IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

Plaintiff, OPINION and ORDER

v. 06-C-205-C

THOMAS E. KARLEN, RANDALL R. HEPP, CYNTHIA L. O'DONNELL, MATTHEW FRANK, RICHARD RAEMISCH, DANIELLE LACOST, PERRY NICHOLS, APRIL OLIVERSON, K. BAUER, MICHELLE MCCAUGHTRY, JEFFREY SCHEFELKER, TRAVIS BERRY, JUDY IMBERG and OFFICER M. NELSON,

Defendants.

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In this civil action brought under 42 U.S.C. § 1983, plaintiff James Kaufman, a former prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin, contends that defendants Thomas Karlen, Randall Hepp, Cynthia O'Donnell, Matthew Frank, Richard Raemisch, Danielle LaCost, Perry Nichols, April Oliverson, K. Bauer, Michelle McCaughtry, Jeffrey Schefelker, Travis Berry, Judy Imberg and M. Nelson violated his rights under the First and Eighth Amendments in myriad ways. Although originally plaintiff requested relief in the form of money damages and an injunction, I note that his

recent release from prison has rendered moot his claims for injunctive relief.

Now before the court are the parties' cross-motions for summary judgment. Because the undisputed facts reveal that plaintiff's constitutional rights were not violated by defendants' actions, plaintiff's motion for summary judgment will be denied and defendants' motion will be granted.

Before turning to the undisputed facts, I note several procedural anomalies. On March 19, 2007, in conjunction with the filing of their reply brief, defendants filed a document entitled "supplemental proposed findings of fact," dkt. #103. The addition of new facts at the reply stage of summary judgment briefing is not permitted by the court's summary judgment procedures and is improper, as it does not afford plaintiff any chance to respond. All facts contained in defendants' supplemental proposed findings of fact have been disregarded.

Because discovery disputes prevented plaintiff from obtaining all the discovery he was due until after summary judgment had been partially briefed, I granted plaintiff the opportunity to propose supplemental proposed findings of fact that relied on the untimely-disclosed discovery documents and gave defendants the opportunity to respond to plaintiff's newly-proposed facts. Order dated Mar. 28, 2007, dkt. #106, at 4. Instead of merely responding to plaintiff's supplement, defendants took the opportunity to file a document titled "defendants' second supplemental proposed findings of fact," dkt. #109. Many of the

facts contained in this document are not responsive to plaintiff's supplement and are facts that defendants should have proposed in their original filings. I have disregarded all proposed supplemental facts that are not directly responsive to plaintiff's supplemental filings in support of his motion for summary judgment.

From the parties' timely-filed proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff James Kaufman is a former prisoner of the Jackson Correctional Institution in Black River Falls, Wisconsin.

Defendant Matthew Frank is Secretary of the Wisconsin Department of Corrections.

Defendant Richard Raemisch is Deputy Secretary of the Wisconsin Department of Corrections.

At all times relevant to the complaint, defendant Danielle LaCost was the corrections program supervisor.

Defendant Randall Hepp is Warden of the Jackson Correctional Institution. Defendant Thomas Karlen is former Warden of the Jackson Correctional Institution.

Defendant Michelle McCaughtry is employed as a librarian at the Jackson

Correctional Institution. Defendant Jeffrey Schefelker is defendant McCaughtry's supervisor.

At all times relevant to this complaint, defendant Travis Berry was a correctional officer. He is now deceased.

At all times relevant to the complaint, defendant Judy Imberg was employed at the Jackson Correctional Institution. She is retired.

Defendants Perry Nichols and April Oliverson are correctional officers employed at the Jackson Correctional Institution. Defendant Melissa Nelson is employed at the Jackson Correctional Institution in an unspecified capacity.

B. Plaintiff's Religious Practice

Plaintiff is an atheist. He does not believe in God or any other supernatural power.

1. Religious emblem

On March 25, 2005, plaintiff submitted a form to prison staff asking that he be permitted to order and wear a religious emblem symbolic of his atheist beliefs. Plaintiff's proposed emblem was shaped as a small silver circle. On the request form and in attached documents, plaintiff acknowledged that atheism has no standard emblem but described why the emblem he had chosen was symbolic of his personal beliefs.

The request from was reviewed by prison chaplain Myron Olson, defendant LaCost and Pam Wallace, the Division of Adult Institutions Religious Advisory representative. Defendant Hepp denied plaintiff's request on June 22, 2005, stating that the prison rules required all religious emblems to be ones that are "generally recognized by inmates' religions" and that plaintiff's silver circle was not "generally recognized" by all atheists. In addition, defendant Hepp wrote:

> You also attached documents to support [your] request. Portions of the documents you submitted were scratched out, making them unreadable. In an effort to gain further insight into the purpose of the requested emblem. Ms. LaCost printed out a version of the document that was not altered. A comparison was made of the documentation submitted by you and the documentation that Ms. LaCost printed off of [sic] the same website. Upon this comparison it was discovered that the altered portions state, "We are not a group or organization and certainly not a religion." and "7. It has nothing to do with any religion or belief system. Also it states in both copies of the document, "Our symbol should have nothing to do with any religion or philosophy." The symbol that is referenced is an "O".

Plaintiff appealed the decision to defendants Raemisch and Frank, asserting that the denial of the silver circle violated his religious beliefs. Both appeals were denied.

Later, plaintiff requested a different religious emblem. That request was granted.

2. Donated books

In January 2004, plaintiff arranged to have the American Atheist Society donate a box of books about atheism to the Jackson Correctional Institution's library. The books arrived

in the summer of 2004. For several months thereafter, the books lay untouched on the floor of defendant McCaughtry's office. When plaintiff inquired repeatedly about the books, defendant McCaughtry told him that she did not have time to process the books, did not know how to fit them into the library's collection and was completing more important projects.

Before shelving any donated book, defendant McCaughtry screens the book to determine whether it is one that will likely be read by library patrons, duplicates other books already in the library's collection and supports prison programming. Whenever possible, Defendant McCaughtry reads online book reviews to help her in the screening process. When no review is available, she reads the books herself. None of the books donated by the American Atheist Society had been reviewed by recognized sources.

In August 2004, defendant McCaughtry had retinal surgery that caused her to miss work for most of the month of August. While she was on medical leave, no one was available to review new book donations. For approximately one year following the surgery, defendant McCaughtry had problems reading. The books donated by the American Atheist Society were among 5,000 books defendant McCaughtry was required to review that year.

In the fall of 2004, defendant LaCost called defendant McCaughtry and asked her to process the books more quickly. Defendant La Cost informed plaintiff that the books would be shelved soon. However, nothing happened.

In August 2005, when still none of the books had been placed on the library shelves, plaintiff filed an inmate grievance, which defendant Hepp affirmed. Five books were shelved in September 2005; the remaining seven were shelved in March 2006. As of August 2006, seven of the books had never been checked out; four had been checked out only by plaintiff.

The prison library participates in an interlibrary loan program that allows prisoners to order and check out any book located in any Wisconsin library. Plaintiff was aware of this service and utilized it on occasion, although it took a long time to obtain materials through the program.

3. Free publications

The Jackson Correctional Institution has a policy forbidding inmates from receiving free publications, except for "approved religious items." Such items include "leaflets, bible tracts and magazines." Despite the official prohibition on free items, the prison's custom is to permit inmates to receive free retail catalogues, brochures, and college materials in addition to free religious items. Free publications that do not fall into an excepted category may be donated to the prison's library but may not be sent to individual prisoners.

There are two reasons for the policy. First, prison officials review all publications sent to the prison. Before the prison instituted its ban on free non-religious publications, the volume of free mail created a backlog in the delivery of other mail to prisoners.

Second, for security reasons, prison officials track the value of all items within each inmate's possession. With the exception of the materials noted above, prison officials require all items arriving at the prison to be accompanied by a receipt showing the value of the shipped item. (An additional caveat: if an inmate purchases a magazine subscription, he must produce proof of his purchase only once; prison officials do not require each issue of each magazine to be accompanied by a receipt.) Free items are difficult to value and, with the exceptions noted above, are therefore prohibited.

Between February 23, 2003 and September 6, 2006, plaintiff was sent more than 70 books free of charge from various commercial bookstores, publishers, and programs that provide free literature to prisoners. Prison officials refused to deliver 38 of these books to him. (For reasons the parties do not explain, the remaining books were delivered to plaintiff despite the policy prohibiting him from receiving them.) Plaintiff filed a number of grievances challenging the policy prohibiting free books. Each was rejected or dismissed by defendant Karlen, Hepp, O'Donnell or Raemisch.

Plaintiff was denied a number of magazine publications as well, including free magazines and magazines that plaintiff's family had paid to have sent to the institution.

B. Mail

1. Incoming letters

As part of her job duties, defendant Oliverson is responsible for handling incoming mail. There are approximately 987 inmates at the Jackson Correctional Institution. Each day, the prison receives approximately 225 letters to prisoners and 50 magazines and catalogues. When mail arrives at the institution, defendant Oliverson sorts staff mail from inmate mail and legal mail from nonlegal mail. (The prison defines legal mail as all mail from an attorney, the Wisconsin governor, members of the state legislature, members of Congress, the secretary of the Wisconsin Department of Corrections, the administrator of the Division of Adult Institutions, the state attorney general or an assistant attorney general, an investigative agency of the federal government, the clerk or judge of any state or federal court or the president of the United States. To determine whether mail is coming from any of these persons or agencies, defendant Oliverson looks at the outside of the envelope.

Legal mail is stamped "Open in the presence of inmate" and is sorted into baskets for delivery to each prison unit. Nonlegal mail is sent through an electric opener, then inspected.

When mail arrives at the institution marked "Return to Sender," it is opened even if the mail was sent originally to a person or agency that would qualify as legal under the prison's legal mail policy. The letters are opened and read to safeguard against "three way mail," a practice in which prisoners circumvent prison mail regulations. Three way mail works like this: Prisoner A wants to send Prisoner B mail not permitted under prison rules.

Instead of sending a letter directly to Prisoner B (an act that would be futile because the letter would be intercepted by mailroom staff), Prisoner A sends a letter addressed to a person or agency protected by the legal mail rules. Prisoner A purposely makes some error in the address of the legal agency or applies insufficient postage, and writes Prisoner B's address on the upper left hand corner of the envelope, making it appear that Prisoner B is sending the letter. When postal workers discover the error with the address or the postage, the mail is marked "Return to Sender" and sent to Prisoner B's address.

On March 23, 2003, plaintiff received a letter from the Wisconsin Attorney General. Alleging that the letter had been opened prior to delivery, plaintiff filed an inmate grievance. Following an investigation, inmate complaint examiner Jodi Daugherty recommended that the complaint be dismissed, noting that plaintiff's allegations did not match those of the officer who delivered the letter to plaintiff. On April 14, 2003, defendant Karlen dismissed the complaint "with modification," adopting the examiner's recommendation that staff be reminded to stamp mail "open in presence of the inmate" before sending it from the mailroom to the property room, where it might be inadvertently opened. Plaintiff appealed the dismissal of his complaint; defendant O'Donnell dismissed the appeal.

On May 9, 2003, plaintiff received a letter from the American Civil Liberties Union. The letter was stamped "CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION." It was open, however, and had been stamped also with the words "OPENED IN ERROR."

Plaintiff filed an inmate complaint about the opening of his legal mail. Daughtery recommended that the complaint be dismissed for several reasons, including the fact that the American Civil Liberties Union was not named specifically in the list of agencies whose mail fell under the prison legal mail policy. On May 14, 2003, defendant Karlen accepted the recommendation and dismissed the grievance. Defendant O'Donnell denied plaintiff's appeal of the decision.

In May 2003, plaintiff received a letter from the Wisconsin Department of Justice Division of Law Enforcement Services Crime Information Bureau. The letter had been opened outside plaintiff's presence. Plaintiff filed an inmate complaint regarding the opening of his mail, which Dave Andraska (the former deputy warden of the Jackson Correctional Institution) dismissed based on Daughtery's recommendation. Defendant O'Donnell denied plaintiff's appeal of that decision.

On June 26, 2003, plaintiff received a letter form the United States Department of Justice that had been opened outside his presence and was stamped "OPENED IN ERROR." Plaintiff filed an inmate grievance regarding the opening of his legal mail. Daughtery recommended that the complaint be affirmed, writing:

> Upon review of the envelope, the return address is from the U.S. Department of Justice. The envelope is stamped "Opened in Error" (with initials) and "Open in the Presence of an Officer." This correspondence may only be opened by the inmate in the presence of staff, per [Wis. Admin. Code §] DOC 309.04(3)(h). In the instance when legal mail is inadvertently opened, it is

> JCI's policy to stamp the envelope "Opened in Error" and the staff person initials the envelope. With the large amount of mail that is sent through the mail room, it is understandable that this could occur. It is the opinion of this examiner that the staff person did not notice that legal mail was opened. The mail room has been contacted regarding this issue to monitor the mail more closely to ensure this does not happen again. It is the I[nmate] C[omplaint] E[xaminer]'s recommendation to AFFIRM this complaint. No further action is necessary. Staff are aware of the procedures for opening legal mail.

On October 1, 2003, defendant Karlen affirmed the complaint.

In early October 2003, plaintiff received mail from the United States Department of Health and Human Services, Office of the Secretary, Office of Civil Rights. The envelope had been opened outside his presence and was stamped "Opened in Error." Plaintiff filed an inmate grievance about the matter, which defendant Karlen affirmed.

At an unspecified time, plaintiff received a letter that had been returned to him by the United States Department of Justice, Special Litigation Section, Civil Rights Division. The letter had been opened outside his presence. Plaintiff filed an inmate complaint about the matter. Daughtery made the following recommendation:

> . . . The envelope was originally mailed to the UW [sic] Department of Justice. The envelope also had the inmate's return address. (It was stamped by the USPS stating, "Return to Sender . . . Moved, not forwardable.") The envelope came back to the institution because of the incorrect address for the Department of Justice and as such the mail room opened the envelope because it had the complainant's name as the return address.

On February 17, 2004, defendant Karlen dismissed the complaint. Defendant O'Donnell denied plaintiff's appeal.

On June 23, 2005, plaintiff received mail from the United States Department of Justice. The letter was opened outside his presence but was not stamped "Opened in Error" or initialed by the staff member responsible for sending his letter through the electronic mail opener. Plaintiff filed an inmate complaint, which defendant Hepp affirmed. The mailroom staff were reminded again to monitor the mail more closely.

On July 5, 2005, plaintiff received an envelope from the United States Department of Homeland Security Citizenship and Immigration Services Office. The envelope had been opened outside his presence but was not stamped "Opened in Error" or initialed by a member of the mailroom staff. Plaintiff filed a complaint, which defendant Hepp affirmed.

At an unspecified time, plaintiff filed an inmate complaint asserting that he had received an opened letter from the American Civil Liberties Union. The envelope was stamped "Attorney Laurence J. Dupuis, Legal Correspondence, "Open only in the Presence of the Inmate." It was not stamped "Opened in Error" or "Open in the presence of an Officer." Plaintiff filed an inmate complaint about the incident, which was affirmed by John Paquin, a former deputy warden of the Jackson Correctional Institution.

On November 21, 2005, plaintiff received mail from the Roger Baldwin Foundation of the American Civil Liberties Union. The envelope was marked with the words "CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION." The mail was opened outside plaintiff's presence. Plaintiff responded by filing an inmate complaint. Daughtery

investigated and recommended that the complaint be dismissed because no attorney's name appeared on the outside of the envelope and because the American Civil Liberties Union was not listed as an agency whose correspondence was to be treated as legal mail under prison policy. On November 28, 2005, defendant Hepp dismissed the complaint and on December 7, 2005, defendant Raemisch denied plaintiff's appeal.

2. Denied publications

a. Loompanics catalog

On February 27, 2003, plaintiff was sent a copy of the Loompanics Catalog. The prison would not deliver the catalog to him because it offered for sale books that discussed how to make and use drugs, manufacture weapons and engage in unarmed combat. It also offered books that promoted other illegal activities. The catalog itself did not describe these matters in detail; however, it provided a sketch or photograph of each book, along with a synopsis of its content. The title page to the catalog contained this warning: "Certain of the books and papers in this catalog deal with activities and devices which would be in violation of various Federal, State and local laws if actually carried out or constructed."

b. Joke books

On December 16, 2005, plaintiff was sent three books titled Jackie the Joke Man

Matling's Disgustingly Dirty Jokes, Jokes for Your John, and Strange, Outlandish, Crude, and Sometimes Funny Jokes. (Plaintiff was sent other books as well, but does not challenge the prison's decision to deny him those books.) Prison officials refused to deliver the books because they contained material that was designated as advocating "racial or ethnic purity" and attacking "a racial, religious or ethnic group" in violation of prison policy. In addition, some of the books contained pictures and content that violated the prison's policy banning sexually explicit material.

Plaintiff filed a grievance over the denial. Before responding to plaintiff's complaint, the prison inmate complaint examiner asked the prison's psychologist supervisor, Dr. Richard McKee, to review the books. McKee recommended that the books be denied on the ground that they were "injurious," meaning they were "inconsistent with or posed a threat to the safety, treatment or rehabilitative goals of an inmate." Defendant Hepp dismissed plaintiff's complaint and defendant Raemisch dismissed plaintiff's appeal of Hepp's decision.

The prison library contains many texts with controversial passages or themes. These range from the Bible and classics such as Alex Haley's Roots and Shakespeare's Romeo and Juliet to lesser-known works. Many of these books contain sexually explicit scenes and passages that are demeaning to racial minorities, women and children.

c. Magazines without receipts

On August 21, 2005, a package of 6 QV magazines arrived at the prison, addressed to plaintiff. Because the magazines arrived without a receipt and were not part of an ongoing subscription, defendant Oliverson refused to deliver them to plaintiff.

After plaintiff filed a grievance about the denial of the magazines, inmate complaint examiner Jodi Dougherty performed a web search and determined that the magazines were a one-time purchase worth $26.95. Dougherty recommended that defendant Hepp dismiss the complaint (which he did) because prison rules required all items sent to the prison to be accompanied by a sales receipt. (The prison makes an exception to this rule in the case of ongoing magazine subscriptions. If an inmate subscribes to a magazine, he is required to produce a receipt only once, showing the cost of the subscription. All magazines received thereafter as part of the subscription do not need to be accompanied by a receipt.)

3. Conduct reports

a. letter to the ACLU

On June 30, 2003, plaintiff submitted a letter for mailing addressed to the American Civil Liberties Union. (Plaintiff was sending the letter to class counsel for the Aiello case, in which plaintiff was a class member.) Because plaintiff had no money, he asked for a legal loan to mail the letter.

Defendant LaCost had told plaintiff on prior occasions that it was against prison rules for him to use legal loan money to write to the American Civil Liberties Union unless he could show that an attorney there was representing him in a lawsuit. The name of the lawyer representing the plaintiff class in Aiello did not appear on the envelope plaintiff was mailing, and prison officials believed (mistakenly) that plaintiff was not a member of the class covered by Aiello. After plaintiff submitted the letter for indigent postage, defendant LaCost read the letter, confiscated it, and issued plaintiff a conduct report charging him with disobeying orders and misusing state or federal property.

b. Letters to the clerk of court

On July 5, 2003, plaintiff submitted paperwork requesting a legal loan to mail a letter to Wisconsin Supreme Court Clerk Cornelia Clark. The request was denied because it was not related to ongoing litigation. On July13, 2005, plaintiff submitted the same letter again, renewing his request for free postage. Defendant LaCost asked plaintiff whether the second letter had been denied postage previously. Plaintiff responded by stating that he had placed a new letter in the old envelope. When defendant LaCost asked plaintiff to open the envelope to verify his assertion, she discovered that it contained the same letter that had been denied postage previously. She issued him a conduct report, charging him with lying and disobeying orders. Plaintiff was punished for his alleged abuse of the legal loan program

by being placed on cell confinement for 15 days.

c. Request for access to law library

While on cell confinement for violating the rules regarding use of legal loan funds, plaintiff made repeated requests to borrow copies of case law from the prison law library to help him prepare for an upcoming deadline in one of his lawsuits. Defendant Bauer denied plaintiff's requests, telling him that case law was not available for check out and assuring him that he would have adequate time to visit the library in person once his cell confinement ended. (Once released from cell confinement, plaintiff was able to visit the law library 18 times before his deadline passed.)

After plaintiff submitted his fifth request for case books, defendant Bauer issued him a conduct report, charging him with violating institution policies and procedures by submitting multiple requests for the same information after having received a definitive answer. Plaintiff was found guilty of the charge and was punished with 8 days' loss of recreation.

C. Soap

The prison provides plaintiff with three free bars of soap each month and with unlimited quantities of free hand soap in the prison lavatories. Although the prison permits

inmates to purchase additional bars of soap from the canteen, plaintiff has no money with which to do so.

Prison rules require inmates to keep themselves clean and the prison encourages inmates to shower daily. Plaintiff does so. Using soap at each shower, plaintiff exhausts his monthly supply of soap within one week.

Each bar of soap costs the prison approximately $.08. When plaintiff filed an inmate grievance demanding more free soap, he received the following response: "We are not a store. You need to purchase your own soap or use sparingly. The policy has always been (3) a month. State budget cuts."

DISCUSSION

In this lawsuit, plaintiff is proceeding on twelve claims: that (1) defendant Hepp violated his rights under the establishment clause by refusing to permit him to obtain and possess a silver circle as an emblem of his atheist beliefs; (2) defendants McCaughtry and Schefelker violated his rights under the establishment clause by making Christian literature readily available to inmates while impeding plaintiff's access to atheist literature; (3) defendants Frank, Nichols, Oliverson, Hepp, Karlen, Raemisch Nelson and Imberg violated the establishment clause by prohibiting plaintiff from receiving free nonreligious items and publications while permitting other inmates to receive free religious items and publications;

(4) defendants Frank, Nichols, Oliverson, Hepp, Karlen, Raemisch, Nelson and Imberg violated his right to free speech by enforcing prison policies prohibiting him from receiving free publications; (5) defendants Karlen, O'Donnell, Hepp, Raemisch, Imberg, Berry, Oliverson and Nichols violated plaintiff's rights under the First Amendment by permitting his legal mail to be opened outside his presence on May 9, 2003, August 13, 2005, and November 21, 2005; (6) defendants Karlen, O'Donnell, Smith, Nichols and Oliverson violated plaintiff's constitutional rights by opening his legal mail outside his presence on March 23, 2003, May 19, 2003, July 1, 2003, September 22, 2003, October 6, 2003, February 5, 2004, June 23, 2005, and July 5, 2005; (7) defendant Hepp violated plaintiff's right to free speech by refusing to deliver "several" months' worth of "several" magazines in the fall of 2005 by returning them to the publisher for no legitimate reason; (8) defendants Karlen, O'Donnell and Imberg violated plaintiff's right to free speech by confiscating his "Loompanics Unlimited" book catalog for no legitimate reason; (9) defendants Hepp, Raemisch and Nelson violated plaintiff's right to free speech by refusing to deliver six books sent to plaintiff on December 16, 2005, because the books allegedly contained offensive jokes; (10) defendants Oliverson, Hepp and Raemisch violated plaintiff's right to free speech by refusing to deliver six magazines to him on August 29, 2005, because they arrived without a receipt; (11) defendants LaCost, Karlen and Bauer retaliated against plaintiff by issuing conduct reports in connection with his request for law library material and letters to his

lawyer and the Wisconsin Supreme Court clerk; and (12) defendants Karlen and O'Donnell exhibited deliberate indifference to plaintiff's serious health needs by refusing to provide him with adequate quantities of soap.

Before addressing the merits of each of plaintiff's claims against each defendant, I note that two defendants were never served with a copy of the complaint. Defendant Travis Berry was not served because he is deceased, dkt. #65, and defendant Judy Imberg was not served because she is no longer employed by the Wisconsin Department of Corrections and can not be located. Id. These defendants will be dismissed from the case, as will plaintiff's claims against them.

A. Establishment

Plaintiff contends that his right to be free from religious establishment was violated when defendant Hepp refused to permit him to obtain and possess a silver circle as an emblem of his atheist beliefs; when defendants McCaughtry and Schefelker made Christian literature readily available to Christian inmates while impeding his access to atheist literature; and when defendants Frank, Nichols, Oliverson, Hepp, Karlen, Raemisch and Nelson violated the establishment clause by prohibiting plaintiff from receiving free nonreligious items and publications while permitting other inmates to receive free religious items and publications.

The First Amendment prohibits Congress from making any "law respecting an establishment of religion." The evils against which the establishment clause protects have been described in many ways. Eg., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) ("[T]he essential command of the establishment clause [is] that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred."); Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) ("Primary among those evils [against which the Establishment Clause protects] have been sponsorship, financial support, and active involvement of the sovereign in religious activity."); Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005) ("The Establishment Clause [] prohibits the government from favoring one religion over another without a legitimate secular reason."). Regardless how the protection afforded by the establishment clause is framed, at its core the First Amendment guarantees citizens the right to be free from any purposeful form of government favoritism, sponsorship or promotion of one belief system over another. Berger v. Rensselaer Central School Corp., 982 F.2d 1160, 1168-69 (7th Cir. 1993) ("Under the Establishment Clause, the government may not aid one religion, aid all religions or favor one religion over another.").

To determine whether government action violates the establishment clause, courts

employ the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under that test, a government policy or practice violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. Id. at 612-13; Kaufman, 419 F.3d at 683. With those standards in mind, I turn to the substance of each of plaintiff's establishment clause claims.

1. Denial of religious emblem

Plaintiff begins by asserting that defendant Hepp violated his rights under the establishment clause by denying his request for a silver circle to wear as an emblem of his atheist beliefs. Plaintiff does not dispute that he was given permission to wear another self-selected emblem; however, he challenges the decision to deny him his first choice.

Wisconsin Department of Corrections Policy 309 Internal Management Procedure 6A governs the use of religious emblems by prisoners. In relevant part, that policy reads:

> Religious emblems are objects that function as a religious symbol, and which is [sic] generally recognized by the inmate's religion as having religious significance.
>
> Inmates who wish to acquire an emblem must submit DOC-1585 and submit it to the Institution chaplain/designee.
>
> The Warden/designee shall review the request and approve or deny the request indicating reasons for a denial.

Dkt. #52, Exh. 1013. The policy serves to promote the legitimate secular interest of

insuring that prisoners wear symbols that have actual religious significance, rather than symbols that may serve to designate prisoners as members of secular groups or gangs. The limitations imposed by the policy balance prisoners' legitimate interest in expressing their religious beliefs through outward symbols with the prison's interest in maintaining security. Nothing about the policy advances or inhibits religion; it merely requires that inmates who wish to express their faith do so by means of a symbol recognized by others who share similar religious beliefs.

Finally, the prison policy does not foster an excessive entanglement with religion. Although prison officials do monitor symbols to insure that those selected are recognized by other members of a prisoner's religion, it does so only by reference to materials produced by members of the religious organizations. Plaintiff objects to the fact that prison officials second-guessed his choice of a religious symbol, but he omits the context for their decision. In support of his request for a religious symbol, plaintiff submitted "supporting documentation." The documents he submitted were partially redacted. When prison officials accessed a copy of the original documents on the internet, they found that the redacted sections directly contradicted plaintiff's assertion that the silver circle was a "religious" symbol. (The usefulness of the documentation was diminished by the fact that the originators of the design distinguished atheism from a philosophy or religion in a way plaintiff does not do.) In fact, portions of the original document contained statements that

the symbol "has nothing to do with any religion or belief system" and that the "symbol should have nothing to do with any religion or philosophy." Under those circumstances, it was reasonable for prison officials to question whether the silver circle plaintiff had selected was a religious symbol.

It is undisputed that when plaintiff submitted a later request for a different symbol, with supporting documentation from the American Atheist Society, his request was granted. He has adduced no evidence from which it may be inferred that his request for a religious symbol was treated less favorably than requests from prisoners of other religious persuasions. To the contrary, the undisputed facts reveal that he was subject to the same policy as every other religious prisoner and that the policy struck a reasonable balance between his right to express his faith and the prison's interest in security. Plaintiff's motion for summary judgment will be denied with respect to his claim that defendant Hepp violated his rights under the establishment clause by denying his request for a silver circle; defendants' cross-motion will be granted.

2. Denial of atheist literature

Next, plaintiff contends that defendants McCaughtry and Schefelker violated his rights under the establishment clause by making Christian literature readily available to inmates while impeding plaintiff's access to atheist literature. The facts underlying his claim

are undisputed: In the summer of 2004, at plaintiff's request, the American Atheist Association donated a box of twelve books about atheism to the Jackson Correctional Institution's library. No books were shelved until September 2005, when five books were made available for check out; the remaining seven books were not were shelved until March 2006.

Two aspects of this claim require preliminary comment. First, although plaintiff named both defendant McCaughtry and her supervisor, defendant Schefelker, as defendants to his claim, he has proposed no facts suggesting that Schefelker was personally involved in failing to shelve the donated library books. Liability under 42 U.S.C. § 1983 must be based on a defendant's personal involvement in the alleged constitutional violation; a supervisor cannot be sued simply because it is his responsibility to oversee his subordinates. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Because plaintiff has adduced no evidence connecting defendant Schefelker to the alleged violation of his constitutional rights, defendants' motion for summary judgment will be granted with respect to plaintiff's claims against Schefelker.

Second, I note that although plaintiff was granted leave to proceed only on an establishment clause claim related to the untimely shelving of the donated library books, both he and defendants have briefed the question whether defendant McCaughtry's failure to promptly shelve the donated books violated plaintiff's rights under the free exercise clause

or the Religious Land Use and Institutionalized Persons Act as well. Because it makes no difference in the outcome of the case and because the parties have addressed all angles of plaintiff's allegations, I will too.

a. Establishment

Plaintiff's claim that defendant McCaughtry violated his rights under the establishment clause fails for the simple reason that plaintiff has not adduced evidence showing that the prison treated his donated materials less favorably than any other donated materials, religious or nonreligious. It is undisputed that defendant McCaughtry took an unusually long time to review plaintiff's books and shelve them in the library. However, it is also undisputed that during the time plaintiff's donated books were awaiting review, many other books were awaiting review as well. Plaintiff has adduced no evidence suggesting that defendant McCaughtry expedited the review of books about other religions while ignoring plaintiff's donations.

As plaintiff is well aware, summary judgment is the "put up or shut up" moment in a lawsuit when he must come forward to show what evidence he has to convince a trier of fact to accept his version of the facts. Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Failure to do so entitled defendants to summary judgment in their favor. Fed. R. Civ. P. 56(e). Without

some suggestion that defendant McCaughtry treated donations from other religious organizations more favorably than she treated the donation from the American Atheist Society, plaintiff's establishment clause claim cannot proceed further. Therefore, plaintiff's motion for summary judgment will be denied and defendants' motion granted with respect to plaintiff's claim that defendants McCaughtry and Schefelker violated his rights under the establishment clause by making Christian literature readily available to inmates while impeding plaintiff's access to atheist literature.

b. Free exercise and RLUIPA

The free exercise clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act both protect religious freedom, although they do so in different ways. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a *central* religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). By contrast, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), prohibits the government from imposing a substantial burden on *any* religious exercise of a person residing in or confined to an institution unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Cutter v. Wilkinson,

125 S. Ct. 2113, 2114 (2005). Consequently, any state action that substantially burdens religious exercise in a manner that is not tailored to address a compelling state interest will violate both RLUIPA and the free exercise clause.

It is undisputed that the prison library contained other books about atheism and that, at all times, plaintiff was able to order books from any public library in Wisconsin through an interlibrary loan program. Although plaintiff argues that books ordered in this manner were slow to arrive, he has no constitutionally guaranteed right to the speedy delivery of books. What he does have is a right to reasonable access to materials about his religion. The undisputed facts show that defendant McCaughtry's failure to shelve plaintiff's donations promptly did not substantially burden his ability to exercise his religion. Consequently, to the extent the parties understand plaintiff to be pursuing a claim that defendant McCaughtry's actions violated plaintiff's rights under RLUIPA or the free exercise clause, defendants' motion for summary judgment on the claim will be granted and plaintiff's motion denied.

3. Religious exception for free publications

The Jackson Correctional Institution prohibits inmates from receiving all free publications except religious literature, college promotional materials and retail catalogs. Plaintiff's challenge to the prison's ban on free publications takes two forms. First, he

contends that the ban violates his rights under the establishment clause by impermissibly permitting religious publications to enter the institution while prohibiting nearly all other free publications. Second, he contends that the policy violates his rights under the free speech clause by limiting his ability to receive reading material without any legitimate reason. (I will address the second of plaintiff's arguments below, in conjunction with his other mail-related claims.)

Plaintiff's first challenge to the policy relates to its religious publications exception. Under the terms of the prison policy, prisoners are permitted to receive free religious literature but not free nonreligious literature (with the exception of retail catalogues and college promotional materials). Plaintiff contends that the exception for religious literature constitutes government endorsement of religion over irreligion in violation of the establishment clause.

As I noted in the July 13, 2006 screening order, dkt. #4, at 51-52, not all differential treatment provided to religious inmates constitutes a violation of the establishment clause. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("The constitutional obligation of 'neutrality' is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation."). When a prison makes an exception to a policy of general applicability in order to accommodate religious practice by removing unnecessary government-imposed burdens, the accommodation may be permissible. Id. at 720.

However, when a prison provides religious inmates with privileges not accorded to nonreligious inmates for no purpose beyond that of favoring religion, the establishment clause is violated. McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 125 S. Ct. 2722, 2733 (2005). The question here is whether plaintiff has adduced evidence that the prison's policy fails to alleviate any government-imposed burden on religious exercise or, rather, whether it impermissibly favors religious over nonreligious expression. He has not.

Although plaintiff focuses his challenge on the exception for free religious publications, it is undisputed that the prison policy contains several other exceptions that benefit all inmates, not just those with religious affiliations. These additional exceptions diminish the risk that the prison will be seen as promoting religion by bestowing benefits on religious prisoners, rather than alleviating government-imposed burdens on the ability of religious inmates to exercise religious beliefs. Moreover, by permitting prisoners to receive free religious literature, the prison protects itself against running afoul of the religious accommodation requirements mandated by the Religious Land Use and Institutionalized Persons Act.

As I explained in Kaufman v. McCaughtry, 422 F. Supp.2d 1016, 1020-1021 (W.D. Wis. 2006), aff'd 192 Fed. Appx. 556 (7th Cir. Sep. 7, 2006), laws such as the First Amendment's free exercise clause and the Religious Land Use and Institutionalized Persons

Act (RLUIPA), 42 U.S.C. § 2000cc-1, limit the government's ability to burden prisoners' exercise of sincerely held religious beliefs, even when governmental burdens are imposed neutrally upon believer and non-believer alike. Although it is well-established that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all," it does not follow that non-religious beliefs must always be treated in the same fashion as religious ones. It may seem strange to say that accommodating religion can constitute a "secular" or non-religious purpose; nevertheless, courts have held that the government may "accommodate the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings" without violating the establishment clause. Lee v. Weisman, 505 U.S. 577, 627 (1992). "[I]n commanding neutrality, the Establishment Clause does not require the government to be oblivious to the burdens that state action may impose upon religious practice and belief. Rather, there is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Madison v. Riter, 355 F.3d 310, 317 (4th Cir. 2003) (quoting Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994)).

Because the policy permitting inmates to receive free religious publications, while prohibiting free secular materials with the exception of retail catalogues and college promotional materials, does not rise to the level of a government endorsement or promotion

of religion, it does not transgress the establishment clause. Plaintiff's motion for summary judgment will be denied with respect to his claim that defendants Frank, Nichols, Oliverson, Hepp, Karlen, Raemisch and Nelson violated the establishment clause by prohibiting plaintiff from receiving free nonreligious items and publications while permitting other inmates to receive free religious items and publications. Defendants' cross-motion for summary judgment will be granted with respect to this claim.

B. Free Speech

Although imprisonment does not automatically deprive a prisoner of important constitutional protections, the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere. Beard v. Banks, 126 S. Ct. 2572, 2577-2578 (2006). In reviewing a prison's policies restricting prisoners' access to written materials, courts owe "substantial deference to the professional judgment of prison administrators." Id. (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)). A prison policy restricting access to publications is permissible when it is reasonably related to legitimate penological interests," and is not an "exaggerated response" to such objectives. Turner v. Safley, 482 U.S. 78, 87 (1987).

In determining whether a prison policy withstands the Turner test, courts consider four factors:

> First, is there a " 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for furthering the governmental interest available?

Beard, 126 S. Ct. at 2578 (internal citations omitted).

1. Ban on free publications

As mentioned in Section A.3. above, plaintiff's challenge to the prison's ban on free publications has a second angle. Plaintiff contends that whether or not the exception for religious publications violates the establishment clause (and it does not), the entire policy is constitutionally infirm because it restricts prisoners' free speech rights without a legitimate penological reason. I conclude that although a better policy could be drafted, the one chosen by the prison passes the Turner test.

Defendants have proposed two reasons for the policy: to reduce the volume of mail that prison staff must inspect and to insure that the value of all material entering the institution is easy to assess. Clearly, by limiting junk mail and other free mailings, defendants accomplish both these goals, thereby establishing a valid, rational connection between their policy and the governmental interest it purports to advance.

Second, defendants have shown that alternative means exist for prisoners to exercise

their right to read material that would otherwise have been mailed to them free of charge. Prisoners are permitted to receive free catalogues, religious literature and college material. All other free material may be donated to the prison library where it will be shelved if it meets other requirements established by the prison librarian (for example, the material is of general interest, does not undermine prison security and fills a need left unmet by existing library materials). Moreover, prisoners remain free to use the interlibrary loan program to order any published material they wish from any Wisconsin public library. These alternate means of obtaining information are more than adequate means of acquiring information that might otherwise be denied under the policy banning free material.

With respect to the question whether overturning the policy would have a negative effect on "guards and other inmates, and on the allocation of prison resources generally," it is undisputed that before implementing the policy, prison officials had a backlog of mail to screen. Implementing the policy led to a more streamlined, efficient process for delivering prisoners' mail. The limitations imposed by the policy insure that the prison is not overwhelmed with junk mail that require prison staff screening time and slow the delivery of letters, purchased publications and other mail. Moreover, the policy serves the purpose of helping prison staff to properly value each inmate's possessions by requiring receipts for publications and other materials.

Plaintiff contends that the value of a free publication is, by definition, zero. Of

course, the value the prison seeks to assess is an item's "street value"; the worth it may have both inside and outside the prison. A book donated may cost nothing to the prisoner who receives it, yet have significant value to fellow prisoners or others unable to obtain the same publication. Prison officials do not violate the Constitution by insisting that all publications entering the prison have an ascertainable value.

The final Turner factor is whether the prison has other "ready alternatives" to accomplish its purpose. Plaintiff takes issue with the prison's current policy but does not suggest a simple and effective means of addressing the concerns the policy addresses: the volume of mail received by the prison and the ability of prison staff to easily assess the value of all publications received by the institution. This factor, too, counsels in favor of upholding the policy as constitutionally valid.

It is true that the policy makes it more difficult for indigent inmates, such as plaintiff, to receive the number and variety of publications they might wish to receive. That alone, however, is not enough to make the policy an unconstitutional limitation on plaintiff's right to free speech.

In the context of a motion for summary judgment, a court must draw all justifiable inferences in the plaintiff's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However,

[i]n doing so . . . [courts] must distinguish between evidence of disputed

> facts and disputed matters of professional judgment. In respect to the latter . . . inferences must accord deference to the views of prison authorities. Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

Beard, 126 S. Ct. at 2578. Plaintiff has adduced no such evidence here, and application of the Turner test counsels a finding in favor of defendants. Consequently, plaintiff's motion for summary judgment will be denied with respect to his claim that defendants Frank, Nichols, Oliverson, Hepp, Karlen, Raemisch and Nelson violated his right to free speech by enforcing prison policies prohibiting him from receiving free publications; defendants' cross-motion will be granted.

2. Confiscated publications

a. Allegedly offensive materials

Plaintiff challenges the decision of defendants Karlen and O'Donnell to confiscate his "Loompanics Unlimited" book catalog and the decision of defendants Hepp, Raemisch and Nelson to refuse him delivery of six joke books sent to him on December 16, 2005. Plaintiff's challenge to the denial of his Loompanics catalogue is unavailing. It is undisputed that the catalog contained descriptions of books on topics such as drug use, combat techniques, sex with minors and other subjects not appropriate for consumption within the prison environment. If any further reason were needed to justify the denial of the catalogue,

the warning contained on the title page does the trick. Prison officials would have been derelict had they ignored the prominently displayed warning regarding the illegality of information contained in the books it offered for sale. There can be no question that the presence of the catalogue in the institution posed a threat to prison security.

When screening plaintiff's complaint, I noted that although prison officials may have reasons for refusing to deliver material that may be inflammatory, it is also true that many works of literature contain statements that could be classified as offensive or derogatory, if read in isolation. In support of his claim that defendants were wrong to confiscate his joke book, plaintiff has provided a catalogue of books in the prison library that contain material he contends is also inflammatory, offensive or hateful. He argues that because these books are permitted in the prison library, his books should have been delivered to him, too.

The line between insuring prison security and censoring unpopular ideas is undeniably a fine one. Turning prison officials (or judges, for that matter) into literary critics is a risky proposition, fraught with the very real possibility of misjudgment. Nevertheless, prison officials do have a right to draw distinctions between publications that are permissible and those that are dangerous to institutional security or counter productive to a prisoner's rehabilitation. That the reasons for drawing those distinctions may be difficult to articulate is not sufficient ground in itself for overturning prison officials' decisions about what is and is not safe within the context of the prison. See, e.g.,

Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) ("The exercise of discretion called for by [the use of discretion permitted by prison] regulations may produce seeming "inconsistencies," but what may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality.").

In this case, both the magistrate judge and I denied plaintiff's repeated requests to compel defendants to produce in discovery copies of the denied catalogue and joke books. See, e.g., dkt. ##37, 38, 57. Having reviewed the materials in camera, we independently determined that the content of the catalogue and the subject matter of the "jokes" was more than unpopular, distasteful or juvenile. The material was lurid and blatantly problematic, promoting the use of drugs and weaponry and making light of racial violence and the sexual assault of minors, among other things. Although the catalogue itself did not contain details on how to commit crimes, it served no purpose other than to assist customers in procuring such texts. And, unlike the literature found in the prison library to which plaintiff points, the joke books served no purpose other than to mock crime and make sport of racial hatred.

In context, the decision to deny plaintiff the catalogue and joke books is easily defensible and the decision of defendant Hepp, Raemisch and Nelson not to deliver the book is entitled to deference. Plaintiff argues with defendants' taste and rationale, but he has "not offer[ed] any fact-based or expert-based refutation" of defendants' decisions. Beard, 126 S. Ct. at 2581. Plaintiff's mere disagreement is not enough to stave off summary judgment.

Therefore, defendants' motion for summary judgment will be granted with respect to plaintiff's claims that his free speech rights were violated by the decision of defendants Karlen and O'Donnell to confiscate his "Loompanics Unlimited" book catalog and the decision of defendants Hepp, Raemisch and Nelson to refuse him delivery of six joke books sent to him on December 16, 2005. Plaintiff's motion for summary judgment will be denied with respect to these claims.

b. Publications without receipts

The circumstances surrounding plaintiff's claim against defendants Oliverson, Hepp and Raemisch relating to the non-delivery of his QV magazines are not entirely clear. However, it appears that the meager facts proposed by the parties are not in dispute. On August 29, 2005, defendant Oliverson refused to deliver a package of six QV magazines to plaintiff because they arrived at the prison without a receipt from the publisher listing their value. (Although the parties' proposed findings of fact are a bit garbled on this point, it appears that prison policy requires all publications to be accompanied by receipts. An exception exists for magazines that arrive as part of an ongoing subscription. So long as prisoners produce a receipt soon after a subscription has been purchased, subsequent magazines do not need to be accompanied by a receipt.) Plaintiff's QV magazines were a one-time purchase and were not part of an ongoing subscription.

Oddly, although both sides refer to this claim in their briefs, neither develops a coherent argument regarding the legitimacy of the decision to deny plaintiff his magazines. Plaintiff asserts in one short paragraph that he is "the only inmate who had magazines denied for arriving without receipts" and laments the prison's espousal of several magazine policies that appear to contradict one another with respect to the need for magazines to come with receipts. Dkt. #50, at 13-14. Defendants do no more to clarify the argument (perhaps out of confusion themselves as to the exact nature of plaintiff's claims).

Ultimately, however, it is plaintiff who bears the burden of coming forward with evidence from which a reasonable jury could conclude that by denying him delivery of his magazines without a receipt, prison officials violated his free speech rights. Because plaintiff has not clearly set forth the reasons why he believes the policy or its application (which he is challenging is not entirely clear) violated the Constitution, his motion for summary judgment must be denied and defendants' cross-motion granted with respect to plaintiff's claim that defendants Oliverson, Hepp and Raemisch violated plaintiff's right to free speech by refusing to deliver six magazines to him on August 29, 2005, because they arrived without a receipt.

3. Legal mail

Next, plaintiff contends that his constitutional rights were violated when defendants

Karlen, O'Donnell, Hepp, Raemisch, Oliverson and Nichols permitted his legal mail to be opened outside his presence on May 9, 2003, August 13, 2005, and November 21, 2005 and when defendants Karlen, O'Donnell, Smith, Nichols and Oliverson permitted his legal mail to be opened outside his presence on March 23, 2003, May 19, 2003, July 1, 2003, September 22, 2003, October 6, 2003, February 5, 2004, June 23, 2005, and July 5, 2005. Although I granted plaintiff leave to proceed on his legal mail claims, I have recently had occasion to examine more closely the question whether the opening of legal mail outside an inmate's presence violates the First Amendment. I conclude that, with rare exception, it cannot.

As I explained recently in Vasquez v. Raemisch, 480 F. Supp. 2d 1120 (W.D. Wis. 2007), the right on which plaintiff relies has never been clearly defined. Although the Court of Appeals for the Seventh Circuit has assumed in various cases that prisoners have a constitutional right to be present when certain kinds of legal mail are opened, I am not aware of any case in which the court has found the right to be violated.

There are a number of likely reasons for the court's reluctance to find violations of the right, including the difficulty of proving an intentional violation and in many cases, an inability to identify a cognizable harm that flows from a violation. Apart from these practical difficulties, the most important reason may be that the source of the right is far from clear. Bieregu v. Reno, 59 F.3d 1445 (3d Cir. 1995) (noting disagreement among

courts regarding scope and source of prisoner's right to be present when legal mail is opened).

Of course, prisoners have a First Amendment right to send and receive mail. Thornburgh v. Abbott, 490 U.S. 401, 413 (1989); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). But a right to *receive* mail does not necessarily include a right to receive mail *privately*. Even the rights of nonprisoners are limited in this area. E.g., United States v. Ramsey, 431 U.S. 606 (1977) (First Amendment not violated when envelopes opened and inspected by customs officer having reasonable suspicion that envelope contained contraband). With respect to prisoners, the Court of Appeals for the Seventh Circuit has held that prison officials are not prohibited by the Constitution from inspecting or even reading most mail that prisoners receive. E.g., Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir.1986); Smith v. Shrimp, 562 F.2d 423 (7th Cir. 1977). The justification for the rule is the interest that trumps all others in the prison context: security. In Gaines and Smith, the court held that the officials' need to check for contraband, escape plans, criminal schemes and other security threats outweighs any interest the prisoner has in keeping his general correspondence private. See also Martin v. Tyson, 845 F.2d 1451, 1457 (7th Cir. 1988) (pretrial detainees have no First Amendment right to be present when officials open general correspondence to detainee).

Why should legal mail be treated any differently? The Supreme Court has made it

clear that no hierarchy of First Amendment rights exists in the prison context; all of them are analyzed under the standard set forth in Turner v. Safley, 482 U.S. 87 (1987), which is whether the restriction on the right is reasonably related to a legitimate penological interest. Shaw v. Murphy, 532 U.S. 223 (2001). In fact, in Shaw, the Court expressly rejected the proposition that Turner was limited to "nonlegal correspondence." Id. at 228. In concluding that legal advice was not entitled to special First Amendment protection, the Court explained:

> To increase the constitutional protection based upon the content of a communication first requires an assessment of the value of that content. But the Turner test, by its terms, simply does not accommodate valuations of content. On the contrary, the Turner factors concern only the relationship between the asserted penological interests and the prison regulation.

Id. at 230.

One might argue plausibly that the security justifications for reading "legal" mail are less pronounced than for other types of mail. Murder plots and gang-related instructions are much less likely to be included in mail from a lawyer or a judge. But simply because correspondence is labeled "legal mail" does not mean that it is. Take, for example, the practice of three way mailing, which defendants have cited as a key security concern behind their decision to inspect all mail returned by the post office. After all, no one can tell whether an envelope's contents match its label without inspecting it.

Of course, once prison officials discover that the mail is in fact related to a legitimate

legal matter, this would wipe out any security interest in actually reading its contents. But the same could be said for *any* mail, ranging from junk mail to letters from Mom. If security interests allow prison officials to inspect general correspondence outside the prisoner's presence, as the court of appeals has held, and legal communications are not entitled to special First Amendment treatment, as the Supreme Court has held, it is difficult to find a coherent free speech rationale for a rule treating legal mail differently from other types of incoming mail.

If the First Amendment does not guarantee an absolute right to be present when legal mail is opened, might the right be found elsewhere? It is sometimes suggested that the right to be present when legal mail is opened is protected by the right of access to the courts. E.g., Kaufman v. McCaughtry, 419 F.3d 678, 685-86 (7th Cir. 2005). But if this is the source of the right, the right is not violated unless the prisoner can show that the opening of his mail somehow hindered him from filing or litigating a lawsuit. This is because in Lewis v. Casey, 518 U.S. 343, 352 (1996), the Supreme Court held that a prisoner does not have standing to bring an access to courts claim unless he was "actually injured," which the Court defined as being prevented from filing or litigating a nonfrivolous lawsuit. Because plaintiff has not suggested that any of the four instances he describes prevented him from litigating a case, he could not proceed under that theory. Further, because none of the mail at issue involved correspondence from plaintiff's criminal defense lawyer, he could not assert any

privilege that might arise from the Sixth Amendment right to be represented by counsel in criminal cases. Wolff v. McDonnell, 418 U.S. 539, 575-77 (1974). (A federal common law attorney-client privilege extends to civil cases. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). Although violations of this privilege by prison officials could be sanctioned by a court in the context of particular proceedings, e.g., Gomez v. Vernon , 255 F.3d 1118, 1133-34 (9th Cir. 2001), I am aware of no authority to the effect that the privilege may provide a basis for a federal lawsuit.) A final possibility is the constitutional right to privacy, cf. Jolivet v. Deland, 966 F.2d 573, 576 (10th Cir. 1992), but the scope of this right is ill-defined, especially as it applies to prisoners, Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995), and the court of appeals has never suggested that this right applies to the inspection of prisoner mail.

Wolff is often cited as authority for the prisoner's right to be present when his legal mail is opened, but this is misleading. In Wolff, the Court held only that it did *not* violate the Constitution for prison officials to open mail from the prisoner's lawyer when they did so in the presence of the prisoner. The Court stated that "the state had done all and perhaps more" than the Constitution required. Id. at 577. Before reaching this conclusion, it noted problems with the argument that either the right to free speech or the right of access to the courts prohibits prison officials from opening and inspecting legal mail. Thus, any reliance on Wolff is misplaced. Since Wolff, the Court has not reconsidered the issue of the

confidentiality of legal mail.

Perhaps the strongest argument in favor of a rule requiring legal mail to be opened in front of prisoners is one that was suggested in Wolff: if prison officials are free to open and inspect sensitive legal communications outside the watchful eye of the prisoner, the officials may read these materials with impunity, which could chill prisoners from exercising their right to free speech out of fear of retaliation or embarrassment. Although this is a powerful argument, again, it would not apply solely to legal mail, but to any mail that includes criticisms of prison officials or discussions of sensitive subjects. As noted by one court: "It takes little more than common sense to realize that a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would first be scrutinized by a guard." Wolfish v. Levi, 573 F.2d 118, 130 (2d Cir. 1978), rev'd on other grounds, Bell v. Wolfish, 441 U.S. 520 (1979). If the court of appeals has concluded that the danger in chilling free speech is outweighed by security concerns with respect to mail in general, it is difficult to argue that a different conclusion applies with respect to legal mail. In any event, if prison officials *do* retaliate against prisoners for their receipt of a letter about a legal complaint, that would be an independent constitutional violation that may be remedied by a lawsuit under 42 U.S.C. § 1983. Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002).

Finally, to the extent that plaintiff may retain a right to be present when his legal mail

is opened, defendants have not violated the right as it has been defined by the court of appeals. Negligent acts may not be remedied using § 1983, Kincaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992), and plaintiff has adduced no evidence suggesting that defendants Smith, Nichols or Oliverson (the only mailroom staff members plaintiff has connected to any of his legal mail claims) were anything more than negligent in the opening of his mail.

Plaintiff's claims against defendants Karlen, Hepp, Raemisch and O'Donnell are even more attenuated. None of these defendants was personally responsible for opening plaintiff's mail and, in reviewing plaintiff's grievances, these defendants affirmed plaintiff's complaints more often than not, reasonably relying on Daugherty's factual investigations in reaching their conclusions.

Because plaintiff has failed to show that his First Amendment rights were violated by the opening of his legal mail, his motion for summary judgment will be denied with respect to his claims that defendants Karlen, O'Donnell, Smith, Nichols, Hepp, Raemisch, Oliverson violated his First Amendment rights by permitting his legal mail to be opened outside his presence on May 9, 2003, March 23, 2003, May 19, 2003, July 1, 2003, September 22, 2003, October 6, 2003, February 5, 2004, June 23, 2005, July 5, 2005, August 13, 2005, and November 21, 2005.

4. Undelivered magazines

Plaintiff's free speech claim is easily dismissed because plaintiff has failed to pursue it. In his complaint, plaintiff alleged that defendant Hepp and unidentified prison officials violated plaintiff's right to free speech by refusing to deliver "several" months' worth of "several" magazines in the fall of 2005 by returning them to the publisher for no legitimate reason. In his amended complaint, plaintiff did not identify the unnamed prison officials (thereby waiving his claims against them), and on summary judgment, plaintiff has proposed no facts related to this claim or offered any evidence or argument to support the allegation that any of his magazines were returned to the publisher. (Defendants deny that any were.) Because plaintiff has not developed his claim in any meaningful way, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Hepp violated his right to free speech by refusing to deliver "several" months' worth of "several" magazines in the Fall of 2005 by returning them to the publisher for no legitimate reason. Plaintiff's motion for summary judgment on this claim will be denied.

C. Retaliation

In the July 13, 2006 screening order, I granted plaintiff leave to proceed on his claims that defendants LaCost and Karlen (and later, defendant Bauer) retaliated against him by issuing conduct reports in connection with his request for law library material and letters to his lawyer and the Wisconsin Supreme Court clerk. I explained:

> Petitioner contends that respondent LaCost issued him a conduct report when he tried to send letters to a lawyer representing the prisoner class in Aiello (see section B.2.a.3), above) and the Clerk of the Wisconsin Supreme Court, and that respondent Karlen affirmed the conduct report on appeal. In addition, petitioner contends that prison staff member K. Bauer . . . issued him a conduct report in retaliation for his request to gain access to materials in the prison law library (presumably in order to aid his ongoing litigation efforts), and that respondent Karlen upheld that conduct report as well.
>
> Inmates have a right of access to the courts. Lewis v. Casey, 518 U.S. 343, 351 (1996). Researching the law and corresponding with lawyers and courts are necessary components of accessing courts to litigate claims. Drawing all inferences in petitioner's favor, I infer that writing to his lawyer and the Wisconsin Supreme Court clerk and asking for access to prison law library materials were constitutionally protected activities. Because petitioner alleges that he was punished because of these activities, he has stated a claim that respondents LaCost and Karlen retaliated against him by issuing conduct reports in connection with his request for law library material and letters to his lawyer and the Wisconsin Supreme Court clerk.

Dkt. #4, 65-66. Now that the facts have been developed, it is clear that plaintiff omitted important information from his factual allegations that alter the nature of his retaliation claims.

1. Letters

The undisputed facts reveal that plaintiff was not disciplined for sending letters to his lawyers or to the clerk of court: he was disciplined for seeking legal loans with which to mail those letters, after having been told repeatedly that he could not use legal loan money to mail them.

It is undisputed that plaintiff has a constitutional right to mail letters to lawyers or to correspond with a court. The question is whether plaintiff had a constitutional right to demand that prison officials provide him with free postage to mail his letters and whether, by disciplining him for his persistence, they retaliated against him.

The first question is easily answered. The court of appeals has held repeatedly that prisons are under no constitutional obligation to provide litigants with financial assistance in pursuing civil litigation because there is "no constitutional entitlement to subsidy" to prosecute civil lawsuits. Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002); see also Lindell v. McCallum, 352 F.3d 1107, 1111 (7th Cir. 2003). Because an act cannot constitute actionable retaliation unless it is precipitated by a constitutionally protected act, plaintiff's mail-related retaliation claims are nonstarters.

Plaintiff makes a strong case that the prison's refusal to distribute legal loan funds for letters addressed to the American Civil Liberties Union was a violation of Wis. Admin. Code § DOC 309.51(1). If he is correct, plaintiff's claim is one that arises under state law only. Defendants LaCost and Karlen did not violate plaintiff's rights under the First Amendment.

2. Requests for law library

Plaintiff contends that defendants Bauer and Karlen retaliated against him by issuing him a conduct report for filing grievances. Once again, however, plaintiff's allegations do not

match the undisputed facts.

It is clear that plaintiff filed grievances regarding his inability to use the law library during the 15 days he was on cell confinement. Inmates have a constitutional right to file grievances regarding the conditions of their confinement; therefore, defendants would violate plaintiff's rights if they were to punish him for his decision to submit a complaint voicing his concerns about a perceived injustice. See, e.g., DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000) (citing Babcock v. White, 102 F.3d 267, 274-75 (7th Cir. 1996) (prisoner may not be transferred in retaliation for filing inmate grievances).

However, prison officials' hands are not tied entirely when it comes to the filing of inmate grievances. Prison officials are free to restrict inmates' ability to file grievances to the extent that the exercise of the right impedes the efficient administration of the prison. Buise v. Hudkins, 584 F.2d 223, 231 (7th Cir. 1978). In this case, prison officials responded to plaintiff's first four grievances even though prison policy prohibited inmates from filing multiple grievances on the same topic. However, when plaintiff filed a fifth grievance within 15 days on the same topic he had raised four times previously, defendant Bauer issued plaintiff a disciplinary report for violating institution policies and procedures.

Plaintiff's retaliation claim against defendants Bauer and Karlen suffers from the same deficits as his retaliation claim against defendants LaCost and Karlen: plaintiff has not adduced evidence showing that he was disciplined for his exercise of a constitutional right.

Plaintiff was permitted to file grievances with no adverse consequence. It was only when his filing became abusive that he was disciplined for his repeated filing of inmate complaints on the same subject. Such discipline does not constitute retaliation.

Because the undisputed facts show that plaintiff was disciplined for failing to follow reasonable prison rules, rather than as a result of his exercise of his constitutional rights, plaintiff's motion for summary judgment will be denied on his claim that defendants LaCost, Karlen and Bauer retaliated against him by issuing conduct reports in connection with his request for law library material and letters to his lawyer and the Wisconsin Supreme Court clerk. Defendants' cross-motion will be granted with respect to this claim.

D. Deliberate Indifference

In his complaint, plaintiff alleged that defendants Karlen and O'Donnell exhibited deliberate indifference to his health and safety by failing to provide him with enough soap to shower and, at some earlier point in his confinement, enough soap to wash his hands after using the bathroom. Plaintiff alleged that as a result of the prison's stingy soap policy, he was forced to go without soap for three weeks each month. Now that summary judgment has arrived and the evidence has been adduced, it is clear that the prison did not violate plaintiff's Eighth Amendment rights.

Prison officials must provide inmates with materials sufficient to meet basic levels of

sanitation and hygiene. Sanders v. Sheahan, 198 F.3d 626, 629 (7th Cir. 1999). In his proposed findings of fact and in his brief, plaintiff concedes that he was provided with unlimited amounts of free soap in the prison bathrooms with which to wash his hands. In addition, he admits that prison officials permitted him to shower daily and provided him with three bars of soap each month, which he asserts was enough to last through at least five showers.

Plaintiff's real complaint is that he was unable to use soap *each time* he showered without exhausting his free monthly soap supply prematurely. The claim is frivolous. Because plaintiff has failed to adduce any evidence suggesting that the conditions of his confinement rose to the level of cruel and unusual deprivations of the minimal measure of life's most basic necessities, defendants' motion for summary judgment will be granted and plaintiff's motion denied with respect to plaintiff's claim that defendants Karlen and O'Donnell exhibited deliberate indifference to plaintiff's serious health needs by refusing to provide him with adequate quantities of soap.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of plaintiff James Kaufman is DENIED.

2. The cross-motion for summary judgment of defendants Thomas Karlen, Randall

Hepp, Cynthia O'Donnell, Richard Raemisch, Danielle LaCost, Matthew Frank, Perry Nichols, April Oliverson, K. Bauer, Michelle McCaughtry, Jeffrey Schefelker, Travis Berry, Judy Imberg and Melissa Nelson is GRANTED.

3. Defendants Travis Berry and Judy Imberg are DISMISSED from this case.

4. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 21st day of June, 2007.

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