IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHON M. MARK,

ORDER

Plaintiff,

05-C-279-C

v.

Off. IMBERG; Capt. HANSON; Capt. SCHULTZ;
Off. GUSTAFSON; Sgt. McARTHER; Chaplain
OLSON; DANIELLE LaCOST; Sgt. (JOHN DOE);
UNIT PSYCHOLOGIST (MELROSE - JANE DOE);
Lt. DOHMS; Unit Manager DOUGHERTY;
Mr. BROWN (head of PRC); STEVEN M. PUCKETT;
Sgt. MESHUN; THOMAS KARLEN; Capt. HENDRICKS;
Sgt. BERLINGAME; Unit Psychologist (Oxbow - JANE DOE);
Unit Social Worker (JANE DOE - Oxbow); Mr. TAYLOR (Unit
Manager - Oxbow); Off. BAUER; Off. KENYON; Inmate KORN;
and Off. JOHN DOE (HUGHS),

Defendants.

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This is a civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Plaintiff Jonathon M. Mark is confined at the Chippewa Valley Correctional Treatment Facility in Chippewa Falls, Wisconsin. He alleges a myriad of violations of his rights under federal law and the United States Constitution. Plaintiff has paid the filing fee in full. Nevertheless, because he is a prisoner, he is subject to the 1996 Prison Litigation

Reform Act, which requires the court to screen his allegations and deny him leave to proceed on those claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek 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 42 U.S.C. § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In an order dated June 3, 2005, I dismissed plaintiff's complaint without prejudice because it did not comply with Fed. R. Civ. P. 8. I noted that the eleven-page complaint did not adhere to Rule 8's requirement of a "short and plain" statement of the claims upon which relief is sought and that many of the allegations in the complaint were little more than legal conclusions. I advised plaintiff to think carefully about which of his claims have the most merit in drafting a new complaint.

Plaintiff has submitted a new complaint. His latest effort has mushroomed from eleven to twenty-five pages in length because of his efforts to make his allegations legible and his failure to eliminate any of the claims raised in his first complaint. He has organized the allegations in his complaint by defendant. I have attempted to construct a coherent

recitation of the operative factual allegations, which are set out below.

ALLEGATIONS OF FACT

Defendants Imberg, Hanson, Schultz and Olson denied plaintiff a religious publication titled "Llewellyn" that plaintiff needs to purchase items necessary to practice his religion. Defendants Imberg and Olson allowed another inmate to have the publication. Defendants Imberg and Hansen denied plaintiff a hearing to determine whether he could have the publication. Schultz is a gang coordinator. He determined that the publication contained writings and symbols that are gang-related. These same writings and symbols appear in other books allowed in the prison, such as the Qu'ran, Torah and Pentateuch.

Defendants Gustaffson and McArther destroyed plaintiff's "magical seals," which plaintiff had made for a specific purpose related to the practice of his religion.

Defendant Danielle LaCost "[shot] down all alternatives that [plaintiff] provided to her" for practicing his religious beliefs.

Defendant Jane Doe, a psychologist in the Melrose Unit at the prison, did not provide plaintiff with sufficient psychological treatment or prescribe medication for plaintiff's schizophrenia.

Defendant Unit Psychologist (John Doe) - Oxbow was not qualified or certified as a psychologist, yet acted in that capacity. This defendant did not provide services to plaintiff

or prescribe him medication for his schizophrenia.

Defendant Olson delayed plaintiff's receipt of or lost some of plaintiff's religious publications in retaliation for plaintiff's having filed complaints against him. Defendant Olson lost plaintiff's publication without first providing him a hearing.

Defendant Henricks did not allow plaintiff to defend against allegations made at a disciplinary hearing and did not disclose witness statements or other evidence to plaintiff before the hearing. The hearing examiner was biased. Plaintiff's punishment called for him to lose regular library privileges, but Henricks denied plaintiff access to the law library as well. This temporary loss of library privileges "completely stopped" plaintiff's litigation in state court regarding his motion for post-conviction relief.

Defendant Taylor is the manager of the Oxbow Unit. He failed to respond to plaintiff's complaints and intervene to prevent other prison officials from interfering with his access to the courts. Plaintiff needed defendant Taylor's permission to use the law library but was unable to obtain it.

Defendant Hanson refused three times to grant plaintiff access to the law library. As a result, plaintiff had to "set aside" his motion for post-conviction relief and was denied materials he wanted to initiate this lawsuit.

Defendant Bauer denied plaintiff access to the law library and his requests for copies of legal materials and a legal loan, which interfered with plaintiff's ability to prosecute his

post-conviction motion and initiate this lawsuit.

Defendant Korn is an inmate. He failed to give plaintiff forms he needed to initiate this lawsuit.

Defendant Unit Social Worker (Jane Doe) - Oxbow failed to take action to prevent others from harming plaintiff after he told her of "everything that had happened up to this point in time." This same defendant failed to provide plaintiff assistance with respect to his disability.

Defendant Sgt. John Doe retaliated against plaintiff because plaintiff is a "ritual magician" and because plaintiff filed inmate complaints. Doe did not retaliate against another inmate.

Defendants Dohm, Dougherty, Brown and Puckett transferred plaintiff to another institution in retaliation for plaintiff's use of the inmate complaint review system. These defendants conspired to transfer plaintiff to moot his claims in this lawsuit and disrupt his circuit court proceedings.

Defendant Henricks retaliated against plaintiff for using the inmate complaint review system and because plaintiff helped another inmate with his legal issues.

Defendant Meshun changed plaintiff's room assignment and transferred him "off the unit" in retaliation for plaintiff's filing an inmate complaint against Meshun alleging that Meshun had showed favoritism toward another prisoner. Meshun allegedly transferred

plaintiff off the unit because he did not have a job, but other inmates without jobs were allowed to remain on the unit. The unit plaintiff was sent to was "deficient." It contained a social worker, psychologist and unit manager. Meshun did not give plaintiff a hearing before transferring him off the unit and changing his room assignment.

Defendant Taylor retaliated against plaintiff for using the inmate complaint review system by failing to respond to plaintiff's inquiries about law library access.

Defendant Bauer retaliated against plaintiff for using the inmate complaint review system by not giving him access to legal materials.

Defendant John Doe (Hughes) retaliated against plaintiff for using the inmate complaint review system by sending him "back to the unit" and denying plaintiff outside recreation. Hughes did not give plaintiff a hearing before taking away his recreation privileges. Hughes enforced a rule against plaintiff prohibiting inmates from talking to inmates on other units while walking past them. He did not enforce the rule against other inmates.

Defendant Kenyon refused to let plaintiff submit a canteen sheet at 9:00 p.m., but allowed another inmate to submit a sheet twenty seconds earlier. This prevented plaintiff from purchasing stamps and envelopes from the prison canteen and was done in retaliation for plaintiff's use of the inmate complaint review system.

ANALYSIS

In considering plaintiff's allegations, I am mindful that a litigant need only provide a "short and plain" statement of the claims on which he requests relief, Fed. R. Civ. P. 8, and that complaints filed by pro se litigants are to be construed liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). Although plaintiff does not have to plead detailed facts or legal theories, DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000), he must provide minimal facts sufficient to give defendants adequate notice of the grounds upon which his claims rest. Kyle v. Morton High School, 144 F.3d 448, 455 (7th Cir. 1998). In other words, plaintiff must supply enough factual detail "to allow the court and the defendants to understand the gravamen of [his] complaint." Dougherty v. City of Chicago, 75 F.3d 318, 326 (7th Cir. 1996).

Before analyzing plaintiff's individual constitutional claims, I note that plaintiff has sued "Inmate Korn" for violations of his due process rights, his right of access to courts and 42 U.S.C. § 1986 because Korn failed to provide plaintiff with the forms he needed to initiate this lawsuit. Plaintiff's allegations against Korn are legally frivolous for two reasons. First, the fact that plaintiff has filed his complaint in this case demonstrates that he has not been prevented from litigating this case. Second, §§ 1983 and 1986 provide a remedy for situations in which an individual's constitutional rights are violated *under color of state law*. Defendant Korn, a prison inmate, is not a state actor. Morfin v. City of Chicago, 349 F.3d

989, 1003 (7th Cir. 2003) (listing factors to consider in determining whether private citizen may be considered state actor for purpose of § 1983). Plaintiff will be denied leave to proceed on all of his claims against defendant Korn, who will be dismissed from this case.

Additionally, plaintiff has named as defendants Thomas Karlen and Sgt. Berlingame, but he has not asserted any claims against them in his complaint. Therefore, the complaint will be dismissed as to these defendants.

I turn then to plaintiff's claims against the remaining defendants.

A. First Amendment Religious Freedom

Plaintiff alleges that defendants Imberg, Hanson, Schultz and Olson denied him a religious publication entitled "Llewellyn" that he needs to purchase items necessary to practice his religion. Also, he alleges that defendant Schultz, who is employed as a gang coordinator, denied his religious publications because they contain writings and symbols that appear in other books that are allowed in the prison such as the Qu'ran, Torah and Pentateuch. He claims that defendants Gustaffson and McArther destroyed his "magical seals" which he made for a specific purpose related to the practice of his religion. Finally, plaintiff alleges that defendant Danielle LaCost violated his rights under the First Amendment by "shooting down all alternatives that I provided to her, in order to practice my religious beliefs."

Actions that infringe the First Amendment rights of prison inmates are constitutionally permissible so long as they are reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). Although plaintiff does not identify his religion, his allegations that defendants Imberg, Hanson, Schultz and Olson denied him a religious publication and that defendants Gustaffson and McArther destroyed his "magical seals" are sufficient to state a claim under the First Amendment.

Plaintiff's allegation that defendant LaCost violated his rights by "shooting down all alternatives [plaintiff] provided her in order to practice [his] religious beliefs" is insufficient to state a claim because it fails to give defendant LaCost adequate notice of the grounds on which plaintiff's claim rests. As noted above, plaintiff has not identified his religious affiliation or provided any factual detail regarding the "alternatives" that defendant LaCost allegedly rejected. Therefore, plaintiff will be denied leave to proceed on his claim against defendant LaCost and his complaint will be dismissed as to LaCost.

Plaintiff asks the court to certify a class with respect to his First Amendment claims. In order to certify a class action, the court must find, among other things, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). I cannot make this finding in the present action for two reasons. First, plaintiff is not represented by an attorney and it appears from the complaint and from the circumstances that he is not an attorney. Since absent class members are bound by a

judgment whether for or against the class, they are entitled at least to the assurance of competent representation afforded by licensed counsel. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); see also Ethnic Awareness Org. v. Gagnon, 568 F. Supp. 1186, 1187 (E.D. Wis. 1983); Huddleston v. Duckworth, 97 F.R.D. 512, 51415 (N.D. Ind. 1983) (prisoner proceeding pro se not allowed to act as class representative). Second, even if plaintiff were a licensed attorney, lawyers may not act both as class representative and as attorney for the class because that arrangement would eliminate the checks and balances imposed by the ability of the class representatives to monitor the performance of the attorney on behalf of the class members. E.g., Sweet v. Bermingham, 65 F.R.D. 551, 552 (1975); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973); see also Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 n. 5 (7th Cir. 1977), appeal after remand, 587 F.2d 866 (1978); Conway v. City of Kenosha, 409 F. Supp. 344, 349 (E.D. Wis. 1975) (plaintiff acting both as class representative and as class attorney precludes class certification). Consequently, plaintiff's request for class certification will be denied.

B. Equal Protection

Plaintiff alleges that the denial of his religious publication violated his rights under the equal protection clause of the Fourteenth Amendment because defendants Imberg and Olson allowed another inmate of the same religious preference as plaintiff to have the

publication that plaintiff was unable to have. He alleges that defendant Sgt. John Doe violated his rights under the equal protection clause because Doe retaliated against plaintiff but not against another inmate. He alleges that defendant Kenyon denied him equal protection of the law by not allowing him to submit his canteen sheet at 9:00 p.m. when he allowed another inmate to submit his sheet less than twenty seconds earlier. Finally, plaintiff alleges that defendant John Doe (Hughes) denied him equal protection of the law by enforcing a rule prohibiting inmates from talking to inmates on other units while walking past them against plaintiff but not against any other inmate.

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Plaintiff's allegation regarding defendants Imberg and Olson does not suggest that he was denied his publication because of his religion. To the contrary, plaintiff alleges that defendants Imberg and Olson treated two inmates of the same religion differently. Therefore, his allegation falls into the "class of one" category. "Class of one" claims under the equal protection clause are viable where "the state has intentionally treated the plaintiff differently from those similarly situated and no rational basis is offered for the difference in treatment." Boyd v. Illinois State Police, 384 F.3d 888, 898 (7th Cir. 2004); see also Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001). Because a rational basis for denying plaintiff the religious publication and allowing another inmate

to have it does not appear on the face of plaintiff's complaint, I will allow him to proceed on this claim. However, plaintiff should be aware that he cannot succeed on his claim by showing merely that defendants Imberg and Olson knew they were treating plaintiff differently. Rather, plaintiff will have to prove that these defendants treated him differently because they wanted plaintiff to be worse off than the other inmate who received the religious publication. Tuffensdam v. Dearborn Co. Board of Public Health, 385 F.3d 1124, 1127 (7th Cir. 2004).

Plaintiff's conclusory allegation that defendant Sgt. John Doe retaliated against him but not another inmate does not provide enough factual detail to provide adequate notice of the grounds for this claim. Therefore, plaintiff will not be allowed to proceed on this claim against defendant Sgt. John Doe.

Likewise, plaintiff will not be allowed to proceed on his equal protection claims against defendants Kenyon and John Doe (Hughes). Federal courts must defer to prison officials in matters such as enforcement of prison regulations. Frasie v. Terhune, 283 F.3d 506, 515 (3d Cir. 2002). Not every instance of unequal treatment of prisoners violates the equal protection clause. Durso v. Rowe, 579 F.2d 1365, 1372 (7th Cir. 1978). The equal protection clause protects individuals against "purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers." Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970). Plaintiff's allegations against Kenyon and Hughes suggests that

at most he may have been the victim of erroneous decisionmaking by these defendants. He does not allege that any other inmate was similarly situated to him or that defendants enforced the rules against him but no other inmates intentionally. These isolated incidents constitute a de minimis injury that is not serious enough to implicate equal protection concerns.

C. Due Process

Plaintiff alleges that 1) defendants Imberg and Hanson violated his due process rights by not giving him a hearing before denying him his religious publication; 2) defendant Olson denied him due process when he lost some of plaintiff's publications without affording him a hearing; 3) defendant Meshun transferred plaintiff "off the unit" and changed his cell assignment without first providing him a hearing; 4) defendant Henricks subjected him to a disciplinary hearing in which the decision maker was biased and did not allow plaintiff to present a defense to allegations made against him and did not disclose witness statements or any other evidence to plaintiff before the hearing; and 5) defendant John Doe (Hughes) took away plaintiff's outside recreation privileges without giving him a hearing.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Before plaintiff is entitled to Fourteenth Amendment due process protections, he must first show that a

protected liberty or property interest is at stake. Averhart v. Tutsie, 618 F.2d 479, 480 (7th Cir. 1980). Assuming plaintiff had a property interest in his religious publications, his allegations against defendants Imberg, Hanson and Olson fail to state a claim under the due process clause. 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.

Moreover, Wis. Stat. §§ 810 and 893 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 plaintiff has post-deprivation procedures available to him, he will be denied leave to proceed on his due process claims against defendants Imbert, Hanson and Olson.

Also, plaintiff will be denied leave to proceed with respect to his claim that defendant John Doe (Hughes) took away his outside recreation privileges without giving him a hearing because prisoners do not have a protected interest in receiving outside recreation time. Garza v. Miller, 688 F.2d 480, 485 (7th Cir. 1982); see also Sandin v. Conner, 515 U.S. 472 (1995).

Finally, plaintiff will be denied leave to proceed on his claims that defendant Meshun transferred him "off the unit" and changed his cell assignment without providing plaintiff a hearing and that defendant Henricks subjected him to a disciplinary hearing without certain procedural protections because these claims do not implicate a liberty interest. In Sandin, 515 U.S. at 483-484, the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." After Sandin, in the prison context, protected liberty interests are essentially limited to the loss of good time credits because the loss of such credit affects the duration of an inmate's sentence. Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (when sanction is confinement in disciplinary segregation for period not exceeding remaining term of prisoner's incarceration, Sandin does not allow suit complaining about deprivation of liberty). The penalty plaintiff

alleges he suffered following his disciplinary hearing was a temporary loss of library privileges. Such a loss does not implicate a liberty interest because it does not constitute an atypical and significant hardship for plaintiff. Moreover, plaintiff does not have a protected liberty interest in being celled in a particular location within a prison. Williams v. Faulkner, 837 F.2d 304, 309 (7th Cir. 1988); cf. Meachum v. Fano, 427 U.S. 215 (1976) (due process clause does not limit interprison transfer even when conditions of new institution are much more unpleasant).

D. Access to Courts

Plaintiff alleges that when defendant Henricks imposed loss of library privileges as a punishment following a disciplinary hearing, plaintiff was prevented from continuing his litigation in state court on post-conviction matters. He alleges also that his ability to pursue his post-conviction motions and file this lawsuit was impeded when defendant Taylor refused to give him permission to use the law library, defendant Hanson denied three of plaintiff's requests for access to the law library and defendant Bauer denied his requests for copies of legal materials and a legal loan. Finally, plaintiff alleges that defendants Dohm, Dougherty, Brown and Puckett transferred him to another institution in an effort to moot the claims in this case and to disrupt plaintiff's "circuit court proceedings."

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. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004); Campbell v. Miller, 787 F.2d 217, 225 (7th Cir. 1986) (citing Bounds v. Smith, 430 U.S. 817 (1977)). The right of access is grounded in the due process and equal protection clauses. Murray v. Giarratano, 492 U.S. 1, 6 (1989). However, prisoners do not have the constitutional right to any specific form of assistance such as access to a law library. Lehn, 364 F.3d at 868. To state a claim, a prisoner must allege "that he had a non-frivolous legal claim that was frustrated or impeded by [a prison official's] failure to assist him in the preparation and filing of meaningful legal papers and that he was harmed by [the prison official's] action (or lack thereof)." Id. The latter requirement is derived from the doctrine of standing. Lewis v. Casey, 518 U.S. 343, 349 (1996). To show harm, a prisoner must "make specific allegations as to the prejudice suffered because of the defendants alleged conduct." Ortloff v. United States, 335 F.3d 652, 656 (7th Cir. 2003). A prisoner may satisfy this requirement by alleging that he "missed court deadlines, failed to make timely filings, or that legitimate claims were dismissed because of the denial of reasonable access to legal resources." Id. What is critical is that the prisoner provide some indication that he "has suffered an injury over and above the denial." Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998).

Plaintiff's allegations are insufficient to state a claim of denial of access to the courts

because he has not alleged that he was sufficiently harmed by defendants' actions. In particular, he has not alleged facts from which an inference may be drawn that he suffered more than short and temporary delays in preparing his complaint for filing in this case or submitting matters pertaining to his post-conviction motion. Nothing in his allegations suggests that legitimate claims were dismissed because of defendants' actions. Therefore, he will be denied leave to proceed on these claims.

E. First Amendment Retaliation

Plaintiff alleges that he was retaliated against when 1) defendant Olson delayed plaintiff's receipt of his religious publications and lost some of plaintiff's religious publications because plaintiff had filed complaints against him; 2) defendants Dohms, Dougherty, Brown and Puckett transferred plaintiff to another institution because of his use of the inmate complaint review system; 3) defendant Meshun changed plaintiff's room assignment and transferred him "off the unit" because plaintiff filed an inmate complaint against Meshun alleging Meshun's favoritism toward another prisoner; 4) defendant Taylor failed to respond to plaintiff's inquiries about law library access because plaintiff used the inmate complaint review system; 5) defendant Bauer refused to give plaintiff access to legal materials because plaintiff used the inmate complaint review system; 6) defendant John Doe (Hughes) sent plaintiff "back to the unit" and denied plaintiff outside recreation because he

used the inmate complaint review system; 7) defendant Kenyon delayed plaintiff's ability to purchase stamps and envelopes from the prison canteen because of plaintiff's use of the inmate complaint review system; 8) defendant Sgt. John Doe retaliated against plaintiff for his use of the inmate complaint review system and because plaintiff helped another inmate with his legal issues; and 9) defendant Henricks retaliated against plaintiff because he filed inmate complaints and is a "ritual magician."

A prison official who takes action against an inmate to retaliate against him for exercising a constitutional right may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). To state a claim of retaliation, a prisoner must identify the alleged retaliatory acts of the defendant as well as the protected act that prompted the retaliation. McElroy v. Lopac, 403 F.3d 855, 858 (7th Cir. 2005) (per curiam); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (complaint would be insufficient if it contained only allegations that defendants had retaliated against plaintiff for filing suit and no allegations identifying the suit or acts alleged to have constituted retaliation).

Plaintiff alleges that defendants Dohms, Dougherty, Brown, Puckett, Taylor, Bauer, John Doe (Hughes) and Kenyon retaliated against him by taking certain actions against him. Plaintiff has identified the alleged retaliatory conduct of each of these defendants. However, he has not identified with any clarity the constitutionally protected activity that prompted the retaliation other than to say defendants were motived to act as they did "because of [his]

use of the inmate complaint review system." An inmate's use of a prison's internal complaint process is protected under the First Amendment, Hasan v. United States Dept. of Labor, 400 F.3d 1001, 1005 (7th Cir. 2005). Nevertheless, because plaintiff does not identify by number, date or even topic the particular complaint or complaints that allegedly prompted defendants to take action against him, his allegations are too vague to put these defendants on notice of the grounds on which his claims rest. With respect to defendants Sgt. John Doe and Henricks, plaintiff has not identified the allegedly retaliatory conduct with any specificity. He alleges merely that these two defendants retaliated against him. Higgs states clearly that this is not enough. Because plaintiff's allegations are insufficient to put defendants Dohms, Dougherty, Brown, Puckett, Taylor, Bauer, John Doe (Hughes), Kenyon, Sgt. John Doe and Henricks on notice of the grounds on which his claims of retaliation rest, I will deny plaintiff leave to proceed on these claims.

With respect to defendant Olson, plaintiff has identified both the protected act (filing complaints against defendant Olson regarding the denial of a religious publication) and the alleged retaliatory act (loss of religious publications). In addition, he has specified the protected act prompting defendant Meshun's alleged retaliation (plaintiff's complaint about defendant Meshun's demonstration of favoritism toward another prisoner) and the alleged retaliatory act (a change in room assignment and a transfer "off the unit"). Therefore, I will allow plaintiff to proceed on his claims of retaliation for the exercise of his First Amendment

rights against defendants Olson and Meshun.

Plaintiff alleges that defendant Olson's actions violated 42 U.S.C. § 1997d, which prohibits retaliation against persons who report conditions that may violate the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. Section 1997d does not create a private right of action. Price v. Brittain, 874 F.2d 252, 263-64 (5th Cir. 1989); McRorie v. Shimoda, 795 F.2d 780, 783 n.3 (9th Cir. 1986). Therefore, plaintiff will be denied leave to proceed on his retaliation claims under 42 U.S.C. § 1997d.

F. Eighth Amendment Claims

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

Plaintiff alleges that defendant Jane Doe, a psychologist on the Melrose Unit, and defendant John Doe, a psychologist on the Oxbow Unit, violated his Eighth Amendment protection against cruel and unusual punishment because they did not provide him with sufficient psychological treatment and did not prescribe medication plaintiff needed for his

schizophrenia. In addition, plaintiff alleges that defendant Meshun violated his Eighth Amendment rights by sending him to a unit that was "deficient."

It is well settled that the Eighth Amendment protects the mental health of prisoners no less than their physical health. See, e.g., Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983). The need for treatment of a mental illness can constitute a serious medical need. Sanville v. McCaughtry, 266 F.3d 724, 734 (7th Cir. 2001). Interpreting plaintiff's complaint liberally, I will assume that his need for treatment of schizophrenia constituted a serious medical need. Plaintiff's allegations that the Melrose Unit and Oxbow Unit psychologists failed to provide *sufficient* psychological treatment suggests that plaintiff received *some* treatment. From this, it can be inferred that plaintiff's claim may amount to nothing more than a disagreement with defendants regarding the treatment plaintiff received. A mere disagreement with the psychologists' treatment decisions would not constitute deliberate indifference. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996). Moreover, inadvertent error, negligence and ordinary medical malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). However, plaintiff alleges that the unit psychologists failed to prescribe any medication for his mental illness. At this stage of the litigation, I cannot say that these allegations indicate clearly that plaintiff's Eighth Amendment rights were not violated. Therefore, I will allow plaintiff to proceed on his claim

of deliberate indifference to a serious mental health care need against the two unit psychologists.

Because plaintiff does not identify the psychologists by name, his complaint cannot be served on them. Therefore, they will be treated for the time being as Doe defendants. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference. At the time of the conference, the magistrate judge will discuss with the parties the most efficient way to obtain identification of the unnamed defendants and will set a deadline within which plaintiff is to amend his complaint to include them.

Plaintiff's allegation that defendant Meshun sent him to a unit that was "deficient" fails to state a claim under the Eighth Amendment. The Eighth Amendment prohibits conditions of confinement that "involve the wanton and unnecessary infliction of pain" or that are "grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Conditions that create "temporary inconveniences and discomforts" or that make "confinement in such quarters unpleasant" are insufficient to state an Eighth Amendment claim. Adams v. Pate, 445 F.2d 105, 108, 109 (7th Cir. 1971). Plaintiff fails to allege any facts from which an inference may be drawn that the deficiencies in the unit to which he was sent violated the Eighth Amendment. Therefore, plaintiff will not be allowed to proceed on this claim against defendant Meshun.

G. Americans with Disabilities Act

Plaintiff alleges that the Melrose and Oxbow unit psychologists failed to provide sufficient treatment and medication and that the Oxbow Unit Social Worker failed to provide plaintiff assistance with respect to his disability in violation of the Americans with Disabilities Act. Title II of the ADA, which prohibits a "public entity" from discriminating against a "qualified individual with a disability" because of the individual's disability, applies to state prison inmates. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998). To make out a claim under the ADA, a plaintiff must first show that he is disabled within the meaning of the act. Best v. Shell Oil, 107 F.3d 544, 547-48 (7th Cir. 1997). Not all physical or mental illnesses or maladies qualify as disabilities under the statute. Rooney v. Koch Air, LLC, No. 03-3862, slip. op. at 7 (7th Cir. June 6, 2005). Instead, an individual is disabled within the meaning of the Act if he suffers from a physical impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2). Plaintiff's allegation that he suffers from schizophrenia is sufficient to permit an inference that he is disabled for the purpose of the Act.

However, plaintiff's allegation that the unit psychologists provided insufficient treatment and medication to treat his mental illness and that the Oxbow Unit social worker failed to give him assistance with respect to his disability fails to state a claim under Title II because plaintiff does not allege that he was denied treatment and medication *because of* his

disability. The anti-discrimination provision of Title II provides that "no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). Plaintiff has not alleged that the unit psychologists denied him sufficient treatment and medication because he has schizophrenia. Therefore, plaintiff will be denied leave to proceed on his claims under the ADA.

H. Civil conspiracy

Plaintiff alleges that defendants Dohms, Dougherty, Brown and Puckett conspired to violate his constitutional right of access to the courts by transferring him to an institution that lacked the legal resources he needed to file the present lawsuit and to pursue his motion for post-conviction relief. Claims of conspiracies to effect deprivations of civil or constitutional rights may be brought in federal court under 42 U.S.C. § 1983. 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 v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) (prisoner need not allege overt act to state conspiracy claim). In this case, plaintiff has provided the names of the parties as well as the alleged purpose of the conspiracy. He has not provided any indication as to when he

believes defendants entered into this conspiracy, although logic dictates that it formed before the date on which plaintiff was transferred. The specific details of the alleged conspiracy may be fleshed out during discovery; for now, construing plaintiff's allegation liberally, I conclude that it is sufficient to state a claim. Thus, he will be granted leave to proceed on this claim.

Although plaintiff has met the minimal pleading requirements for stating a claim of conspiracy, he should be aware that to succeed on his claim under § 1983, he 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). This evidence may be circumstantial in nature but it must amount to more than plaintiff's speculation as to defendants' motives. Id.

I. 42 U.S.C. § 1986

Plaintiff alleges that the Oxbow Unit social worker violated 42 U.S.C. § 1986 because plaintiff told her of "everything that had happened up to this point in time" but she failed to take action to prevent others from harming plaintiff. Section 1986 creates a cause of action for failing to prevent "any of the wrongs . . . mentioned in section 1985." Claims under § 1985 must be based on the existence of racial or other class-based discriminatory animus. Lowe v. Letsinger, 772 F.2d 308, 311 (7th Cir. 1985). In this case, plaintiff has

not been granted leave to proceed on any claims under § 1985 because he has made no allegation that any defendant discriminated against him because of his race. Therefore, he will be denied leave to proceed on his claim under § 1986.

ORDER

IT IS ORDERED that plaintiff Jonathon Mark is GRANTED leave to proceed on his claims that

1. Defendants Imberg, Hanson, Schultz and Olson violated his rights under the First Amendment by denying him a religious publication entitled "Llewellyn";

2. Defendants Imberg and Olson violated his rights under the equal protection clause of the Fourteenth Amendment by denying him a religious publication entitled "Llewellyn";

3. Defendants Gustaffson and McArther violated his rights under the First Amendment by destroying his magical seals;

4. Defendant Olson retaliated against him for filing an inmate complaint by withholding plaintiff's religious publications;

5. Defendant Meshun retaliated against plaintiff for causing Meshun to be investigated for showing favoritism toward another inmate by changing plaintiff's room assignment and transferring him "off the unit";

6. Defendants Unit Psychologist (Melrose - Jane Doe) and Unit Psychologist (John Doe) - Oxbow violated plaintiff's Eighth Amendment protection against cruel and unusual punishment by not providing him with sufficient treatment and medication for his schizophrenia;

7. Defendants Dohms, Dougherty, Brown and Puckett conspired to violate plaintiff's right of access to courts by transferring him to a correctional institution that lacked legal resources he needed to initiate this lawsuit and to pursue his motion for post-conviction relief.

FURTHER, IT IS ORDERED that

1. Plaintiff is DENIED leave to proceed on all other claims raised in this lawsuit;

2. Plaintiff's complaint is DISMISSED as to defendants Danielle LaCost, Sgt. John Doe, Karlen, Henricks, Berlingame, Unit Social Worker (Jane Doe - Oxbow), Taylor, Bauer, Kenyon, Korn and John Doe (Hughes).

3. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants.

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 6th day of July, 2005.

BY THE COURT:

Barbara B. Crabb

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BARBARA B. CRABB
District Judge