

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CEDRIC LEON SHEPERD,

Plaintiff,

v.

R. WERLINGER, et al.

Defendants.

OPINION AND ORDER

Case No. 15-cv-220-wmc

Plaintiff Cedric Leon Sheperd brings this proposed civil action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), contending that several prison employees violated his constitutional rights when a manuscript he wrote was allegedly confiscated and only partially returned. Sheperd requests leave to proceed *in forma pauperis*, and he has made an initial, partial payment of the filing fee as required by the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915(b)(1). The PLRA also requires the court to determine whether the proposed action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks monetary damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. In addressing any *pro se* litigant’s pleadings, the court must construe the allegations generously, and hold the complaint “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After considering the complaint, the court concludes that Sheperd may proceed with his due process and free speech claims, but that his equal protection claim must be dismissed.

ALLEGATIONS OF FACT¹

In April of 2012, Sheperd was transferred to the Federal Correctional Institution in Oxford, Wisconsin (“FCI Oxford”). Sheperd names seven FCI Oxford officials as defendants:

- Robert Werlinger, the warden at all times relevant to Sheperd’s allegations;
- R.E. Williams, a lieutenant who played a supervisory role in the confiscation of Sheperd’s manuscript;
- Joseph Helmin, a lieutenant with Special Investigative Supervisor (“SIS”) who was involved in confiscating and retaining his manuscript;
- Stacey Lenorud, a technician with SIS who also was involved in confiscating and retaining his manuscript;
- John Doe, the staff member with Inmate Systems Management Receiving and Discharge (“R&D”) responsible for confiscating Sheperd’s manuscript and forwarding it to SIS;
- Paul M. Laird, the regional director responsible for denying Sheperd’s regional administrative remedy appeal; and
- Harrell Watts, the administrator responsible for denying Sheperd’s national administrative remedy appeal.

Before he was transferred, Sheperd had written an urban fiction manuscript where the main character struggled with gang membership. When Sheperd was transferred, R&D processed his personal property separately from Sheperd himself. While processing

¹ For purposes of this order, the court accepts all well-pleaded allegations as true. The court draws all facts from the complaint and exhibits plaintiff submitted along with the complaint. *See* Fed. R. Civ. P. 10(c); *see also* *Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that some or all of the substance of certain documents attached to the complaint may become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim).

the former, defendant John Doe allegedly confiscated Sheperd's manuscript and sent it to SIS for review. When R&D staff processed Sheperd himself, defendants Helmin and Lenorud were present. They questioned him about his status as a gang member, and Sheperd denied being active in a gang.

On April 19, 2012, when Sheperd finally collected his personal property from R&D, he realized that his manuscript was missing. Lieutenant Helmin informed Sheperd that SIS staff had held his manuscript for screening, but did not tell him why his manuscript was being screened and denied his request simply to mail the manuscript home. Then, on April 26, 2012, Sheperd asked Helmin about the manuscript again, and this time Helmin told him that Lenorud and he decided not to return the manuscript because it was gang-related.

In seeking the return of his manuscript, Sheperd submitted an informal resolution form on or about May 1, 2012, as well as a Request for Administrative Remedy on May 25, 2012. Sheperd was thereafter summoned to the lieutenant's office by Lieutenant Simpson, and a portion of his manuscript was returned to him. On June 5, 2012, Sheperd was called to the lieutenant's office again, this time by Lieutenant R.E. Williams, where he received an Attempt at Informal Resolution form that stated that his manuscript was gang-related and would not be returned to him. Williams then asked him to sign the form, which Sheperd refused to do. On or about June 15, 2012, Sheperd received a formal response from Defendant Werlinger, who denied his request because inmates are not permitted to possess gang-related materials.

Sheperd then filed a Regional Administrative Remedy Appeal on June 27, 2012. Three weeks later, on July 19, 2012, Sheperd was summoned to the lieutenant's office by SIS Technician Lenorud, who asked him to sign a form that acknowledged the manuscript was confiscated because it contained gang-related material. The form was dated mid-June, which struck Sheperd as incorrect because by then it was July and the manuscript was taken in April. Lenorud allegedly told Sheperd he did not have to sign the form, and so Sheperd did not sign it, feeling that signing would indicate that he approved incorrect statements in the form.

On or about August 15, 2012, Sheperd received a response to his regional appeal from Defendant Paul Laird, who denied the appeal because Sheperd did not claim his property by signing the confiscation form. Laird also noted in the response that the manuscript would be destroyed. Sheperd then filed a Central Office Administrative Remedy Appeal on August 27, 2012, and on June 13, 2013, that appeal was denied by Defendant Harrell Watts for the same reasons. Sheperd believes that the unreturned portion of his manuscript has been destroyed, and he filed this complaint seeking compensatory and punitive damages.

OPINION

Plaintiff brings a due process claim against all of the defendants, an equal protection claim against John Doe, and a free speech claim against all defendants. The court will address them in that order.

I. Due Process Claim Against All Defendants²

Plaintiff alleges that all of the defendants deprived him of his manuscript without due process. To state a due process claim, a plaintiff must show that the state deprived him of a constitutionally protected interest in “life, liberty, or property” without due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). When the deprivation occurs pursuant to prison procedure, the government must generally provide a predeprivation hearing before taking property provided doing so is not unduly burdensome. *Id.* at 132. Due to the “needs and exigencies” of the prison environment, however, predeprivation procedures are not always possible even if not unduly burdensome. *Caldwell v. Miller*, 790 F.2d 589, 608-09 (7th Cir. 1986) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). When, for example, the deprivation is the result of a “random and unauthorized” act, there is no due process violation if the government provides an adequate, post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984) (holding that the availability of a damages remedy is an adequate post-deprivation remedy); *Stewart v. McGinnis*, 5 F.3d 1031-1035-36 (7th Cir. 1993). Whether conduct is to be deemed random and unauthorized depends on its unpredictability, which in turn is measured by the amount of discretion of the state actor. *Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996).

² Sheperd purported to bring his equal protection and due process claims under the Fourteenth Amendment, but they actually sound under the Fifth Amendment because the defendants were all federal actors. Regardless, the analysis is the same. *Crowder v. True*, 74 F.3d 812, 814 (7th Cir. 1996) (applying the same methodology for claims under the Fifth Amendment’s and Fourteenth Amendment’s Due Process Clauses); see *San Francisco Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987); see also *Boling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (noting that the Fifth Amendment does not contain an equal protection clause like the Fourteenth Amendment, but that conduct by a federal actor that violates this safeguard is deemed to violate due process under the Fifth Amendment, where the Constitution prohibits a denial of equal protection by a state actor, it being “unthinkable that the same Constitution would impose a lesser duty on the Federal Government”).

Here, plaintiff has alleged a property interest in his transcript. As for the act of deprivation, it is not yet clear whether plaintiff is alleging that the deprivation was the product of a predictable procedure or of a random or unauthorized act. Indeed, he pleads facts that might suggest both. On one hand, he directs the court to: the written procedures permitting inmates to prepare manuscripts; the statements of various defendants that the manuscript was confiscated because it contained gang-related material; and the written responses in plaintiff's administrative appeal that the manuscript would not be returned because he did not sign a confiscation form. These allegations would suggest that plaintiff's manuscript may have been confiscated consistent with prison policies and that predeprivation notice or a hearing may have been practical. If this is the case, then the court would need further factual development to determine whether defendants can justify the failure to provide a predeprivation process -- for example, that immediate confiscation of materials that may be gang related is considered necessary for safety reasons.

On the other hand, plaintiff also includes allegations that defendant John Doe "disregarded his professional obligations," arbitrarily took his manuscript and forwarded it to SIS for review. These allegations indicate that the analysis of his deprivation may fall into the *Hudson* line of cases. If the facts reveal that the confiscation was random and unauthorized (which appears unlikely given plaintiff's allegations that various prison officials confirmed the manuscript was taken consistent with a ban on gang-related materials), then it appears that there may be no due process claim because plaintiff had adequate post-deprivation remedies at his disposal through the prison administrative remedy system and the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80.

At this point, there appears to be no question that plaintiff did not receive a predeprivation hearing, but there is a question as to whether due process required it. Therefore, plaintiff may proceed with his due process claim against all of the defendants to determine: whether a predeprivation hearing was necessary; if so, whether any of the defendants may be held liable in a personal or official capacity; and if not, whether the post-deprivation procedures made available to him were adequate.

II. Equal Protection Claim Against John Doe

Sheperd names only a “John Doe” in his equal protection claim. The due process clause of the Fifth Amendment forbids the federal government from denying equal protection of the laws. *See Davis v. Passman*, 442 U.S. 228, 234 (1979); *Markham v. White*, 172 F.3d 486, 491 (7th Cir. 1999). Generally, a plaintiff bringing an equal protection claim must establish that a state actor has treated him differently because of his membership in a particular class and that the state actor did so purposefully. *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). If this were plaintiff’s only basis for asserting an equal protection violation, his claim would have to be dismissed. As is the case here, however, a plaintiff may also bring an equal protection claim as a “class of one,” where the plaintiff pleads “both the absence of a rational basis for the defendant’s action *and* some improper personal motive . . . for the differential treatment.” *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 899 (7th Cir. 2012) (en banc) (Posner, J., leading opinion) (emphasis in original); *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Here, Sheperd alleges that John Doe intentionally treated him differently than other inmates by taking his manuscript with no rational basis or cause. Although Sheperd at least

superficially alleges differential treatment from similarly situated inmates with no rational basis, he wholly fails to allege that Doe had an improper motive in treating him differently. Sheperd, therefore, also fails to state a colorable “class of one” claim, and this equal protection claim will be dismissed.

III. First Amendment Claim Against All Defendants

Finally, Sheperd alleges that confiscation of his manuscript violates the First Amendment. A prison may impose regulations that restrict inmates’ constitutional rights if such regulations are “reasonably related to legitimate penological interests.” *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010). The Supreme Court has adopted a four-prong test for courts to consider in evaluating the reasonableness of these regulations: “(1) whether there is a rational relationship between the regulation and the legitimate government interest advanced [by the prison]; (2) whether the inmates have alternative means of exercising the restricted right; (3) whether and the extent to which accommodation of the asserted right will impact prison staff, inmates’ liberty, and the allocation of limited prison resources; and (4) whether the contested regulation is an ‘exaggerated response’ to a prison concern and if there is a ‘ready alternative’ that would accommodate inmates’ rights.” *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89-91 (1987)).

Sheperd claims that in confiscating his manuscript, defendants Doe, Helmin, Lenorud, Williams and Werlinger restricted his speech without justification. Further, he claims that defendants Laird and Watts, who handled his regional and national appeals, did the same because they were aware that the protected manuscript had been confiscated but

nevertheless permitted its destruction. Thus the question is whether defendants' actions were reasonably related to a legitimate penological interest.

Plaintiff maintains two, seemingly contradictory positions that: (1) the manuscript was arbitrarily taken; and (2) the manuscript was confiscated under a policy prohibiting gang-related material. Regardless of the actual motivation or lack thereof, his claim may proceed. Under either theory, the court can "envision a security justification that would support the defendants' actions," but will not presume it at this stage in the proceedings. *Lindell v. Frank*, 377 F.3d 655, 657-58 (7th Cir. 2004). Sheperd's First Amendment claim against each of the defendants therefore may proceed.

While Sheperd's First Amendment allegations pass muster under the court's lower standard for screening, if barely, the court expresses no opinion as to whether it will survive a motion to dismiss. Even it does, Sheperd will have to come forward with admissible evidence as to this claim. In particular, Sheperd must show that the actions by each of the individual defendants constituted a clear violation of the First Amendment. As he proceeds with this claim, Sheperd should consider that "an inmate who challenges the reasonableness of the regulation bears the burden of proving its invalidity," which is an extremely difficult burden to meet, due to the significant deference courts must grant prison administrators. *Singer*, 593 F.3d at 534 (citing *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

ORDER

IT IS ORDERED that:

1. Plaintiff Cedric Sheperd is GRANTED leave to proceed on his First Amendment and due process claims against Defendants Robert Werlinger, R.E. Williams, Joseph Helmin, Stacey Lenorud, John Doe, Paul M. Laird, and Harrell Watts for the confiscation of plaintiff's manuscript, and the failure to return the entirety of his manuscript.

2. Plaintiff is DENIED leave to proceed on all other claims.
3. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to the defendants' attorney.
4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
5. The clerk's office will prepare summons and the U.S. Marshal Service shall affect service upon these defendants. Summons will not issue for Defendant John Doe until plaintiff discovers the real name of this party and amends his complaint accordingly.
6. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 19th day of May, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge