IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY GEORGE,

Plaintiff, ORDER

v. 05-C-403-C

JUDY SMITH, MATTHEW FRANK, RUTH TRITT, JOHN RAY, MARTY SCHROEDER, CINDY O'DONNELL, OFFICER VILSKI, TIM PIERCE, RICK RAEMISCH, JENNIFER DELVAUX, SANDRA HAUTAMAKI, LT. BLODGETT, TOM EDWARDS, PATRICIA VOERMANS, MICHELLE ALBRECHT, MICHAEL BOUSHON, NURSE CARIVOU, SHARON ZUNKER, JUDY JAEGER, STEVEN CASPERSON, JIM SCHWOCHERT, SANDY HABECK, LENARD WELLS, STEVEN LANDREMAN,

Defendants.

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This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Larry George, a prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin, has submitted a proposed complaint and paid the $250 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 performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or 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. 42 U.S.C. § 1915(e).

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

A. Denial of Publications

1. Internet materials

On May 7, 2002, plaintiff was denied delivery of printed pages from the web site of the United States Department of the Treasury that had been mailed to him by a friend. Plaintiff had requested the materials from the Treasury Department directly but was told that he had to download them from the department's web site. Plaintiff requested the materials in support of a lawsuit he had filed.

On July 12, 2002, plaintiff was denied a copy of an article posted on the internet about a lawsuit he had filed.

2. Books, magazines, etc.

On July 8, 2002, plaintiff was denied three art books and an atlas. He ordered the atlas to obtain the address of a sheriff so that he could serve legal papers on the sheriff.

On July 15, 2002, defendant Schroeder denied plaintiff delivery of a newsletter from "The Jeff Dicks Medical Coalition."

On August 5, 2002, plaintiff received a notice from defendant Vilski that he would not be receiving the September 2002 issue of Spin magazine because it contained gang-related material.

On August 6, 2002, defendant Tritt informed plaintiff that he would not be receiving the September 2002 issue of Stuff magazine because it contained contraband.

On May 27, 2003, defendant Tritt denied plaintiff delivery of the June 12, 2003 issue of RollingStone magazine because it contained gang signs.

On June 9, 2003, defendant Vilski denied plaintiff delivery of the July 2003 issue of FHM magazine because it contained "gang signing."

On June 18, 2003, defendant Vilski denied plaintiff delivery of the June 23, 2003 issue of US Weekly magazine.

On July 2, 2003, plaintiff filed an inmate complaint challenging the denial of his August 2003 issue of Spin magazine.

On August 7, 2003, defendant Tritt informed plaintiff that he would not receive his

August 21, 2003 issue of RollingStone magazine because it contained "gang signing."

On August 22, 2003, defendant Tritt denied plaintiff delivery of the September 2003 issue of Maxim magazine but did not provide a reason for doing so. Later, plaintiff received a notice of non-delivery for this publication indicating that it had been withheld because it contained "gang signing."

On August 27, 2003, defendant Vilski denied plaintiff delivery of the October 2003 issue of Spin magazine because it contained gang-related content.

On February 13, 2004, defendant Vilski denied plaintiff delivery of the March 2004 issues of Details, a men's fashion magazine, and Esquire, a fashion magazine. After filing inmate complaints regarding each publication, plaintiff learned that the issue of Details magazine had been withheld "based on nudity of a person who is under 18" and the Esquire magazine had been withheld because it contained a drawing depicting sexual intercourse.

On February 20, 2004, defendant Tritt denied plaintiff delivery of the March 2004 issue of Spin magazine because it contained gang signs. That same day, defendant Tritt denied plaintiff delivery of the March 2004 issue of Razor magazine because it contained "Nazis" and the March 2004 issue of Maxim magazine "based on 'terrorists.'"

On November 22, 2004, defendant Tritt denied plaintiff delivery of the December 2004 issue of Maxim magazine because it contained "gang signing."

On December 16, 2004, plaintiff was denied delivery of the December 2004 issue of

Blender magazine.

On December 28, 2004, defendant Tritt notified plaintiff that he would not receive his December 30, 2004 issue of RollingStone because it contained gang-related material. That same day, defendant Tritt denied plaintiff delivery of an issue of Blender magazine. Some time later, plaintiff learned that this magazine had been denied because it contained "gang signing."

On January 3, 2005, plaintiff filed an inmate complaint challenging the denial of his January 2005 issue of Spin magazine. His complaint was dismissed because defendant Blodgett concluded that the magazine contained "gang signing and insignia."

On January 24, 2005, plaintiff filed an inmate complaint challenging the denial of his February 2005 issue of Spin magazine.

On February 9, 2005, plaintiff filed an inmate complaint challenging the denial of his March 2005 issue of FHM magazine. Defendant Delavaux dismissed the complaint, relying soley on defendant Blodgett's conclusion that the magazine contained "gang signing."

On March 11, 2005, plaintiff filed an inmate complaint challenging the denial of his March 2005 issue of Blender magazine. Defendant Pierce dismissed the complaint after defendant Blodgett told him the magazine contained "gang signing."

On March 22, 2005, defendant Pierce denied plaintiff three art books.

On April 15, 2005, plaintiff filed an inmate complaint over the denial of his May

2005 issue of Blender magazine. (Plaintiff does not indicate which defendant denied him this publication, although he does allege that he "sent it out" after defendant Tritt ordered him to dispose of it.)

On April 27, 2005, plaintiff filed an inmate complaint challenging the denial of his May 2005 issue of Spin magazine. Defendant Delavaux dismissed the complaint on May 2, 2005, relying solely on defendant Blodgett's statement that the magazine contained "gang signing."

At some point in December 2004, plaintiff learned that defendants were not providing notice of non-delivery forms to the publishers of the magazines he was not receiving.

Defendant Judy Smith has a policy of prohibiting inmates from sharing magazines or publications with each other.

B. Personal Ad

On January 25, 2005, plaintiff requested permission to place a personal ad on the internet and in the Reno News & Review newspaper. His request was denied on January 27, 2005.

C. Identification Tags

Inmates at the Oshkosh Correctional Facility must wear identification tags at all times except when showering or when in their cells. The tag is approximately the size and shape of a credit card and is attached to a plastic cord that ties around the neck. The tag displays an inmates' name, inmate number, date of birth, sex, height, weight, eye and hair color and a color photograph of the inmate. Plaintiff's tag gets in his food and causes injuries when it hits him in the face when it is windy or when plaintiff walks in front of a fan. Plaintiff has asthma. If someone were to choke him with the plastic cord, plaintiff could be injured severely or killed. On one occasion, plaintiff spit on his tag while brushing his teeth, which was unsanitary.

On August 24 and September 9, 2003, the wind blew plaintiff's identification tag into his face, cutting his lip and causing bleeding, pain and a scar.

D. Medication

On July 4, 2002 and March 25, 2003, plaintiff filed inmate complaints because he did not receive Nasacort for several days. Nasacort is a medication that is part of plaintiff's treatment for asthma. Not only was he denied Nasacort, but his health was placed at serious risk because he was given medication that was not to be taken for asthma.

On August 1, 2002, plaintiff received medication with another inmate's name on it. Plaintiff alerted medical staff, who crossed the name off the medication and gave it to him.

E. Vision Problems

Plaintiff has been diagnosed with a severe sensitivity to light. He needs a medical approval form to be able to wear sunglasses while walking to and from his visits outside. He is outside for approximately twenty minutes when walking to and from his visits. On August 26, 2003, plaintiff filed an inmate complaint because he had not seen an eye doctor for several months. At some point after he filed the complaint, plaintiff saw an eye doctor and was given a prescription for sunglasses.

F. Smoking at Oshkosh

On December 16, 2004, plaintiff filed an inmate complaint requesting that smoking be banned at Oshkosh Correctional Institution. Plaintiff is subjected to second hand smoke at the institution which aggravates his asthma.

G. Medical Service Co-Payments

On February 21, 2005 and April 27, 2005, plaintiff filed inmate complaints challenging the $7.50 payments he is required to make before seeing medical staff or receiving dental services. On May 5, 2005, defendant Delvaux explained to plaintiff the institution's policy of placing an inmate's account "in the red" if he cannot afford to make the payments.

H. Postage

In September 2002, plaintiff filed an inmate complaint challenging the requirement that he be required to pay for postage when appealing the dismissal of an inmate complaint.

I. Dirty Dishes

On January 18, 2005, plaintiff filed an inmate complaint requesting that the screens on the dishwasher be changed in between "the feeding of unit sides" because food particles were left on dishes that plaintiff had to use, which placed his health at risk.

J. Parole Hearing

On April 14, 2005, plaintiff was seen by defendant Landreman, a member of the Wisconsin Parole Commission. At this hearing, defendant Landreman deferred plaintiff's parole for 36 months. In doing so, defendant Landreman relied on a report and allegations that were factually unsupported, failed to consider plaintiff's cooperation with the police as a mitigating circumstance and failed to consider that plaintiff could receive treatment in Nevada as stated in his parole plan. In addition, defendant Landreman determined that plaintiff must complete sex offender treatment before his "risk would reduce" and failed to consider that sex offenders have a low risk of reoffending. Defendant Landreman concluded

that plaintiff needed "PRM," which means that plaintiff will serve his entire prison sentence with no good time credits. Also, he concluded that plaintiff is a candidate for civil commitment pursuant to Wis. Stat. ch. 980. On April 19, 2005, defendant Wells, the chairman of the Parole Commission, agreed with the 36-month deferment given to plaintiff by defendant Landreman. Plaintiff has served more than 25% of his sentence.

DISCUSSION

A. Inmate Complaints and Complaint Examiners

Before turning to the substance of plaintiff's complaint, I must make two points regarding plaintiff's allegations. First, plaintiff begins most of his allegations by stating that he filed an inmate complaint about an event or policy. As a technical matter, allegations that an inmate filed an inmate complaint challenging a particular decision or policy and that the complaint was dismissed are not sufficient to allege a violation of the inmate's constitutional rights. A prison official does not violate an inmate's constitutional rights merely by dismissing an inmate complaint. However, because the pleadings of pro se litigants are to be construed liberally, I will assume that plaintiff intends to challenge the decisions or policies that were the subjects of his inmate complaints. For future reference, plaintiff should be aware that he need not include allegations detailing his efforts to exhaust the prison's inmate complaint process in a complaint.

Second, I must address the potential liability of inmate complaint reviewers and examiners. Plaintiff has named as defendants the prison officials who reviewed the inmate complaints he filed and the officials who affirmed the dismissals of these complaints. It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. 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.

In order to satisfy the personal involvement requirement, a plaintiff need not show direct participation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2002). However, he must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. Morfin v. City of Chicago, 349 F.3d 989, 1001 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit has held that a prison official may be held liable for a constitutional violation if he knew about it and had the ability to intervene but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). However, this rule "is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees." Windle v. City of Marion, Ind., 321 F.3d 658, 663 (7th Cir.

2003). Recently, the court of appeals made it clear that in order to succeed on a failure to intervene theory, a plaintiff must prove that the defendant failed to intervene with deliberate or reckless disregard for the plaintiff's constitutional right. Fillmore, 358 F.3d at 505-06. If inmate complaint examiners have authority to find in favor of an inmate on the ground that they believe a regulation or practice is unconstitutional, this might be sufficient to satisfy the personal involvement requirement. However, if they have such discretion, then they are entitled to absolute immunity for their decisions. It is well settled that prison officials are entitled to immunity for acts that are functionally equivalent to those of judges. Wilson v. Kelkhoff, 86 F.3d 1438, 1443-1445 (7th Cir. 1996).

Absolute immunity immunizes government officials from liability completely and is accorded to public officials only in limited circumstances. Burns v. Reed, 500 U.S. 478, 486-87 (1991). In most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Qualified immunity protects officials from liability for the performance of discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). "Truly judicial acts" are among the few functions accorded the more encompassing protections of absolute immunity. Forrester v. White, 484 U.S. 219, 226-27 (1988).

In determining whether government officials are entitled to absolute immunity, courts apply a functional approach, evaluating whether the official's action is functionally comparable to that of judges. Wilson, 86 F.3d at 1445. If the acts are ministerial and unrelated to the decision making process, they are not covered. Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993) (court reporter not entitled to absolute immunity for failing to provide a transcript promptly even though task is "part of the judicial function"). In deciding whether a government official is entitled to absolute immunity, a court must look at "'the nature of the function performed, not the identity of the actor who performed it.'" Buckley, 509 U.S. at 269 (quoting Forrester, 484 U.S. at 229).

Under the inmate complaint review system described in Wis. Admin. Code Ch. DOC 310, an inmate complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority that they be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the examiner makes a recommendation, the reviewing authority has the authority to dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate appeals the decision of the reviewing authority, the corrections complaint examiner is required to conduct additional investigation where appropriate and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within forty-five days after a recommendation has been made, the secretary must accept it

in whole or with modifications, reject it and make a new decision or return it for further investigation.

"[T]he 'touchstone' for [the applicability of the doctrine of judicial immunity] has been 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.'" Snyder v. Nolen, 380 F.3d 279, 286 (7th Cir. 2004) (quoting Antonie, 508 U.S. at 435-36 (additional citations omitted)). When inmate complaint review personnel reject inmate complaints for procedural deficiencies or dismiss them as unmeritorious, they perform an adjudicatory function and therefore, are entitled to absolute immunity for those acts. Cf. Imbler v. Patchman, 424 U.S. 409, 430 (1976) (absolute immunity available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process"); Walrath v. United States, 35 F.3d 277 (7th Cir. 1994) (parole board members are entitled to absolute immunity for making parole revocation decisions); Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517 (7th Cir. 2001) (members of state board of elections entitled to absolute immunity for refusing to certify political candidates; decision was product of process much like court trial). Also, absolute immunity is accorded officials when they make recommendations to dismiss or to affirm dismissals. Tobin, 268 F.3d at 522 (officials making recommendation entitled to immunity just as magistrate judge who makes recommendation to district court would be); Wilson, 86 F.3d at 1445 (absolute immunity protects against both actual decision making

and any act that is "part and parcel" of the decision making process).

Because I conclude that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity, plaintiff will not be allowed to proceed against any of the prison officials who reviewed and dismissed his inmate complaints. This conclusion is consistent with the purpose behind affording absolute immunity, which is to free the judicial process from harassment and intimidation. Forrester, 484 U.S. at 226 ("the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have"). The potential for harassment or intimidation is particularly high in the prison setting given the unusually litigious tendencies of inmate populations.

B. First Amendment Claims

Plaintiff alleges a plethora of violations of his rights under the First Amendment. A prison inmate retains "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Actions or policies that infringe on the First Amendment rights of inmates are justified so long as they are "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987).

1. Internet materials and personal ad

Plaintiff alleges that he was denied delivery of printed pages from the web site of the Department of Treasury on May 7, 2002. He alleges that he was denied delivery of an article posted on the internet on July 12, 2002 about a lawsuit he had filed. Finally, he alleges that his request to place a personal ad on the internet and in a newspaper was denied on January 27, 2005.

The ability of Wisconsin prisoners to access materials on the internet is governed by an internal management procedure of the Department of Corrections, DOC 309 IMP 1. Recently, this policy was challenged on First Amendment grounds in another case before this court. West v. Frank et al., 04-C-173. From that case, I take judicial notice of the fact that in 2002, DOC 309 IMP 1allowed inmates to receive material downloaded from the internet only from a web site directly or through a recognized commercial source. Inmates could not receive downloaded internet materials from family or friends and they could not receive e-mail from personal web pages. On February 25, 2004 and May 3, 2004, a revised procedure went into effect that allows an inmate to possess materials downloaded from the internet regardless of the identity of the sender, provided the materials are printed on standard 8.5" x 11" paper. The revised procedure still prohibits inmates from receiving e-mail from a personal web page.

In West, I concluded that the implementation of the new policy mooted the inmate's

claims for injunctive and declaratory relief and that the prison officials were entitled to qualified immunity with respect to the inmate's request for monetary relief. Opinion & Order, dkt. #35, at 9-18. In this case, plaintiff alleges that he was denied internet materials on May 7, 2002 and July 12, 2002, under the version of the procedure that is no longer in effect. Because of my conclusions in West, plaintiff would not be able to secure any form of relief on this claim if he prevailed. Therefore, he will be denied leave to proceed on this claim.

This leaves plaintiff's allegation that he was denied permission to place a personal ad on the internet and in the Reno News & Review newspaper on January 27, 2005. In the interest of maintaining prison security, prison officials may lawfully limit an inmate to corresponding with individuals on a pre-approved list. Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Palmigiano v. Travisono, 317 F. Supp. 776, 791 (D.R.I. 1970); cf. Farrell v. Peters, 951 F.2d 862 (7th Cir. 1992) (upholding prison officials' refusal to allow inmate to correspond with "common law" wife housed in another prison). Plaintiff's allegation suggests that he was seeking permission to correspond with anyone who might answer his personal ad. The First Amendment does not require prison officials to allow inmates this degree of freedom in choosing their correspondence partners. Plaintiff's allegation does not allege a violation of his rights under the First Amendment. Therefore, he will be denied leave to proceed on this claim.

2. Books, magazines, etc.

Plaintiff alleges that he has been denied over twenty magazines, several books, an atlas and a newsletter by various prison officials from July 2002 to April 2005. From his allegations, it appears that the officials denied delivery of most of the magazines because they contained gang-related content. Plaintiff has placed these paragraphs under the heading "First Amendment Claims." From this, I understand plaintiff to allege that the prison officials who denied delivery of the publications violated his rights under the First Amendment. With two exceptions I will discuss below, plaintiff's allegations regarding these denials are sparse but sufficient under a liberal construction to satisfy the pleading requirements of Fed. R. Civ. P. 8.

Before setting out which officials plaintiff may proceed against, I note that plaintiff's allegations regarding the denial of books and magazines may not comply with Fed. R. Civ. P. 11(b)(3), which provides that when a civil litigant files a complaint or other written document with the court, he certifies that, "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). In other words, Rule 11 requires litigants to conduct a reasonable investigation into the factual bases underlying their claims *before* filing suit. An

individual may not file a complaint containing factual allegations that are based on nothing more than speculation and then use the discovery process to learn whether those allegations are factually supported. Macken ex rel. Macken v. Jensen, 333 F.3d 797, 800 (7th Cir. 2003). The "reasonable investigation" requirement, along with all of the other requirements of Rule 11, applies to prison inmates. Bouriboune v. Berge, 391 F.3d 852 (7th Cir. 2004).

In this case, plaintiff alleges that prison officials violated his First Amendment rights by denying him certain publications. To comply with Rule 11(b)(3), plaintiff must have some basis (other than his own speculation) for believing that each publication was withheld wrongfully. Because plaintiff was denied the publications, I assume that he has not seen them. There is no indication in the complaint that he has learned of their contents in another way. Therefore, it is not clear that plaintiff conducted a reasonable investigation before initiating this case and that he has good cause to believe that each of the publications was withheld wrongfully. If defendants believe that plaintiff's claims are factually baseless, they may notify plaintiff of their intent to file a motion for sanctions under Rule 11 and give him 21 days to withdraw the allegations they believe are frivolous. See Fed. R. Civ. P. 11(c)(1)(A).

Plaintiff will be granted leave to proceed on the following claims against the following defendants.

Defendant Marty Schroeder - denial of a newsletter from "The Jeff Dicks Medical

Coalition" on July 15, 2002.

Defendant Tim Pierce - denial of three art books on March 22, 2005.

Defendant Officer Vilski - denial of September 2002 issue of Spin magazine on August 5, 2002; denial of July 2003 issue of FHM magazine on June 9, 2003; denial of June 23, 2003 issue of US Weekly magazine on June 18, 2003; denial of October 2003 issue of Spin magazine on August 27, 2003.

Defendant Ruth Tritt - denial of September 2002 issue of Stuff magazine on August 6, 2002; denial of June 12, 2003 issue of RollingStone magazine on May 27, 2003; denial of August 21, 2003 issue of RollingStone magazine on August 7, 2003; denial of September 2003 issue of Maxim magazine on August 22, 2003; denial of March 2004 issue of Spin magazine on February 20, 2004; denial of March 2004 issue of Razor magazine on February 20, 2004; denial of March 2004 issue of Maxim magazine on February 20, 2004; denial of December 2004 issue of Maxim magazine on November 22, 2004; denial of December 30, 2004 issue of RollingStone magazine on December 28, 2004; denial of an issue of Blender magazine on December 28, 2004.

Defendant Judy Smith - denial of three art books and an atlas on July 8, 2002; denial of August 2003 issue of Spin magazine; denial of December 2004 issue of Blender magazine on December 16, 2004; denial of January 2005 issue of Spin magazine; denial of February 2005 issue of Spin magazine; denial of March 2005 issue of FHM magazine; denial of

March 2005 issue of Blender magazine; denial of May 2005 issue of Blender magazine; denial of May 2005 issue of Spin magazine on or about April 27, 2005. Plaintiff will be allowed to proceed on these claims against defendant Smith, the warden of the institution, for the sole purpose of discovering the identity of the official(s) who denied plaintiff delivery of these materials. Early on in this lawsuit, Magistrate Judge Stephen Crocker will hold a preliminary pretrial conference at which time he will discuss with the parties the most efficient way to obtain identification of the proper defendants. Once the identity of the proper defendants is learned, this claim will be dismissed with respect to defendant Smith.

The two exceptions noted above are plaintiff's allegations that defendant Vilski denied him delivery of the March 2004 issues of Details magazine and Esquire magazine on February 13, 2004. Plaintiff alleges that the Details magazine had been withheld because it contained a nude picture of a person under 18 years old and that the Esquire magazine had been withheld because it contained a drawing depicting sexual intercourse. I understand plaintiff to allege that these publications were withheld because defendant Vilski improperly concluded that they contained pornography. Plaintiff will be denied leave to proceed on this claim because it is governed by the settlement agreement in Aiello v. Litscher, No. 98-C-791, which states that inmates may receive sexually explicit written material except when it violates obscenity laws.

On April 24, 2003, in Kaufman v. McCaughtry, No. 03-C-27-C, 2003 WL

23218305, I considered whether it was proper for this court to review claims brought in independent lawsuits by individual members of the class in Aiello, in which the members challenged post-settlement characterizations of mail as pornography. (Plaintiff is a member of the class defined in Aiello because he is an adult inmate in the custody of the Wisconsin Department of Corrections). I concluded that such claims could not be decided without affecting the Aiello class as a whole and that in any event, the settlement agreement precludes lawsuits based solely on isolated misinterpretations of the rules regarding sexually explicit material or its successor regulations by line staff. Therefore, I will deny petitioner leave to proceed on his claims concerning the denials of the March 2004 issues of Details magazine and Esquire magazine.

As a final note, plaintiff should be aware that (1) he has the burden of proving that each denial of a publication was not reasonably related to a legitimate penological interest; (2) prison officials may lawfully withhold written materials that contain gang-related content; and (3) federal courts must accord considerable deference to the judgments of prison officials regarding what does and does not constitute gang-related material.

3. Failure to provide notice to publishers

Plaintiff alleges that defendants did not provide copies of the notices of non-delivery that he received to the publishers of the magazines that were withheld. Wis. Admin. Code

§ DOC 309.05(3) provides that the department shall notify the sender of a publication that is not delivered. Plaintiff's allegation suggests a violation of state law but does not state a claim that *his* constitutional rights are being violated. He will be denied leave to proceed on this claim.

4. Prohibition on sharing publications

Plaintiff alleges that defendant Smith has a policy of prohibiting inmates from sharing magazines and other publications with each other. This allegation is insufficient to state a claim because plaintiff has not alleged that he has been prevented from sharing a magazine or another publication with any inmate. In other words, plaintiff has not alleged that he has been injured because of the policy. Therefore, he will be denied leave to proceed on this claim.

C. Eighth Amendment Claims

I understand plaintiff to assert multiple claims under the Eighth Amendment, which prohibits prison officials from imposing cruel and unusual punishments on prison inmates.

1. Medication

Plaintiff alleges that he has asthma and that on several occasions he has failed to

receive proper medication. To state a claim under the Eighth Amendment, an inmate must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1974). In other words, plaintiff must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

a. Medication to treat asthma

Plaintiff alleges that he takes Nasacort to treat his asthma and that he filed inmate complaints on July 4, 2002 and March 25, 2003 because he had not received Nasacort for several days. He alleges further that defendant Carivou gave him medication that was not to be taken for asthma, which placed his health at serious risk. The Court of Appeals for the Seventh Circuit has held that asthma can constitute a serious medical condition, "depending on the severity of the attacks." Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005). Plaintiff has not alleged that he suffered any physical injury as a result of not receiving Nasacort for several days or as a result of being given the wrong medication. However, he has alleged that his health was placed at serious risk because he was denied his Nasacort and given the wrong medication. This is sufficient to allege that his asthma qualifies as a serious medical condition.

The deliberate indifference prong is established when a prison official knows of and disregards an excessive risk to an inmate's health or safety. Gil v. Reed, 381 F.3d 649, 661 (7th Cir. 2004). Inadvertent error, negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Deliberate indifference requires a showing of intent or recklessness. Foelker v. Outgamie County, 394 F.3d 510, 513 (7th Cir. 2005). Plaintiff alleges that defendant Carivou, a nurse, gave him medication contained in a box that indicated clearly that it was not to be taken for asthma. He alleges further that he was denied Nasacort for at least two periods of several days. These allegations are sufficient to allege deliberate indifference on the part of defendant Carivou. Therefore, plaintiff will be granted leave to proceed on this claim.

b. Medication labelled for another inmate

Plaintiff also alleges that he received medication bearing the name of another inmate on August 1, 2002 and that medical staff crossed the name off the medication and gave it to plaintiff. This allegation is insufficient to state a claim under the Eighth Amendment because plaintiff has not alleged facts from which an inference may be drawn that his health was placed at serious risk by the actions of the medical staff. He does not allege what the medication was, or even that he took the medication and suffered an adverse reaction.

Therefore, he will be denied leave to proceed on this claim.

2. Sunglasses

Plaintiff alleges that he has been diagnosed with a severe sensitivity to light and that he was unable to see a doctor for several months to obtain a medical approval form needed to allow him to wear sunglasses while walking outside. He alleges further that he filed an inmate complaint about not seeing a doctor and that some time after filing the complaint, he saw a doctor and was given a prescription for sunglasses. Plaintiff's allegations are sufficient to state a claim under the Eighth Amendment. His allegation that he has been diagnosed with a severe sensitivity to light is enough at this stage of the litigation to suggest the possibility that plaintiff has a serious medical condition. In addition, he alleges that he was unable to secure an appointment with an eye doctor for several months and that he needed a doctor to approve a prescription for sunglasses that he needs when he is outside. It is possible that plaintiff will be able to show that this delay was the result of deliberate indifference on the part of one or more officials at Oshkosh. Therefore, I will allow plaintiff to proceed on this claim. Because plaintiff has not indicated which official or officials are responsible for the delay, I will allow him to proceed against defendant Judy Smith on this claim for the sole purpose of discovering the identity of the responsible official or officials.

3. Exposure to second hand smoke

Plaintiff alleges that he filed an inmate complaint requesting that smoking be banned at Oshkosh in December 2004 because he is subjected to second hand smoke which aggravates his asthma. Two claims are possible with respect to an inmate's exposure to second hand smoke: deliberate indifference to an existing medical condition and deliberate indifferent to an inmate's future health. Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001). Plaintiff alleges that exposure to second hand smoke at Oshkosh aggravates his asthma, which is an existing medical condition. This is sufficient to state a claim under the Eighth Amendment. Because it appears that plaintiff is challenging a policy of the institution, I will allow him to proceed on this claim against defendant Smith.

5. Co-payments

Plaintiff alleges that he filed inmate complaints on February 21, 2005 and April 27, 2005 challenging the requirement that he pay a $7.50 co-payment before seeing medical staff or receiving dental services. He alleges further that defendant Delvaux explained the institution's policy of placing a debit on an inmate's account if he cannot afford to make a payment.

The Wisconsin Department of Corrections's co-payment policy provides that "[h]ealth services staff may not deny an inmate or a juvenile medical, dental or nursing

services based only on the inmate's or the juvenile's inability to pay a co-payment." Wis. Admin. Code § DOC 316.03. When an inmate lacks the funds to make the required co-payment, the correctional facility's business department simply makes a notation on the inmate's trust account record indicating that the inmate owes the co-payment. Wis. Admin. Code § DOC 316.06(2).

"[A]n inmate does not state a claim under the Eighth Amendment when he cannot allege that he was denied medical treatment because he was unable to pay a nominal co-payment or fee." Gardner v. Wilson, 959 F. Supp. 1224, 1228 (C.D. Cal. 1997) (citing Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 408 (9th Cir.1985)). Although the Court of Appeals for the Seventh Circuit has not yet addressed this issue, other courts have consistently upheld the constitutionality of medical co-payment requirements so long as they do not prevent an inmate who cannot afford the co-payment from receiving medical care. Reynolds v. Wagner, 128 F.3d 166, 174 (3d Cir. 1997) ("If a prisoner is able to pay for medical care, requiring such payment is not 'deliberate indifference to serious medical needs'") (citation omitted); Hutchinson v. Belt, 957 F. Supp. 97, 100 (W.D. La.1996) (allegation that medical care was not free does not state claim of deliberate indifference); Bihms v. Klevenhagen, 928 F. Supp. 717, 718 (S.D. Tex.1996) (state may require reimbursement for medical expenses from inmate who can afford to pay); Hudgins v. DeBruyn, 922 F. Supp. 144 (S.D. Ind. 1996) (co-payment requirement for over-the-

counter medications constitutional; policy had exceptions to avoid hardship for chronically ill inmates and contained provision that inmates could not be denied treatment for inability to pay); Johnson v. Department of Public Safety and Correctional Services, 885 F. Supp. 817, 820 (D. Md. 1995) ("because the policy mandates that no one shall be refused treatment for an inability to pay, the co-payment will not result in a denial of care"); Martin v. Debruyn, 880 F. Supp. 610, 614 (N.D. Ind. 1995) ("A prison official who withholds necessary medical care, for want of payment, from an inmate who could not pay would violate the inmate's constitutional rights if the inmate's medical needs were serious . . . [b]ut insisting that an inmate with sufficient funds use those funds to pay for medical care is neither deliberate indifference nor punishment."). In this case, plaintiff does not allege that he has been denied medical care because of his inability to pay the co-payment. The Wisconsin Department of Corrections's co-payment policy is designed to prevent this situation from occurring. Because co-payment policy will not prevent an indigent inmate from receiving medical care, it does not violate the Eighth Amendment. Plaintiff will be denied leave to proceed on this claim.

6. Frivolous claims

Plaintiff alleges that he has had to eat meals off of dirty dishes because the water used to wash dishes during meals is not clean. 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). In contrast, 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's allegation regarding dirty dishes falls into the latter category. Therefore, he will be denied leave to proceed on this claim.

In addition, plaintiff alleges that his identification tag gets in his food while he is eating, that he spit on his tag once while brushing his teeth, that the wind blew his tag into his face on two occasions, resulting in cuts to his lip and that he could be injured or killed if someone tried to choke him with the plastic cord that holds the tag around his neck. None of these allegations are sufficient to satisfy either the objective or subjective components of the Eighth Amendment standard. Plaintiff alleges that his lip was cut twice when the wind caused his tag to fly into his face, but a mere cut does not constitute a serious medical need. Gutierrez, 111 F.3d at 1371 ("serious medical needs" include conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated and those in which deliberately indifferent withholding of medical care results in needless pain and suffering). Plaintiff's allegation that he could be injured severely or killed if someone choked him with the plastic cord that holds the tag around his neck is pure speculation that

will not support an Eighth Amendment claim. The mere possibility that a prison inmate might be harmed does not violate that inmate's rights under the Eighth Amendment. Plaintiff will be denied leave to proceed on an Eighth Amendment claim regarding his identification tag.

D. Access to Courts

Plaintiff alleges that he filed an inmate complaint in September 2002 challenging the requirement that he pay for postage to mail an appeal of the dismissal of an inmate complaint. He contends that because he earns only 12 cents an hour, the postage requirement is designed to prevent him from filing appeals. Plaintiff has not alleged that he is unable to obtain postage, but only that he wants postage provided at no cost. This abstract desire to have the state subsidize his inmate complaints does not state an access to courts claim. Although the state must pay for postage necessary to insure an inmate's access to courts, Bounds v. Smith, 430 U.S. 817, 824 (1977), there is no general constitutional entitlement to subsidy. Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002); see also Hershberger v. Scaletta, 33 F.3d 955, 956-57 (8th Cir. 1994) (indigent inmates do not have a right to free postage for personal mail); Van Poyck v. Singletary, 106 F.3d 1558 (11th Cir. 1997) (same); Gaines v. Lane, 790 F.2d 1299, 1308 (7th Cir. 1985) (holding that prisoners "do not have a right to unlimited free postage"). If plaintiff finds it difficult to pay the

postage necessary to appeal the dismissals of his many inmate complaints, he will have to exercise discretion and good judgment as to which appeals are worth pursuing. Because his allegations regarding postage do not support an inference that his right to access the courts has been violated, he will be denied leave to proceed on this claim.

E. Due Process

Finally, I understand plaintiff to allege that defendants Landreman and Wells, members of the Wisconsin Parole Commission, violated plaintiff's due process rights by denying him parole. Plaintiff alleges that defendant Landreman deferred his parole for 36 months after a hearing on April 14, 2005 at which he failed to follow proper procedures. Specifically, plaintiff contends that defendant Landreman relied on outdated and false information, failed to consider plaintiff's cooperation with the police as a mitigating factor and failed to consider that sex offenders as a group have a low risk of reoffending. He contends that defendants ignored the facts of his case and deferred his parole because the state of Wisconsin has a policy of denying parole to sex offenders.

Before a prison inmate is entitled to due process protections, he must have a liberty or property interest at stake. Although there is no independent constitutional right to parole, Heidelberg v. Illinois Prisoner Review Board, 163 F.3d 1025, 1026 (7th Cir. 1998), a state may create a liberty interest in being granted parole through state law. Felce v.

Fiedler, 974 F.2d 1484, 1490 (7th Cir. 1992). Wisconsin inmates generally become eligible for parole after serving one-quarter of their sentences. Wis. Stat. § 304.06(1)(b). They are entitled to mandatory release after serving two-thirds of their sentences. Wis. Stat. § 302.11(1)(b). A protectible liberty interest in parole arises only after an inmate reaches his mandatory release date. Felce, 974 F.2d at 1491-92.

Plaintiff alleges that he has served at least one-quarter of his sentence. He does not allege that he has reached his mandatory release date. Therefore, the decision of defendants Landreman and Wells to defer his parole for 36 months did not implicate a liberty interest for which due process protections were applicable. As a result, plaintiff will be denied leave to proceed on this claim.

ORDER

IT IS ORDERED that

1. Plaintiff Larry George's request for leave to proceed is GRANTED on his claim that his rights under the First Amendment were violated when he was denied delivery of three art books and an atlas on July 8, 2002 as well as the following publications: August 2003 issue of Spin magazine; December 2004 issue of Blender magazine; January 2005 issue of Spin magazine; February 2005 issue of Spin magazine; March 2005 issue of FHM magazine; March 2005 issue of Blender magazine; May 2005 issue of Blender magazine; and

the May 2005 issue of Spin magazine. Plaintiff will proceed against defendant Judy Smith on this claim for the sole purpose of discovering the identities of the individuals who denied delivery of each of these publications. Upon discovery of the identities of the responsible individuals, this claim will be dismissed with respect to defendant Smith.

2. Plaintiff's request for leave to proceed is GRANTED on his claim that defendant Marty Schroeder violated his First Amendment rights by denying him delivery of a newsletter from "The Jeff Dicks Medical Coalition" on July 15, 2002;

3. Plaintiff's request for leave to proceed is GRANTED on his claim that defendant Tim Pierce violated his First Amendment rights by denying him delivery of three art books on March 22, 2005;

4. Plaintiff's request for leave to proceed is GRANTED on his claim that defendant Officer Vilski violated his First Amendment rights by denying him delivery of the following publications: September 2002 issue of Spin magazine; July 2003 issue of FHM magazine; June 23, 2003 issue of US Weekly magazine; and the October 2003 issue of Spin magazine;

5. Plaintiff's request for leave to proceed is GRANTED on his claim that defendant Ruth Tritt violated his First Amendment rights by denying him delivery of the following publications: September 2002 issue of Stuff magazine; June 12, 2003 issue of RollingStone magazine; August 21, 2003 issue of RollingStone magazine; September 2003 issue of Maxim magazine; March 2004 issue of Spin magazine; March 2004 issue of Razor magazine; March

2004 issue of Maxim magazine; December 2004 issue of Maxim magazine; December 30, 2004 issue of RollingStone magazine; issue of Blender magazine denied on December 28, 2004;

6. Plaintiff's request for leave to proceed against is GRANTED with respect to his claim that defendant Carivou violated his rights under the Eighth Amendment by giving him medication that was not to be taken for asthma and for denying plaintiff his Nasacort for two periods of several days;

7. Plaintiff's request for leave to proceed is GRANTED with respect to his claim that an unknown defendant violated his Eighth Amendment rights by refusing to allow him to see an eye doctor for several months. Plaintiff will proceed against defendant Judy Smith on this claim for the sole purpose of discovering the identity of the responsible individual. Upon discovery of the identity of the responsible individual, this claim will be dismissed with respect to defendant Smith.

8. Plaintiff's request for leave to proceed against defendant Judy Smith is GRANTED with respect to his claim that exposure to second hand smoke at the Oshkosh Correctional Institution violates his rights under the Eighth Amendment;

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

10. Defendants Matthew Frank, John Ray, Cindy O'Donnell, Rick Raemisch, jennifer Delvaux, Sandra Hautamaki, Lt. Blodgett, Tom Edwards, Patricia Voermans, Michelle

Albrecht, Michael Boushon, Sharon Zunker, Judy Jaeger, Steven Casperson, Jim Schwochert, Sandy Habeck, Lenard Wells and Steven Landreman are DISMISSED from this case;

11. Plaintiff is responsible for serving his complaint upon the defendants. A memorandum describing the procedure to be followed in serving a complaint on individuals in a federal lawsuit is attached to this order, along with six copies of plaintiff's complaint and blank waiver of service of summons forms.

12. 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 defendants or to defendants's attorney.

13. 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 2nd day of August, 2005.

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