleged that he was denied a copy of the Bible;

(f) defendants violated the Green Bay Correctional Institution segregation handbook rules because the rules do not create a right on which plaintiff may state a claim.

3. Plaintiff will have until January 15, 2004 to identify the causes of action he was unable to pursue because of inadequate access to the prison law library. If plaintiff fails to respond within this time period, his claim that he was denied adequate access to the courts

will be denied. In addition, plaintiff will be denied leave to proceed on his claim under Wis. Admin. Code § 309.155 if he fails to particularize his complaint by this deadline but will be granted leave to proceed on this related state law claim if he does appropriately amend his complaint.

4. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that plaintiff has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 5th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge