IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TITUS HENDERSON,

ORDER

Petitioner,

06-C-12-C

v.

JOHN D. BRUSH; CORRECTIONS CORPORATION OF AMERICA; ASSOCIATE WARDEN PICKERING; MATTHEW FRANK; PETER HUIBREGTSE; BRIAN KOOL; JUDITH HUIBREGTSE; TRACEY GERBER; JOHN BOSTON; JOHN DOE; SGT. GRONDIN; J. STARKY; RUSSELL BAUSCH; ROBERT SHANNON; TODD OVERBO; ELLEN RAY; KELLY TRUMM; CHRISTEN BEERKIRCHER; DICK VERHAGEN; CO II HENNERMAN; CO II SCHISSEL; RICHARD SCHNEITER; JOHN & JANE DOE CORRECTIONAL OFFICERS; DR. COX; and AMY CAMPBELL,

Respondents.

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This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner Titus Henderson, who is presently confined at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of

starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

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

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Titus Henderson is an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Respondent John Brush is employed by respondent Corrections Corporation of America as Managing Director of Operations. Respondent Pickering is employed by respondent Corrections Corporation of American as an associate warden at the North Fork Correctional Institution in Sayre, Oklahoma.

Respondent Matthew Frank is Secretary of the Wisconsin Department of Corrections. Respondent Dick Verhagen is an administrator in the Department of Corrections. The following respondents are employed at the Wisconsin Secure Program Facility in the following capacities: Richard Schneiter, warden; Peter Huibregtse, deputy warden; Brian Kool, unit manager; Judith Huibregtse, Sgt. Grondin, J. Starky, Russell Bausch, Robert Shannon, CO II Hennerman, CO II Schissel, John and Jane Doe, correctional officers; Tracey Gerber, accountant; John Boston and John Doe, dentists; Todd Overbo, chaplain; Ellen Ray, Kelly Trumm, Christen Beerkircher, inmate complaint examiners; Dr. Cox, doctor; and Amy Campbell, nurse.

B. Placement in Disciplinary Segregation

On January 5, 2001, respondent Pickering placed petitioner in disciplinary segregation for allegedly interfering with respondent Pickering's profits from an illegal "ice cone stand" and drug money of the Gangster Disciples. The next day, petitioner was taken

to respondent Pickering's office for questioning. Respondent Pickering asked petitioner why he was interfering with "my GD's money and Ice Cone Stand." Petitioner responded that he did not know what respondent Pickering was talking about. Respondent Pickering accused petitioner of interfering and told a lieutenant to take petitioner back to disciplinary segregation. Some time later, Mrs. Jackson, a social worker, asked petitioner why he was placed in segregation and petitioner told her about respondent Pickering's accusation. She asked him how long he was to stay in segregation and petitioner told her that he had not received a disciplinary ticket. Petitioner remained in disciplinary segregation from January 5, 2001 to April 5, 2001 without receiving a ticket. On April 6, 2001, Jackson told petitioner that she was moving him to general population.

During petitioner's time in segregated confinement, no grievance process was available at the Corrections Corporation of America facility. Inmates could file grievances with unit social workers or with respondent Brush when he visited the institution. Respondent Brush's job was to train and educate staff regarding the constitutional rights of prisoners. He failed to train officers and staff, and failed to implement a policy for dealing with staff misconduct and discipline of staff for misconduct. He knew from visits to the institution and memoranda prepared by staff that staff had a history of misconduct with gangs, drugs and sexual activity but did not take appropriate action in response.

C. Interference with Access to the Courts

1. Writ of certiorari

On March 3, 2004, Judge William Foust denied petitioner's petition for a writ of certiorari in case no. 03-CV-2645. Petitioner had filed the petition to have a disciplinary ticket overturned because he believed it was arbitrary. On March 8, 2004, respondent Shannon came to petitioner's door with mail from the Circuit Court for Dane County. After reading petitioner's mail, respondent Shannon asked petitioner if he was "trying to leave us." When petitioner approached his cell door, respondent Shannon had opened his mail and refused to give it to him. The mail consisted of Judge Foust's order denying petitioner's petition. Respondent Shannon said that he was going to give petitioner's mail to CO II Peterson and tell her that petitioner was trying to file papers in court. Respondent Shannon gave petitioner's mail to Peterson, who came to petitioner's door and asked him whether he wanted his mail. Petitioner said that he did. Peterson said that because petitioner had "disrespected her, it was pay back time" and tore his mail into pieces. Petitioner wrote an inmate complaint but was unsuccessful in getting his mail. He wrote the Circuit Court for Dane County and asked for another copy of Judge Foust's order. The clerk of court sent petitioner another copy of the decision on March 18, 2004. By the time petitioner had received a copy of the decision, the time in which petitioner could have appealed the decision had passed.

2. Service of complaint

On June 1, 2004, petitioner submitted outgoing mail for inspection, leaving it unsealed. The mail consisted of pleadings that were to be sent to Sheriff Gary Hamblin for service on Steven Casperson and Matthew Frank in Henderson v. Frank, case no. 04-CV-1289. The mail was returned to petitioner and he resubmitted it June 14, 2004. Respondents Judith Huibregtse and Grondin were responsible for reading the mail intended for Sheriff Hamblin. Respondent Gerber is responsible for providing postage and sending mail out of the institution. Respondents Judith Huibregtse, Grondin and Gerber inspected, read and removed the copy of the complaint intended for Frank. The disbursement for petitioner's mail indicated a charge of $3.95 for postage. The postage on the envelope was $2.21. Petitioner filed an inmate complaint requesting that the copy of his complaint intended for Frank be returned but never received a response. Judge Fieldler dismissed Frank from the case for petitioner's failure to complete service of process on Frank.

3. Destruction of dental records

In Henderson v. Frank, case no. 04-CV-1289, petitioner filed a civil complaint against respondent Boston alleging denial of dental care in connection with his request for a tooth extraction. Judge Fieldler issued an order compelling discovery of dental records. Respondent Boston said that respondent John Doe intentionally destroyed request forms in

which petitioner complained about tooth pain and requested a tooth extraction to prevent petitioner from showing that respondent Boston had been deliberately indifferent to petitioner's request for dental care. Petitioner's claim was dismissed for lack of evidence.

4. Rejection of inmate complaints

When an inmate submits an inmate complaint, it must be limited to one issue. If an explanation of the grievance is provided with the complaint, the complaint will be rejected for raising too many issues. If an explanation is not provided, the complaint will be rejected or dismissed for its lack of facts.

Respondents Ray, Trumm and Beerkircher have abused their authority by rejecting inmate complaints filed in compliance with Wis. Admin. Code ch. DOC 310. They reject inmate complaints because they believe they can respond to two issues in one complaint. Wis. Admin. Code §§ DOC 310.07–310.09 do not give inmate complaint examiners authority to reject inmate complaints alleging misconduct by Secure Program Facility staff. Because of inmate complaint examiners' abuse of their authority, a case that petitioner was litigating in this court, Henderson v. Kool, no. 05-C-157-C, was dismissed for petitioner's failure to exhaust his administrative remedies.

D. Refusal to Deliver Outgoing Mail

Respondent Peter Huibregtse has implemented a policy that requires facility staff to "censor" outgoing legal and non-legal mail by reading, inspecting and, in some cases, refusing to deliver it. Application of this policy interferes with delivery of privileged legal correspondence and prevents inmates from expressing inflammatory political beliefs and exposing the harsh treatment of inmates at the facility. The policy, Wisconsin Secure Program Facility policy 524.02, is unconstitutional on its face and as applied because it gives staff broad discretion to deny delivery of outgoing mail that contains inflammatory political beliefs or that exposes the harsh medical treatment given to inmates at the facility. The practice of reading personal mail and rejecting letters that contain inappropriate statements is widespread at the facility. Respondent Peter Huibregtse approves of the practice as a way of preventing inflammatory statements and information about the harsh treatment prisoners receive from reaching the public.

Respondents Frank, Schneiter and Peter Huibregtse have acted with deliberate indifference in implementing and enforcing the policy of screening outgoing mail and refusing to deliver mail that contains inflammatory statements, political beliefs or that exposes the harsh treatment inmates receive at the facility. They have failed to train facility staff and to implement and enforce policy 524.02, which has caused staff to refuse to deliver all mail that they deem inappropriate.

Since January 14, 2003, petitioner has been forced to submit personal mail in an

open condition so that facility staff can read it and reject letters that expose the facility's harsh medical treatment of inmates and that contain inflammatory statements and political beliefs. From that date to the present, facility staff continue to read and reject his outgoing mail. Petitioner has not been found guilty of any infraction relating to outgoing mail and has not given staff permission to censor his outgoing mail.

1. Letter to Elsa Greene

On September 3, 2004, respondents Gerber and Judith Huibregtse refused to provide postage and deliver a letter petitioner had written to Elsa Greene, Deputy Administrator for the Attorney Professional Responsibility Board, because the letter was sealed and they could not read its contents.

2. Refusal to deliver letter on March 1, 2005

On March 1, 2005, petitioner submitted a letter in an open envelope for delivery. Respondent Starky read the letter and destroyed it without any penological justification. Petitioner asked respondent Starky why he destroyed the letter and respondent Starky said that the content of the letter was inappropriate and because petitioner's prison number did not appear on the letter. Petitioner's prison number appears on all of his outgoing letters.

3. Refusal to deliver letter on March 16, 2005

On March 16, 2005, respondent Starky read and refused to deliver another letter written by petitioner to his family and friends because he believed the content was inappropriate and because petitioner's prison number did not appear on the letter.

4. Letter to Harold Stepper

On May 25, 2005, respondent Gerber denied postage and delivery of a sealed letter to Harold Stepper, Paralegal Specialist for the Food and Drug Administration, because petitioner would not allow her to read the contents of the letter.

5. Letter to Donald Rumsfeld

On June 26 and 27, 2005, sergeants Brown and Robinson refused to deliver a letter petitioner had written to Secretary of Defense Donald Rumsfeld because petitioner would not allow them to read the contents of the letter. Petitioner received a disciplinary ticket in connection with this incident.

6. Letter to Senator Frist

On July 26, 2005, respondent Gerber denied postage and delivery of a letter petitioner had written to Senator Frist.

7. Letter to Kevin Potter

On September 8, 2005, respondents Gerber, Judith Huibregtse and Grondin refused to deliver a letter petitioner had written to a lawyer named Kevin Potter and refused to provide postage for the letter because petitioner refused to reveal the contents of the letter.

8. Letter to David Faithi

On November 13, 2005, Sgt. Carpenter refused to deliver a letter petitioner had written to a lawyer named David Faithi, who works for the American Civil Liberties Union. In the letter, petitioner asked for Faithi to represent him in connection with his refusal to let facility staff read his outgoing legal mail.

E. Interference with Incoming Mail

Respondents Peter Huibregtse and Kool have prohibited petitioner from possessing any magazines, including those available in the institution's library. On September 24, 2004, petitioner subscribed to Entrepreneur and Inc. magazines to learn about business strategies. Also, he subscribed to Maximum PC and Popular Science magazines in order to continue his education in science and computer repair. These magazines do not pose a security risk to staff or inmates. Respondents Peter Huibregtse and Kool denied petitioner these magazines by keeping him on level two.

F. Denial of Taoist Texts

On December 13, 2004, petitioner informed respondent Overbo that he is a practicing Taoist. On September 16, 2005, petitioner asked respondent Overbo to provide two Taoist texts, Tao te Ching and I-Ching. Followers of Taoism are required to study and practice according to the teachings of these two texts. Respondent Overbo refused petitioner's request because, pursuant to DOC 309 IMP 6, all Asian religions are grouped together under the Buddhist faith. As a result, the Department of Corrections does not recognize Taoism as a religion and its sacred texts and literature are unavailable.

Respondent Overbo has used federal funds to provide sacred texts to inmates who practice other faiths, such as Catholicism, Protestantism, Judaism and Islam, but he has refused to use federal funds to provide access to texts that are sacred to Taoists. Inmates who practice Taoism are forced to rely on non-governmental agencies to provide access to Taoist texts. Petitioner's ability to study his faith is hindered because the department refuses to use federal funds to provide sacred texts.

G. Denial of Promotions to Level Three

On January 3, 2005, respondent Kool denied petitioner a promotion to level three in retaliation for statements petitioner made in a questionnaire. In the questionnaire,

petitioner wrote that he was transferred to the Secure Program Facility because he filed lawsuits against staff at the Red Granite Correctional Institution instead of writing that he was transferred to the facility because he received a conduct report.

On October 25, 2005, petitioner wrote on a level three questionnaire that he would file lawsuits against staff at the facility who mistreat inmates. On November 20, 2005, respondent Kool told Dr. Beech that he did not like what petitioner had written on the questionnaire. The next day, respondent Kool denied petitioner a promotion to level three in retaliation for his threat to file lawsuits against facility staff.

Respondent Kool denied petitioner a promotion to level three on November 1, 2005 in retaliation for petitioner filing a lawsuit in this court, Henderson v. Kool, 05-C-157-C.

On November 2, 2005, respondent Kool attended petitioner's parole hearing and told respondent Judith Huibregtse that petitioner had filed a lawsuit against him so that petitioner would be denied parole. Respondent Huibregtse deferred petitioner's parole for 24 months because he had failed to move through all of the levels of the facility's level system.

In an administrative confinement hearing on December 19, 2005, respondent Kool recommended that petitioner be placed in administrative confinement because petitioner filed case no. 05-C-157-C and because of the answers petitioner had given in a questionnaire. Respondent Kool recommended that petitioner be placed in administrative confinement

because of his membership in an alleged gang but he lacked evidence to support this accusation. Captain Brown, the gang coordinator, has told staff that there is no evidence indicating that petitioner has a history of gang affiliation and that petitioner's security card is not marked with a "g" that would indicate gang membership.

H. Denial of Medical Care

1. Stomach pain

On September 23, 2004, petitioner requested medical attention because of stomach pain. Respondent Cox told petitioner that he had a stomach bacteria that could develop into an ulcer and possibly stomach cancer. He prescribed Amoxycillin for petitioner but did not tell petitioner about its adverse side effects. After taking the medicine for two weeks, petitioner experienced more pain, internal bleeding, hallucinations and seizures. Petitioner requested medical attention. Respondent Cox stopped the medication but refused to treat petitioner's internal bleeding. On January 18, 2005, petitioner requested medical attention for his internal bleeding. Respondent Campbell refused to treat him until he sent a money disbursement. Petitioner did not have the means to make the payment. Respondent Campbell did not inform a doctor of petitioner's situation and petitioner did not receive treatment.

2. Seizure

On April 4, 2005, petitioner pushed the emergency call button in his cell because he was shaking, felt dizzy and had become unbalanced. Sgt. Sickinger asked petitioner what was wrong and he told her he "felt a seizure coming on." Sgt. Sickinger told petitioner that because he had not had a seizure, this was not an emergency and he should call a nurse. Petitioner pushed the button again but Sgt. Sickinger had turned it off. Approximately one hour later, petitioner pushed the button again but received no answer. Other inmates pushed their buttons and told Sgt. Sickinger that they had heard petitioner fall. An hour later, CO II Hubbert and CO II Schneider told Sgt. Sickinger that petitioner needed help because he was stumbling and semi-conscious. Hubbert and Schneider had to escort petitioner to the nurse. Petitioner went to the hospital where tests revealed that he had had a recent seizure. Sgt. Sickinger has a pattern of denying inmates medical care. Respondents Schneiter and Peter Huibregtse have refused to remove Sgt. Sickinger from his position.

3. Leg pain

On October 9, 2005, petitioner pulled a muscle in his leg, causing serious pain. He pushed his emergency call button to tell Sgt. Sickinger that he needed medical attention. Petitioner pushed his button five times; Sgt. Sickinger said she did not consider a pulled muscle an emergency and turned off his button each time. When CO II Brueace did a count,

he told Sgt. Sickinger that petitioner was lying down in pain and asking for help. A short time later, Nurse Jo told Sgt. Sickinger that petitioner was faking his injury.

As petitioner's pain increased, he began to scream for medical attention. CO II Bearce went to get Lt. Brudos. Nurse Jo came back with Lt. Brudos and said that petitioner had pulled a muscle in his leg. Petitioner's leg was swollen when Nurse Jo first examined it; it had swollen more by the time she came back with Lt. Brudos. CO II Bearce and another officer had to escort petitioner to the medical room because he could not walk by himself. Sgt. Sickinger made the officers distribute meal trays before helping petitioner to the medical area. It took the officers twenty minutes to distribute the trays. Sgt. Sickinger has repeatedly denied or prolonged medical treatment for petitioner knowing that he is in pain. Respondents Schneiter and Peter Huibregtse know that this pattern exists and that Sgt. Sickinger poses a risk to the health of inmates.

According to a policy at the facility, petitioner is allowed to choose between recreation or law library. Since January 17, 2003, petitioner has not participated in recreation because he has to do legal research. Because the only time petitioner can attend law library is during his recreation time, his leg muscle began to atrophy, which made it more likely that he would injure it.

I. Sexual Touching and Comments

On July 16, 2003, respondents Bausch and Shannon took petitioner out of his cell to demote him because petitioner had filed inmate grievances against one of them for making sexual comments over the intercom while petitioner showered and used the bathroom. Respondent Bausch told petitioner to stand after he placed him in shackles. As petitioner stood and other inmates watched, respondent Shannon held petitioner's arms to the back of his head and respondent Bausch reached in petitioner's pants and fondled his penis. Petitioner told respondent Bausch that he did not appreciate the touching and told respondent Shannon to release him. Respondent Shannon said that he would release petitioner after respondent Bausch finished fondling him. Petitioner was taken to a cell and stripped naked while respondents Bausch and Shannon made sexual comments about the size of petitioner's penis and buttocks.

On December 17, 2003, respondents Bausch and Shannon pulled petitioner out of his cell and respondent Bausch grabbed his buttocks through his pants for no reason and made sexual comments. Petitioner filed numerous inmate complaints but the officials who reviewed them failed to investigate his allegations because they would not accept his word over the word of a staff member. Respondent Peter Huibregtse failed to investigate petitioner's allegations in his capacity as a reviewing authority in the inmate complaint review system. After respondent Peter Huibregtse failed to investigate petitioner's allegations, petitioner wrote to Steve Casperson, an administrator in the Department of

Adult Institutions. Casperson ordered detective Anthony Sheckles to investigate petitioner's allegations. After the investigation, a restraining order was entered against respondents Bausch and Shannon. Petitioner was not informed that the restraining order had been imposed until after respondent Bausch had sexually harassed him again. At no time did respondent Peter Huibregtse or other security staff attempt to enforce the restraining order or stop respondent Bausch's sexual touching because it was a common practice for staff to make sexual sounds over the intercom while watching inmates through video cameras while they were undressed or wearing paper gowns.

DISCUSSION

A. Due Process

I understand petitioner to allege that respondents Brush and Pickering violated his rights under the due process clause while he was incarcerated in a correctional institution in Oklahoma operated by respondent Corrections Corporation of America. He alleges that respondent Pickering placed petitioner in disciplinary segregation for three months after falsely accusing him of interfering with respondent Pickering's profits from an illegal "ice cone stand" and with a prison gang's drug money. Further, petitioner alleges that he did not receive a disciplinary ticket at any time during his stay in segregation. Finally, he alleges that respondent Brush, a supervisory official employed by respondent Corrections Corporation

of America, knew that staff had a history of misconduct concerning gangs and drugs but failed to train them to respect the constitutional rights of inmates and failed to implement a policy for dealing with staff misconduct.

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that he was deprived of a constitutional right and that a person acting under color of state law deprived him of such right. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Respondent Corrections Corporation of America is a private corporation. This fact might suggest that petitioner's due process claim could be dismissed summarily for failure to meet the state actor requirement. Although the Court of Appeals for the Seventh Circuit has not addressed the subject, other courts have determined that employees of respondent Corrections Corporation of America are "state actors" under § 1983. Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (firm operating prison is state actor because it performed "traditional state function" of operating a prison); Giron v. Corrections Corp. of America, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (privately employed correction officer is state actor because he performed state function of incarcerating citizen). The reasoning employed by these courts is sound. It would be inappropriate to dismiss petitioner's claim on the ground that respondents Pickering and Brush are not state actors.

However, petitioner will be denied leave to proceed on this claim because his allegations do not suggest that his due process rights were violated. To state a due process

claim, petitioner must allege that the state has deprived him of a liberty or property interest without proper procedures. In the wake of Sandin v. Conner, 515 U.S. 472, 484 (1995), liberty interests in the prison context are generally limited to deprivations that impose "atypical and significant" hardships on an inmate or that extend the inmate's term of incarceration. Placement in disciplinary segregation does not implicate a liberty interest protected by the due process clause. Thomas v. Ramos, 130 F.3d 754, 761-62 (7th Cir. 1997); Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997). Because petitioner's allegation regarding placement in disciplinary segregation is insufficient to state a claim, his allegation that respondent Brush failed to train staff and discipline them for misconduct fails to state a claim as well. Petitioner has not alleged that respondent Brush's alleged failures violated his constitutional rights in any other way. Therefore, petitioner will be denied leave to proceed on his due process claim.

B. Access to Courts

It is well established that inmates have a fundamental constitutional right to "adequate, effective, and meaningful" access to the courts so that they may challenge their sentences and the conditions of their confinement. Lewis v. Casey, 518 U.S. 343, 355 (1996); Bounds v. Smith, 430 U.S. 817, 821-22 (1977). In Christopher v. Harbury, 536 U.S. 403 (2002), the Supreme Court clarified the pleading requirements for claims alleging

denial of access to the courts. In that case, the widow of a murdered Guatemalan citizen brought a Bivens action against certain federal officials for allegedly concealing information that her husband had been detained and tortured and killed by Guatemalan army forces affiliated with the CIA. She contended that the officials had violated her right of access to the courts because, had she known about her husband's condition, she would have brought a lawsuit that might have saved her husband's life.

In ruling that her allegations failed to state an access to courts claim, the Court noted that access to courts claims generally fall into two categories. The first category consists of claims that a state official or policy is preventing a plaintiff from filing a lawsuit. For example, an inmate might allege that he cannot file a lawsuit because of some impediment, such as a requirement that he pay a filing fee. In these forward-looking cases, the opportunity to bring the underlying suit "has not been lost for all time" and the reason the plaintiff brings the access to courts claim is to have the obstacle removed so that he may pursue the underlying action in the future. Id. at 413.

In contrast, the second category consists of claims that government officials interfered with a previous case and caused "the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order or relief." Id. at 414 (citations omitted). The Court explained that "these cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended

poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." Id. The ultimate object of these cases is not removal of an obstacle to future litigation, but "the judgment in the access claim itself, in providing relief obtainable in no other suit in the future." Id.

Regardless whether the claim looks forward or backward, "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." Id. at 415. In other words, the right of access is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." Id. Therefore, the underlying cause of action must be pled in the complaint. In addition, in a claim that alleges the loss of a past litigation opportunity, "the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." Id. A plaintiff must describe the underlying cause of action and the lost remedy in allegations "sufficient to give fair notice to a defendant," as required by Fed. R. Civ. P. 8. Id. at 416.

A divided panel of the Court of Appeals for the Seventh Circuit applied Christopher in a recent case. In Snyder v. Nolen, 380 F.3d 279 (7th Cir. 2004), the plaintiff sued a clerk of court after the clerk refused to file a complaint in which the plaintiff, who was incarcerated at the time, requested an order enjoining his estranged wife from selling some of his property. The plaintiff alleged that the clerk had violated his right of access to the

courts by refusing to accept his complaint for filing. The panel opinion determined that the clerk was not entitled to absolute immunity. Two members of the panel concluded that plaintiff's allegations did not state an access to courts claim but offered different explanations for their common conclusion. The remaining panel member dissented and concluded that plaintiff's allegations were sufficient to state a claim under the standards set out in Christopher.

Judge Ripple, the dissenter, set out the framework established in Christopher. He wrote that a plaintiff had to allege three things to state a backwards looking access to courts claim: (1) a non-frivolous underlying claim; (2) the official act that frustrated his attempt to litigate that claim; and (3) a remedy that may be awarded for the denial of access but that is not otherwise available in a future suit against the defendant in the underlying action. Snyder, 380 F.3d at 296 (Ripple, J., dissenting). Judge Kanne, who along with Judge Easterbrook concluded that plaintiff had failed to state a claim, agreed with Judge Ripple that Christopher's framework governed the case but disagreed with Judge Ripple over whether the plaintiff's allegations met the third requirement.

Petitioner alleges four distinct access to courts claims in his complaint. All are backward-looking; petitioner contends in each that misconduct by prison officials prevented him from litigating prior cases. Because petitioner's allegations are materially similar to those in Snyder, I conclude that Christopher provides the appropriate framework for

analyzing whether his allegations are sufficient to state a claim.

1. Failure to deliver order denying writ of certiorari

Petitioner alleges that, on March 8, 2004, respondent Shannon refused to give petitioner a piece of mail that had been sent to him from the Circuit Court for Dane County. He alleges that the mail contained an order from Judge Foust denying petitioner's petition for a writ of certiorari in case no. 03-CV-2645 and that he had filed the petition to have a disciplinary ticket overturned because he believed it was arbitrary. He alleges further that respondent Shannon gave the mail to CO II Peterson, who came to petitioner's cell and tore the mail into pieces after accusing petitioner of disrespecting her. As a result, petitioner alleges, he had to write to the court to ask for another copy of the order and the time in which he could have appealed the decision expired before he received a new copy of the order.

As a preliminary matter, petitioner has not stated a claim against CO II Peterson because he did not name her as a potential defendant in the caption of his complaint. With respect to respondent Shannon, petitioner's allegations fail to meet the first requirement set out in Christopher, namely that petitioner identify a non-frivolous claim he was pursuing. In Christopher, 536 U.S. at 436, the Supreme Court stated that a plaintiff must describe the underlying claim "well enough to apply the 'nonfrivolous' test and to show that the

'arguable' nature of the underlying claim is more than hope." Petitioner has alleged that the underlying action was an attempt to obtain a writ of certiorari to overturn a disciplinary decision that he believed was arbitrary. Petitioner's description of this underlying claim does not pass muster under Rule 8 because he has not identified the prison official or officials who were named as respondents in his petition and has not alleged why he received the disciplinary ticket and why he believed that it was arbitrary. Without these minimal facts, the court cannot make a preliminary determination whether his petition was frivolous. In addition, I note that petitioner has not alleged why he could not request an extension to appeal the trial court's decision in light of the fact that his time to appeal lapsed through no apparent fault of his own. Petitioner will be denied leave to proceed on this access to courts claim.

2. Removal of complaint from outgoing mail

Petitioner alleges that respondents Judith Huibregtse, Sgt. Grondin and Tracey Gerber removed from his outgoing mail a copy of a complaint that was to be served on respondent Frank in another case, no. 04-CV-1289. He contends that this allegation is supported by the fact that he requested postage in the amount of $3.95 for his mail but the postage on his envelope was only $2.21. Further, petitioner alleges that the judge in that case dismissed respondent Frank from the case for petitioner's failure to serve him. These

allegations fail to state a denial of access claim because they do not meet the first requirement of the Christopher framework. Although petitioner identified respondent Frank as the defendant in the underlying action, he has not provided minimal factual details concerning the nature of his claim or claims against respondent Frank. Therefore, he has not met his obligation to allege that he was prevented from litigating a non-frivolous case. (As a side note, petitioner has not alleged that he was unable to inform the trial judge that one of his complaints was removed from his outgoing mail.) Petitioner will be denied leave to proceed on this claim.

3. Destruction of dental records

In addition to the claim or claims against respondent Frank, petitioner alleges that another claim in case no. 04-CV-1289 alleged that respondent Boston had denied him dental care. He alleges that after Judge Fieldler issued an order compelling discovery of dental records, respondent Boston said that respondent John Doe intentionally destroyed documentation of petitioner's requests for a tooth extraction to prevent petitioner from proving that respondent Boston had been deliberately indifferent to petitioner's request for dental care. Finally, he alleges that Judge Fieldler dismissed petitioner's claim against respondent Boston for lack of evidence. (Petitioner does not allege that respondent John Doe actually destroyed the records, only that respondent Boston said that respondent John

Doe had destroyed them. Taking this allegation in the light most favorable to petitioner, I will assume that respondent John Doe destroyed the records.)

A party to a lawsuit may not destroy or conceal evidence that prevents his opponent from presenting his case. Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984), overruled on other grounds by Russ v. Watts, 414 F.3d 783 (7th Cir. 2005); see also Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997). However, petitioner's allegations suggest that, at the time respondent John Doe allegedly destroyed petitioner's dental records, petitioner's suit against respondent Boston was pending. Petitioner has not alleged any reason why he could not bring respondent John Doe's alleged action to Judge Fieldler's attention. Because the alleged destruction of evidence occurred after petitioner had filed his lawsuit and petitioner has not shown that the trial court was unable to address the alleged misconduct, petitioner has not stated an access to courts claim. Swekel, 119 F.3d at 1263 ("When the abuse transpires [after a lawsuit is filed], the aggrieved party is already in court and that court usually can address the abuse, and thus, an access to courts claim typically will not be viable.").

4. Rejection of inmate complaints

Petitioner's allegations with respect to this claim are confusing. First, his allegation that officials at the Secure Program Facility who are responsible for reviewing inmate

complaints are abusing their authority makes no sense. Petitioner alleges that three inmate complaint examiners, respondents Ray, Trumm and Beerkircher, "reject file[d] complaints because they feel they can respond to two issues in one complaint, contray [sic] to DOC 310." Wisconsin's procedure governing inmate complaints prohibits inmates from raising more than one issue in an inmate complaint. Wis. Admin. Code § DOC 310.09(1)(e). Therefore, to the extent that petitioner is alleging that respondents have rejected complaints that raise more than one issue, he has not alleged that respondents abused their authority. To the contrary, rejection is the appropriate response to an inmate complaint that raises more than one issue.

The second confusing aspect of petitioner's allegations concerns his contention that respondents Ray, Trumm and Beerkircher rejected his complaints without good cause, thereby preventing him from litigating the merits of two claims he raised in another lawsuit in this court, Henderson v. Kool, 05-C-157-C. In that case, petitioner was allowed to proceed on two claims: a retaliation claim against respondent Kool and a First Amendment claim that respondent Judith Huibregtse had opened two pieces of legal mail addressed to petitioner outside his presence. That case was closed after I granted respondents' motion to dismiss for petitioner's failure to exhaust his administrative remedies. However, the reasons for petitioner's failures to exhaust were not related in any way to any abuse of authority by respondents Ray, Trumm or Beerkircher. I concluded that petitioner failed to

exhaust his administrative remedies with respect to his retaliation claim because he had not filed an inmate complaint alleging the same reason for respondent Kool's retaliatory action that he alleged in his complaint in this court. With respect to petitioner's claim about two pieces of legal mail being opened outside his presence, I concluded that he had failed to exhaust his administrative remedies because he had not filed any inmate complaints concerning one of the pieces of legal mail and he had not appealed the decision to dismiss his complaint concerning the other piece of legal mail. In granting the motion to dismiss, I did not find as fact that respondents Ray, Trumm or Beerkircher rejected any of the inmate complaints relevant to petitioner's retaliation and legal mail claims because they raised more than one issue. Instead, I concluded that petitioner's failure to exhaust was attributable exclusively to his failure to file inmate complaints correctly and his failure to exhaust the administrative review process available to him. Therefore, although petitioner did not have the chance to litigate his claims on their merits in no. 05-C-157-C, this was not the result of any action, lawful or unlawful, taken by respondents Ray, Trumm or Beerkircher. Because the actions of *prison officials* did not prevent petitioner from litigating his claims in 05-C-157-C, he has not stated a claim of denial of access to the courts.

C. First Amendment

1. Interference with outgoing mail

Petitioner alleges that prison officials at the Secure Program Facility have interfered with his outgoing mail. As a general principle, prison officials have a legitimate penological interest in inspecting prisoner mail for contraband, escape plans or other threats to prison security. Martin v. Brewer, 830 F.2d 76, 77 (7th Cir. 1987). Inspection of personal mail is a legitimate prison practice, justified by the important governmental interest in prison security. Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir. 1986); see also Royse v. The Superior Court of the State of Washington, 779 F.2d 573, 575 (9th Cir. 1986) (inspection of inmate mail for contraband does not constitute mail censorship). Accordingly, prison officials may lawfully require inmates to leave their outgoing mail unsealed to expedite screening. Gaines, 790 F.2d at 1304.

However, inmates do retain limited First Amendment rights with respect to the handling of their outgoing mail. Prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests, they censor outgoing mail that contains "'inflammatory political, racial, religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier v. Martinez, 416 U.S. 396, 415 (1974). In addition, prison officials may not read an inmate's privileged mail, although they may open it and inspect it for contraband in an inmate's presence. Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (upholding prison procedure of inspecting but not reading legal mail in part because no threat of chilled communications); Gaines, 790 F.2d at 1305-06 (upholding

policy allowing prison officials to open and inspect but not to read privileged mail in inmate's presence).

a. Facial challenge to Wisconsin Secure Program Facility policy 524.02

Petitioner alleges that Wisconsin Secure Program Facility policy 524.02 is unconstitutional for several reasons. First, he alleges that the policy, as implemented by respondent Peter Huibregtse, *requires* prison officials to reject outgoing mail that expresses inflammatory political beliefs and that exposes the harsh treatment inmates receive at the facility. Also, he alleges that the policy fails to provide prison officials with any meaningful guidance in screening inmate mail and leaves the decision whether to censor a piece of mail to their discretion. These allegations are sufficient to state a claim that the policy is unconstitutional on its face. Procunier, 416 U.S. at 415. I will allow petitioner to proceed on this claim against respondent Huibregtse, who implemented the policy, and respondents Schneiter and Frank, who, as Warden and Secretary of the Department of Corrections, were likely involved in formulating and implementing the policy at the facility.

b. Failure to train

Petitioner alleges that respondents Frank, Schneiter and Huibregtse have acted with deliberate indifference in implementing and enforcing the outgoing mail censorship policy

and that they have failed to train facility staff to apply the policy constitutionally. He alleges further that the practice of rejecting inmate mail that contains inappropriate statements is widespread at the facility. From these allegations, I understand petitioner to be asserting a failure to train claim against respondents.

In most cases, failure to train is a theory that plaintiffs use to hold municipalities liable under § 1983 when their employees commit unconstitutional acts. City of Canton v. Harris, 489 U.S. 378, 388 (1989). In those cases, a municipality, such as a city or county, may be found liable only "where a failure to train reflects a 'deliberate' or 'conscious' choice [or, in other words] a 'policy.'" Id. at 389. In the present case, petitioner alleges failure to train by three individuals rather than a municipality. The Court of Appeals for the Seventh Circuit has recognized that individuals may be held liable personally for failure to train. Kitzman-Kelley ex rel. Kitzman-Kelley v. Warner, 203 F.3d 454, 459 (7th Cir. 2000). The same deliberate indifference standard applies in cases alleging failure to train by an individual supervisor. Id. at 458 (citing Gossmeyer v. McDonald, 128 F.3d 481, 495 (7th Cir. 1997)). In addition, allegations that a particular mail screener is inadequately trained or that one piece of mail would have been delivered if the individual had better training is not sufficient by itself to impute liability to officials charged with training that individual. City of Canton, 489 U.S. at 390-91. However, allegations that an inadequate training program has led to repeated instances of unconstitutional conduct are sufficient to state a

claim. Holmes v. Sheahan, 930 F.2d 1196, 1200 (7th Cir. 1991). Petitioner has met this minimal threshold and will be allowed to proceed on this claim against respondents Frank, Schneiter and Peter Huibregtse.

c. Specific instances of refusal to mail letters

Petitioner provides allegations concerning eight letters he wrote that prison officials refused to deliver. He will be denied leave to proceed on his claims that various prison officials violated his First Amendment rights by refusing to deliver his letters to Elsa Greene, Harold Stepper, Donald Rumsfeld and Kevin Potter because, in each instance, petitioner concedes that the reason prison officials denied delivery of the letter was because petitioner had sealed the letter and refused to allow prison officials to open it. As noted above, prison officials have the right to require that inmates submit outgoing mail unsealed so that it can be inspected. In addition, petitioner will be denied leave to proceed on his claim that Sgt. Carpenter violated his First Amendment rights by refusing to deliver a letter petitioner had written to David Faithi, a lawyer who works for the American Civil Liberties Union, because petitioner has not named Sgt. Carpenter as a defendant in this case.

Petitioner will be allowed to proceed on his First Amendment claims with respect to the other three letters he wrote. I will discuss briefly each of these three claims.

1) Refusal to deliver letter on March 1, 2005

Petitioner alleges that he submitted for delivery a letter on March 1, 2005, that the envelope containing the letter was open, and that respondent Starky refused to deliver the letter because it contained inappropriate content and because petitioner did not write his prison number on the letter. Petitioner alleges further that he writes his prison number on all of his letters. Accepting this allegation as true, I assume that his prison number did appear on the letter. Therefore, the only remaining reason for denying delivery of the letter was that it contained "inappropriate content." This allegation suggests that respondent Starky censored the letter because it expressed an inflammatory opinion or because it contained content that, while objectionable, did not pose a risk to prison security or petitioner's rehabilitation. This is sufficient to state a claim. Petitioner will be allowed to proceed on this claim against respondent Starky.

2) Refusal to deliver letter on March 16, 2005

Petitioner alleges that respondent Starky refused to deliver a letter on March 16, 2005 that petitioner had written to family and friends because respondent believed that the content was inappropriate and because petitioner's prison number did not appear on the letter. For the reasons explained in the discussion of petitioner's letter that was refused delivery on March 1, 2005, petitioner will be allowed to proceed against respondent Starky

on a claim that refusal to deliver his letter on March 16, 2005 violated his First Amendment rights.

3) Refusal to deliver letter to Senator Frist

Petitioner alleges that on March 26, 2005, respondent Gerber denied postage and delivery for a letter petitioner wrote to Senator Frist. It is possible that petitioner will be able to adduce facts in support of this allegation that show that refusal to deliver this letter was unconstitutional. Moreover, this allegation is sufficient to give respondent Gerber notice of the basis for petitioner's claim. Therefore, despite the fact that petitioner has not alleged that respondent Gerber's actions were improper, I will allow him to proceed on this claim.

2. Interference with incoming mail

Petitioner alleges that respondents Peter Huibregtse and Kool have prohibited him from possessing any magazines, including those in the facility's library as well as four magazines to which petitioner subscribed, Inc., Entrepreneur, Maximum PC and Popular Science. He alleges that respondents Huibregtse and Kool denied him these magazines by keeping him on level two at the facility.

These allegations fail to state a claim under the First Amendment or any other

constitutional provision. A refusal to deliver incoming mail to an inmate is constitutional if it is "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89-90 (1987). From other complaints filed by Secure Program Facility inmates and from petitioner's allegations, I note that the restriction on periodicals and publications at the facility is part of its level system, an incentive program. Restricting reading materials as part of an incentive program furthers a legitimate penological interest and petitioner has not alleged that other inmates on the same level as he receive periodicals that he does not. Therefore, petitioner has failed to state a claim.

3. Refusal to provide Taoist texts

Petitioner alleges that he is a practicing Taoist and that he asked respondent Overbo to provide two Taoist texts, Tao te Ching and I-Ching. He alleges that Taoists are required to study and practice according to the books' teachings. He alleges that respondent Overbo refused to provide the texts because Department of Corrections' policy places Taoism and all other Asian religions under the umbrella of Buddhism. As a result, petitioner is forced to rely on non-governmental agencies for access to Taoist texts. Finally, petitioner alleges that respondent Overbo has used federal funds to provide texts for other religions practiced by inmates at the facility, including Catholicism, Protestantism, Judaism and Islam.

Petitioner made similar allegations in a previous case in this court. Henderson v.

Sebastian, 04-C-39-C. In that case, petitioner alleged that prison officials refused to provide him with Taoist texts even though they used tax dollars to provide inmates access to a Christian television network and that he was forced to watch the network and complete a Christian behavior modification program. Petitioner was granted leave to proceed on claims under the free exercise and establishment clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). His free exercise and RLUIPA claims were dismissed without prejudice for failure to exhaust administrative remedies and his establishment clause claim did not survive summary judgment.

Petitioner has omitted allegations concerning the Christian television network from his complaint in the present case. Nonetheless, his allegations raise potential claims under four sources of law: the First Amendment's free exercise and establishment clauses, RLUIPA and the equal protection clause of the Fourteenth Amendment. However, petitioner's equal protection claim is no different from his free exercise claim because both clauses forbid the government from discriminating between religions. Mack v. O'Leary, 80 F.3d 1175, 1181 (7th Cir. 1996) (overruled on other grounds, 522 U.S. 801 (1997)). Therefore, I will analyze petitioner's allegations under the free exercise claim but not the equal protection clause.

a. Establishment clause

The establishment clause provides that Congress "shall make no law respecting an establishment of religion." The clause is violated when a governmental practice or policy "either has the purpose or effect of 'endorsing' religion." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 592 (1989) (citations omitted). The Supreme Court affirmed recently the three-part test set out in Lemon v. Kurtzman, 403 U.S. 602 (1971) for analyzing whether a government practice or policy violates the establishment clause. McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 125 S. Ct. 2722 (2005). Under that test, courts look to see whether a policy (1) has a "secular legislative purpose"; (2) has a principal or primary effect that advances or inhibits religion; and (3) fosters "an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13.

From other cases litigated in this court, I am aware that the Wisconsin Department of Corrections has enacted DOC 309 IMP 6, which recognizes seven "umbrella religion groups," which are designed to appeal to a wide range of religious beliefs within a given faith group, such as Protestant, Islam, Native American, Catholic, Jewish, Buddhist and Pagan (Wiccan). Borzych v. Frank, 04-C-632-C, 2005 WL 2206785, at *4 (W.D. Wis. Sept. 9, 2005); see also Charles v. Verhagen, 348 F.3d 601, 605 (7th Cir. 2003). I understand petitioner to allege that this policy violates the establishment clause because it favors other religions over Taoism. In addition, petitioner alleges that respondent Overbo has used

federal funds to provide sacred texts to Catholic, Protestant, Jewish and Muslim inmates but refuses to use federal funds to provide Taoist texts. These allegations are sufficient to state two establishment clause claims: (1) the department's policy favors certain religions over Taoism and (2) respondent Overbo favored other religions over Taoism by purchasing texts only for the religions recognized in the department's policy. Petitioner will be allowed to proceed on his claim involving the policy against respondent Verhagen, who he alleges was involved in its implementation.

b. Free exercise clause

Under the First Amendment, inmates retain a right to freely exercise their religion, although that right is subject to the legitimate penological demands of the state. Conyers v. Abitz, 416 F.3d 580, 585 (7th Cir. 2005). Prison regulations that place a substantial burden on an inmate's ability to practice his religion are unconstitutional unless they are reasonably related to the prison's legitimate penological interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner, 482 U.S. at 89)); Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005) (for free exercise claim to succeed, inmate must establish that ability to practice religion "was burdened in a significant way."). The Court of Appeals for the Seventh Circuit has identified several factors that can be used in applying the "reasonableness" standard: (1) whether a valid, rational connection exists

between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question that remain available to prisoners; (3) the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources; and (4) although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable. Tarpley v. Allen County, Ind., 312 F.3d 895, 898 (7th Cir. 2003).

Petitioner alleges that respondent Overbo refused to provide him with two texts, Tao te Ching and I-Ching, because DOC 309 IMP 6 does not recognize Taoism as a distinct religion. He does not allege that respondent Overbo or any other prison official has prevented him from obtaining the texts through his own efforts. However, his allegation that he was denied copies of the two texts is sufficient to state a free exercise claim against respondent Overbo at this early stage.

c. Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act prohibits governmental imposition of a "substantial burden on the religious exercise" of a prisoner, unless the defendant can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental

interest." 42 U.S.C. § 2000cc-1. Because the Wisconsin Department of Corrections receives and uses federal grant money for substance abuse treatment programs in its state prison facilities, the requirements of the Religious Land Use and Institutionalized Persons Act apply to it. Recently, the Supreme Court upheld the constitutionality of this statutory provision. Cutter v. Wilkinson, 125 S. Ct. 2113 (2005). In doing so, the Court noted that RLUIPA targets "obstructions institutional arrangements place on religious observances" and that it "does not require a State to pay for an inmate's devotional accessories." Id. at 2121 n.8. Therefore, petitioner's allegation that respondent Overbo has refused to purchase the Taoist texts that he requested fails to state a claim under RLUIPA. Petitioner will be denied leave to proceed on this claim.

4. Retaliation

A prison official who takes action in retaliation for an inmate's exercise of a constitutional right may be liable to the inmate for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). Otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000); see also Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) ("otherwise permissible conduct can become impermissible when done for retaliatory reasons"). To state a claim for retaliation, an inmate need not allege a chronology of events

from which retaliation could be plausibly inferred. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege minimal facts sufficient to give defendants notice of the basis for the claim so that they can file an answer. Id. In the context of a retaliation claim, he must identify the allegedly retaliatory act as well as the constitutionally protected right he exercised. Id.

a. Denial of promotion on January 3, 2005

Petitioner alleges that respondent Kool denied him a promotion to level three on January 3, 2005 because of a statement petitioner made in a questionnaire. He alleges that he wrote in the questionnaire that he had been transferred to the Secure Program Facility because he had filed lawsuits against staff at the Red Granite Correctional Institution.

Petitioner raised this claim in case no. 05-C-157-C. In that case, he alleged that he received a questionnaire on November 24, 2004 that he had to complete before being promoted to level three and that in response to a question that asked why he had been transferred to the Secure Program Facility, he wrote that he had been sent to the facility from the Red Granite Correctional Institution because he had filed a lawsuit against various prison officials at Red Granite. I granted petitioner leave to proceed on this claim. In an order dated November 17, 2005, I dismissed the claim after concluding that petitioner had failed to exhaust his administrative remedies. Now, two months after that order, petitioner

has alleged the same facts in his complaint in this case. Although the dismissal of the claim in case no. 05-C-157-C was without prejudice, it would be pointless to grant petitioner leave to proceed if he has not exhausted his administrative remedies between November 17, 2005 and January 13, 2006, the day he filed his complaint in the present case. Therefore, I will stay a decision whether to grant petitioner leave to proceed on this claim and allow petitioner to submit proof that he has exhausted his administrative remedies with respect to this claim.

b. Denial of promotion on November 1, 2005

Petitioner alleges that respondent Kool denied him a promotion to level three on November 1, 2005 because petitioner filed case no. 05-C-157-C in this court. It is well established that the filing of inmate complaints and lawsuits is constitutionally protected activity. Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002). Therefore, petitioner has met the minimal pleading requirements for a retaliation claim and will be granted leave to proceed against respondent Kool.

c. Denial of promotion on November 21, 2005

Petitioner alleges that he completed another questionnaire for promotion to level three on October 25, 2005. In the questionnaire, he wrote that he would file lawsuits

against staff who mistreat inmates. He alleges further that respondent Kool told Dr. Beech that he did not like what petitioner had written on November 20, 2005 and that respondent Kool denied petitioner a promotion to level three on November 21, 2005 in retaliation for petitioner's threat.

Inmates retain First Amendment rights that are not inconsistent with their status as prisoners. Pell v. Procunier, 417 U.S. 817, 822 (1974). Inmates do not have a First Amendment right to verbally abuse prison staff, threaten them with physical harm or disobey prison rules. Ustrak v. Fairman, 781 F.2d 573, 580 (7th Cir. 1986). However, I concluded recently in another case that an inmate's threat to file a grievance or a lawsuit is constitutionally protected activity. Lindell v. O'Donnell, 05-C-04-C, 2005 WL 2740999, at *29 (W.D. Wis. Oct. 21, 2005). In light of this conclusion, petitioner's allegations are sufficient to state a retaliation claim against respondent Kool.

d. Attendance at parole hearing

Petitioner alleges that respondent Kool attended his parole hearing on November 2, 2005 and informed respondent Judith Huibregtse, who I assume was the hearing officer, that petitioner had filed a lawsuit against him. Petitioner alleges that respondent Kool's motive was to prevent petitioner from being granted parole. In addition, he alleges that respondent Huibregtse denied him parole because he had not progressed through the five levels of the

facility's level system.

These allegations fail to state a retaliation claim. Although petitioner exercised a constitutional right by filing the lawsuit against respondent Kool, respondent Kool's act of informing respondent Huibregtse that petitioner had filed the lawsuit does not qualify as a retaliatory act. If petitioner had alleged that he was denied parole because he had filed the lawsuit, he would state a retaliation claim. However, petitioner alleges that he was denied parole because he had failed to advance through all five of the facility's security levels. Petitioner will be denied leave to proceed on this claim.

e. Placement in administrative confinement

Petitioner alleges that respondent Kool recommended in a hearing on December 19, 2005 that he be placed in administrative confinement for three reasons: (1) the fact that petitioner filed case no. 05-C-157-C; (2) answers petitioner provided in a questionnaire; and (3) petitioner's membership in an alleged gang. Petitioner alleges that respondent Kool's accusation of gang membership lacked any evidentiary support. At this stage of the proceedings, I must accept petitioner's contention as true. Therefore, he has stated a retaliation claim against respondent Kool.

D. Eighth Amendment

1. Deliberate indifference to serious medical needs

The Eighth Amendment protects inmates against cruel and unusual punishment. One aspect of this protection is that the government must provide medical care for inmates and may not exhibit deliberate indifference to an inmate's serious medical needs. From petitioner's allegations, I understand him to assert six claims under the Eighth Amendment concerning his medical care: (1) respondent Cox failed to treat petitioner's stomach pain with appropriate medication and refused to treat the side effects of the inappropriate medication; (2) respondent Campbell refused to treat petitioner's internal bleeding; (3) Sgt. Sickinger refused to respond to petitioner's emergency calls on April 4, 2005 after petitioner told Sickinger that he "felt a seizure coming on"; (4) Sgt. Sickinger refused to respond to petitioner's emergency calls on October 9, 2005 after petitioner pulled a muscle in his leg and experienced pain; (5) Sgt. Sickinger delayed petitioner medical care for his leg by requiring the officers who were to escort him to the medical room to distribute meal trays before doing so; and (6) respondents Schneiter and Huibregtse have refused to remove Sgt. Sickinger from his position despite knowing that he has denied or delayed petitioner's access to medical care.

a. Treatment of stomach pain and side effects of medication

Petitioner raised claims against respondents Cox and Campbell in case no. 05-C-157-

C that are nearly identical to the claims he raises against them in this case. In the earlier case, I denied petitioner leave to proceed on his claim that respondent Cox failed to treat his stomach pain with appropriate medication because the drug petitioner alleged that respondent Cox had prescribed him, Amoxycillin, is an antibiotic used to treat the bacteria petitioner had acquired. Also, I denied petitioner leave to proceed on his claim that respondent Campbell refused to treat the side effects petitioner experienced after taking Amoxycillin. I noted that after petitioner had developed side effects, respondent Campbell had discontinued the medication. Moreover, I concluded that she was not deliberately indifferent by informing him that he would have to make a co-payment if he wanted to see a doctor because the Department of Corrections' policy regarding co-payments does not deny medical care to inmates who do not have the means to make co-payments.

Petitioner's allegations in the present case concerning the actions of respondents Cox and Campbell are virtually identical to his allegations in case no. 05-C-157-C. However, petitioner has made three changes to his allegations in the present case. First, he alleges that respondent Cox (not respondent Campbell) took him off Amoxycillin. Second, he alleges a new side effect of the Amoxycillin, internal bleeding, and says that respondent Cox refused to treat the internal bleeding he suffered after taking Amoxycillin. Third, he alleges that he was unable to pay the co-payment requested by respondent Campbell and that she did not inform a doctor about petitioner's medical situation.

Petitioner will be denied leave to proceed on his claims against respondents Cox and Campbell. I have already considered the merits of his allegations once and determined that they failed to state claims under the Eighth Amendment. Although my earlier decision did not constitute a final judgment on the merits, such that the doctrine of res judicata would prevent petitioner from re-raising this claim, I note that petitioner filed two proposed amended complaints, a motion to supplement his complaint and a motion for reconsideration after I screened his original complaint in case no. 05-C-157-C. Petitioner could have included his expanded allegations in any one of those filings. It is too late now for him to attempt to re-litigate these claims by tweaking his allegations and raising them in a new lawsuit.

b. Claims against Sgt. Sickinger

Petitioner has asserted three claims against Sgt. Sickinger alleging that he refused to respond to petitioner's requests for medical attention and delayed other officers from escorting petitioner to a medical room by making them pass out meal trays first. Petitioner will be denied leave to proceed on these claims because he has not named Sgt. Sickinger as a defendant in his complaint.

c. Claim against respondents Schneiter and Peter Huibregtse

Petitioner alleges that respondents Schneiter and Peter Huibregtse know that Sgt. Sickinger has denied or delayed medical care for inmates repeatedly and that he poses a risk to the health of inmates. He alleges further that respondents have refused to remove Sgt. Sickinger from his position. Petitioner's allegations suggest that respondents knew of and condoned Sgt. Sickinger's actions. Officials who occupy supervisory positions, like respondents Schneiter (warden) and Huibregtse (deputy warden), may not be held liable under § 1983 merely because their subordinates engage in unconstitutional conduct. Chavez v. Illinois State Police, 251 F.3d 612, 651 (7th Cir. 2001). However, a supervisor may be held liable "if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent. That is, he must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (citations and quotations omitted). Petitioner's allegations with respect to respondents Schneiter and Peter Huibregtse satisfy this standard and therefore petitioner will be granted leave to proceed against them.

2. Choice between exercise and law library

I understand petitioner to allege that a policy exists at the Secure Program Facility under which he is forced to choose between participating in recreation or going to the facility's law library. In Thomas v. Ramos, 130 F.3d 754, 764 (7th Cir. 1997), the court of

appeals considered a similar claim when the prisoner alleged that he could not exercise out of his cell because some recreation periods coincided with his medical appointments. The court of appeals found that "[a]lthough prison officials cannot indefinitely prevent an inmate from receiving exercise outside of their cell because of scheduling conflicts, the Eighth Amendment would not be violated where such a conflict occurred only for a few weeks." Id. In this case, petitioner alleges more than a few weeks' worth of interference; he alleges that he has not attended recreation since January 11, 2003, a period of more than three years. Denial of exercise may constitute an Eighth Amendment violation in extreme circumstances where lack of movement causes muscle atrophy, threatening the health of the prisoner. Id. at 763. Petitioner has alleged that the leg muscle he pulled on October 9, 2005 had atrophied before that date because he had not participated in recreation. Petitioner's allegations are sufficient to state a claim that application of the policy has violated his Eighth Amendment right to exercise. Because he is challenging a policy, I will allow him to proceed on this claim against respondent Schneiter. However, I note that petitioner has alleged only that he must choose between exercise and use of the law library and *not* that he never had an opportunity to exercise in his cell. If, during the time petitioner alleges he was forced to choose between recreation and law library, he was able to exercise in his cell, he will be hard pressed to prove that his Eighth Amendment rights were violated.

3. Sexual touching and comments

a. July 16, 2003

Petitioner alleges that respondents Bausch and Shannon pulled him out of his cell on July 16, 2003 to demote him and that, while other inmates watched, respondent Shannon held petitioner's arms to the back of his head and respondent Bausch reached in petitioner's pants and fondled his penis. He alleges further that after respondents had finished searching him, they took him to another cell, stripped him naked and made comments about his penis and buttocks.

Strip searches or invasive searches are not unconstitutional per se. Fillmore v. Page, 358 F.3d 496, 505 (7th Cir. 2004). In light of the reduced privacy interests and paramount security concerns in the prison setting, "only those searches that are maliciously motivated, unrelated to institutional security, and hence totally without penological justification are considered unconstitutional." Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (citations and quotations omitted). To violate the Eighth Amendment, the search "must amount to calculated harassment unrelated to prison needs, with the intent to humiliate and inflict psychological pain." Id. (citations and quotations omitted); see also Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (strip search unconstitutional if "conducted in a harassing manner intended to humiliate and inflict psychological pain"). Petitioner's allegation that the search was conducted before petitioner was demoted suggests that he may

have been searched before being moved to a different area of the facility. However, it is inappropriate to assume the existence of a legitimate reason for the search at this stage of the proceedings. Petitioner will be granted leave to proceed on this claim against respondents Bausch and Shannon with respect to the search that occurred on July 16, 2003. Although it does not appear that respondent Shannon fondled petitioner, petitioner's allegations suggest that he was present when respondent Bausch fondled petitioner and that he failed to stop respondent Bausch. Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982) ("An official satisfies the personal responsibility requirement of § 1983 if she acts or fails to act with a deliberate or reckless disregard of the plaintiff's constitutional rights.").

Petitioner will not be allowed to proceed with respect to his allegation that respondents Bausch and Shannon took him to a cell after the search, stripped him naked and made comments about his penis and buttocks. A prison official's use of vulgar language is not sufficient to support a claim under the Eighth Amendment. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) ("simple verbal harassment does not constitute cruel and unusual punishment"); Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987) (prison official's use of vulgar language did not violate inmate's civil rights).

b. December 17, 2003

Petitioner alleges that respondents Bausch and Shannon removed him from his cell

on December 17, 2003 and that respondent Bausch grabbed petitioner's buttocks for no reason and made sexual comments. This allegation is sufficient to state a claim against respondent Bausch for the same reasons discussed with respect to his allegations that he was fondled on July 17, 2003. Petitioner will be allowed to proceed on this claim.

c. Respondent Huibregtse

Petitioner alleges that respondent Peter Huibregtse refused to investigate petitioner's allegations concerning the behavior of respondents Bausch and Shannon in his capacity as a reviewing authority in the inmate complaint review system. He states also that after respondent Peter Huibregtse refused to investigate, petitioner wrote to Steve Casperson, an administrator in the Department of Adult Institutions, who ordered an investigation. Petitioner alleges that the result of the investigation was a restraining order against respondents Bausch and Shannon but that respondent Peter Huibregtse refused to enforce the restraining order and stop respondent Bausch's sexual touching. (Although it is far from clear, I assume solely for the purpose of this order that he means that the restraining order was imposed some time between the July 17, 2003 and December 17, 2003 incidents.)

Standing alone, petitioner's allegation that respondent Peter Huibregtse failed to investigate his allegations in the course of reviewing his inmate complaints would not state a claim. Also, his allegation that respondent Peter Huibregtse failed to enforce the

restraining order does not support a constitutional claim. However, it is possible to construe petitioner's allegations as a claim that respondent Peter Huibregtse failed to prevent the December 17, 2003 incident. A prison official is not liable under the Eighth Amendment for failing to prevent harm unless the inmate shows "that he is incarcerated under conditions posing a substantial risk of serious harm" and that the prison official was deliberately indifferent to this risk. Farmer v. Brennan, 511 U.S. 825, 837 (1994). To prove that respondent Peter Huibregtse failed to prevent respondents Bausch and Shannon from touching him sexually on December 17, 2003, petitioner will have to prove that respondent Peter Huibregtse was aware that respondents Bausch and Shannon posed a risk of harm to petitioner and that respondent Huibregtse deliberately ignored that risk. The fact that a restraining order was entered against respondents Bausch and Shannon could serve as evidence to establish that respondent Peter Huibregtse knew that they posed a danger to petitioner but petitioner must prove that respondent Peter Huibregtse knew of the restraining order before the incident on December 17. I will allow petitioner to proceed on this claim. As a final note, petitioner should be aware that if the court determines at a later stage that respondents Bausch and Shannon did not violate petitioner's rights on December 17, 2003, his claim against respondent Peter Huibregtse will fail as well. Fillmore, 358 F.3d at 506 (no failure to intervene if "there was no violation that compelled intervention").

ORDER

IT IS ORDERED that

1. Petitioner Titus Henderson's request for leave to proceed in forma pauperis is GRANTED with respect to the following claims:

a. Respondents Frank, Schneiter and Peter Huibregtse implemented a policy at the Wisconsin Secure Program Facility, policy 524.02, that is facially unconstitutional under the First Amendment;

b. Respondents Frank, Schneiter and Peter Huibregtse violated his rights under the First Amendment by failing to train staff at the Wisconsin Secure Program Facility to apply policy 524.02 constitutionally;

c. Respondent Starky violated his First Amendment rights by refusing to deliver a letter on March 1, 2005;

d. Respondent Starky violated his First Amendment rights by refusing to deliver a letter on March 16, 2005;

e. Respondent Gerber violated his First Amendment rights by refusing to deliver a letter addressed to Senator Bill Frist on March 26, 2005;

f. Respondent Verhagen violated his rights under the establishment clause of the First Amendment by implementing DOC 309 IMP 6, which does not recognize Taoism as an umbrella religious group;

g. Respondent Overbo violated his rights under the establishment clause of the First Amendment by purchasing texts for Catholic, Protestant, Jewish, and Muslim inmates but not Taoist inmates;

h. Respondent Overbo violated his rights under the free exercise clause of the First Amendment by refusing to purchase two Taoist texts;

i. Respondent Kool violated his First Amendment rights by denying him a promotion to level three on November 1, 2005 in retaliation for petitioner's having filed case no. 05-C-157-C in this court;

j. Respondent Kool violated his First Amendment rights by denying him a promotion to level three on November 21, 2005 in retaliation for petitioner's having written in a questionnaire that he would file lawsuits against staff who mistreat inmates;

k. Respondent Kool violated his First Amendment rights by recommending that petitioner be placed in administrative confinement on December 19, 2005 in retaliation for petitioner's having filed case no. 05-C-157-C;

l. Respondents Schneiter and Peter Huibregtse violated his Eighth Amendment rights by refusing to take action to prevent Sgt. Sickinger from refusing to respond to inmates' requests for medical care;

m. Respondent Schneiter violated his Eighth Amendment rights because a

policy at the Wisconsin Secure Program Facility forces him to choose between participating in recreation and using the facility's law library;

n. Respondents Bausch and Shannon violated his Eighth Amendment rights by fondling him on July 16, 2003;

o. Respondent Bausch violated his Eighth Amendment rights by grabbing his buttocks on December 17, 2003; and

p. Respondent Peter Huibregtse violated his Eighth Amendment rights by failing to prevent respondent Bausch from grabbing his buttocks on December 17, 2003.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to the following claims:

a. Respondent Pickering violated his due process rights by placing him in segregated confinement on January 5, 2001;

b. Respondent Brush violated his due process rights by failing to train and discipline staff at the North Fork Correctional Institution;

c. Respondent Shannon violated his right of access to the courts by refusing to give petitioner a piece of mail from the Circuit Court for Dane County on March 8, 2004;

d. Respondents Judith Huibregtse, Sgt. Grondin and Gerber violated his right

of access to the courts by removing from his outgoing mail a copy of a complaint that was to be served on respondent Frank in case no. 04-CV-1289;

e. Respondent John Doe violated his right of access to the courts by destroying dental records;

f. Respondents Ray, Trumm and Beerkircher violated his right of access to the courts by improperly rejecting his inmate complaints;

g. Respondents Gerber and Judith Huibregtse violated his First Amendment rights by refusing to deliver a letter addressed to Elsa Greene on September 3, 2004;

h. Respondent Gerber violated his First Amendment rights by refusing to deliver a letter addressed to Harold Stepper on May 25, 2005;

i. Respondents Gerber, Judith Huibregtse and Sgt. Grondin violated his First Amendment rights by refusing to deliver a letter addressed to Kevin Potter on September 8, 2005;

j. Respondents Kool and Peter Huibregtse violated his constitutional rights by keeping him in level two, where he is prohibited from possessing any magazines;

k. Respondent Overbo violated petitioner's rights under the Religious Land Use and Institutionalized Persons Act by refusing to purchase two Taoist

texts;

l. Respondent Kool violated his First Amendment rights by informing respondent Judith Huibregtse that petitioner had filed a lawsuit against him at petitioner's parole hearing on November 2, 2005;

m. Respondent Cox violated his Eighth Amendment rights by failing to treat petitioner's stomach pain with appropriate medication and refused to treat the side effects of Amoxycillin;

n. Respondent Amy Campbell violated his Eighth Amendment rights by refusing to treat his internal bleeding;

o. Respondents Bausch and Shannon violated his Eighth Amendment rights by taking him to a cell, removing his clothes and commenting about the size of his penis and buttocks on July 16, 2003;

3. Petitioner's request for leave to proceed in forma pauperis is DENIED with respect to the following claims against persons not named as defendants in this case:

a. Sgt. Brown and Sgt. Robinson violated his First Amendment rights by refusing to deliver a letter addressed to Secretary of Defense Donald Rumsfeld on June 26-27, 2005;

b. Sgt. Carpenter violated his First Amendment rights by refusing to deliver a letter addressed to David Faithi on November 13, 2005;

c. Sgt. Sickinger violated his Eighth Amendment rights by refusing to respond to petitioner's requests for medical attention on April 4, 2005;

d. Sgt. Sickinger violated his Eighth Amendment rights by refusing to respond to petitioner's requests for medical attention on October 9, 2005; and

e. Sgt. Sickinger violated his Eighth Amendment rights by delaying medical care for his leg;

4. A decision is STAYED whether to grant petitioner leave to proceed in forma pauperis on his claim that respondent Kool violated his First Amendment rights by denying him a promotion to level three on January 3, 2005. Petitioner may have until March 9, 2006 to submit proof that he has exhausted his administrative remedies with respect to this claim. If petitioner does not submit proof by that date, he will be denied leave to proceed on this claim.

5. Respondents John Brush, Corrections Corporation of America, Associate Warden Pickering, Judith Huibregtse, John Boston, John Doe, Sgt. Grondin, Ellen Ray, Kelly Trumm, Christen Beerkircher, CO II Hennerman, CO II Schissel, John & Jane Doe Correctional Officers, Dr. Cox and Amy Campbell are DISMISSED from this case.

6. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents.

The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent or to respondent's attorney.

7. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. The unpaid balance of petitioner's filing fee is $248.22; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

9. 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.

Entered this 6th day of March, 2006.

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