Type: Press Release
Topic: My Lawsuit Against Prison

Concerning E.D. Wis. Case No: 13-cv-00759-cNC,
Lindell v. Pollard, et alia

After I was kicked out of Wisconsin's "former" supermax and transferred to the Waupun Correctional Institution (W.C.I.) on 4 Jan. 2013, staff at W.C.I. decided to take some of my art/drawings and photocopies of such, refuse to mail them to whom I requested, then destroyed them. They also claimed I had 85 publications over the limit which they chose + then destroyed, disregarding my requests as to what specific publications I wanted to keep (there went my Oxford Thesauras, psychology & philosophy textbooks, etc.). They, at first, tried to destroy a bag of legal papers (because they claimed I was over the limit), but, after my attorney wrote them, agreed to let me choose what to dispose of to comply with their limits.

May seem petty, but depriving a prisoner of art or books offends the Free Speech clause of the First Amendment. (See, e.g. **Lindell v. Frank**, 377 F.3d 655 (7th Cir. 2004)), if it's not rationally related to a valid need. Here they just did it to be assholes, so I contend in the forenoted, titular case.

As the attached 30 Sept. 2013 order reveals, the court at first dismissed my case. I made the mistake of protesting too much, trying to sue over too many types of claims; maybe for that reason, the court overlooked my Free Speech claim.

Then I filed a motion for reconsideration, stressing that the 30 Sept. order failed to even consider it. My motion was granted, as can be seen in the attached 15 Jan. 2014 order.

You may find out more about this case from the court's web-site: **wied.uscourts.gov** or using PACER.

At the moment, the defendants' motion to dismiss is

pending. However, as is too often the case, it is a paltry attempt to justify the unjustifiable and asserts some lies to try & do so, lies which are apparent, so I'll soon be filing a Fed. R. Civ. P. 11 motion to sanction defendants' counsel for pursuing a frivolous defense.

Defendants gave no reason for taking & destroying my art other than claiming it was "completed hobby projects" (only some of the art was finished) & thus had to be mailed out to someone on my visiting list — they refused to mail the art to my attorney.

The excuse they gave for not letting me choose what 25 publications to keep (the allowed limit) was that they didn't have time to arrange this. But that excuse is lame, given that they repeatedly brought me specific books, I requested from what they did leave me, and let me sort through and select what legal papers to get rid of in order to satisfy their limits.

What undermines any attempt to justify taking & destroying my art & books is that I was not deemed over the limit in the "former" supermax, which has the tightest security protocols in the entire state. But, WCI suddenly felt the need to destroy my stuff. (Because I was $10,000-plus in debt, they knew I couldn't mail it out, nor would they permit anyone to pick the stuff up for me).

Recall that I was booted to WCI for repeatedly assaulting supermax staff & suing them. Also, it was WCI that originally sent me to the supermax in 2001, based on a bogus attempt-battery disciplinary action, which was later overturned by a state court.

Prison officials are petty, vindictive fucks, huh?

Readers, please share this posting & attached orders with Wisconsin media outlets, etc.

I'll post my summary judgement & sanctions motion shortly.

Best regards Nate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NATE A. LINDELL,

Plaintiff,

v. Case No. 13-C-0759

CAPTAIN DONALD STRAHOTA, WILLIAM POLLARD,
CO II DAVID LEVEY, BRIAN GREFF,
LT. JESSIE SCHNEIDER, MS. TOMASEK-HARPER,
CAPTAIN OLSON, SGT. J. DAHLKE,
TONIA MOON, CHARLES FACKTOR,
CINDY O'DONNELL, LT. HANFELD,
TISHA LANSING, KELLY TRUMM,
and TIMOTHY HAINES,

Defendants.

ORDER SCREENING COMPLAINT PURSUANT TO 28 U.S.C. § 1915A, GRANTING PLAINTIFF'S PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (DOC. 3), AND DISMISSING THIS ACTION FOR FAILURE TO STATE A CLAIM

Plaintiff, a Wisconsin state prisoner, has filed a pro se complaint under 42 U.S.C. § 1983. This matter is before the court on plaintiff's petition to proceed in forma pauperis, and it appears that he lacks the funds to pay an initial partial filing fee. 28 U.S.C. § 1915(b)(4).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

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A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. "Malicious," although sometimes treated as a synonym for "frivolous," "is more usefully construed as intended to harass." *Lindell v. McCallum*, 352 F.3d 1107, 1109-10 (7th Cir. 2003) (citations omitted).

To state a cognizable claim under the federal notice pleading system, plaintiff is required to provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts and his statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, a complaint that offers "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The complaint allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation omitted).

In considering whether a complaint states a claim, courts should follow the principles set forth in *Twombly* by first, "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Legal conclusions must be supported by factual allegations. *Id.* If there are well-pleaded factual allegations, the court must, second, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that: 1) he was deprived of a right secured by the Constitution or laws of the United States; and 2) the deprivation was visited upon him by a person or persons acting under color of state law. *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009) (citing *Kramer v. Village of North Fond du Lac*, 384 F.3d 856, 861 (7th Cir. 2004)); see also *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The court is obliged to give plaintiff's pro se allegations, "however inartfully pleaded," a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

COMPLAINT ALLEGATIONS

Plaintiff is incarcerated at Waupun Correctional Institution (WCI) and was previously incarcerated at Wisconsin Secure Program Facility (WSPF). He is suing the following persons from WCI: Deputy Warden Donald Strahota, Warden William Pollard, Officer David Levey, Segregation Supervisor Brian Greff, Segregation Lieutenant Jessie Schneider, Hobby Department Supervisor Ms. Tomasek-Harper, Property Department Supervisor Captain Olson, Property Department Sergeant J. Dahlke, and Inmate Complaint Examiner Tonia Moon. Defendant Charles Facktor is a corrections complaint examiner

and Cindy O'Donnell is the deputy secretary of the Wisconsin Department of Corrections (DOC). Four defendants are from WSPF: Disciplinary Hearing Supervisor Lieutenant Hanfeld, Security Secretary Tisha Lansing, Inmate Complaint Examiner Kelly Trumm, and Warden Timothy Haines.

1. Unjustifiable Restitution Claim

Plaintiff alleges that defendant Hanfeld ordered him to pay $1,870.37 in restitution for a hospital trip after Hanfeld found him guilty of misuse of prescription medication in violation of Wis. Admin. Code § 303.57(1). The complaint charges that defendant Hanfeld's guilty finding was without evidence and was contrary to evidence showing that plaintiff had not violated that rule. In addition, it is asserted that defendant Hanfeld ordered plaintiff to pay restitution for a hospital trip without explanation or justification to plaintiff, and without providing plaintiff the opportunity to challenge its appropriateness.

Plaintiff was incarcerated at WSPF when he was found guilty on December 19, 2012, and on January 4, 2013, he was transferred to WCI. He was unable to appeal the restitution decision until January 29, 2013, because WCI officials did not give him his property until January 24, 2013. Plaintiff then filed his appeal at WCI but defendant Warden Pollard refused to process it and directed plaintiff to file his appeal at WSPF. Plaintiff did so on January 31, 2013. Defendant Lansing refused to process the appeal at that institution because it was filed beyond the ten-day limit for submitting such appeals. Afterward, plaintiff filed a grievance explaining that he was prevented from filing a timely appeal. However, defendants Trumm, Haines, Facktor, and O'Donnell dismissed the appeal. Plaintiff claims that these defendants' actions violated his right to procedural and substantive due process.

An individual is entitled to an opportunity for a hearing before the state permanently deprives him of his property. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986). A deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the state fails to provide an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). In determining whether alleged conduct was "random and unauthorized," the court considers whether the conduct was predictable. *Hamlin v. Vaudenberg*, 95 F.3d 580, 584 (7th Cir. 1996). Predictability is determined by the amount of discretion exercised by an official as well as the extent to which that discretion is uncircumscribed. *Id.*

As an initial matter, it appears that plaintiff received a hearing. He alleges that defendant Hanfeld found him guilty "without evidence" and "contrary to evidence," and that he ordered restitution "without any explanation or justification." Thus, plaintiff charges that defendant Hanfeld violated his rights by finding him guilty and ordering restitution.

The State cannot be expected to provide a pre-deprivation hearing for such unauthorized and unpredictable conduct. Wisconsin law provides tort remedies to individuals whose property has been converted or damaged by another. *See* Wis. Stat. §§ 893.35 and 893.51. If a deprivation of property did not occur as the result of some established state procedure (which plaintiff does not allege) and state law provides an adequate post-deprivation remedy for redressing the missing property, due process has been satisfied. *Parratt*, 451 U.S. at 543-44; *see also Hamlin*, 95 F.3d at 585 (holding that

Wisconsin's post-deprivation procedures are adequate, albeit in a different context). In sum, the conduct attributed to defendant Hanfeld was random and unauthorized, and Wisconsin's post-deprivation remedies are adequate to address such conduct. Thus, plaintiff may not proceed on a procedural due process claim.[1]

Plaintiff may also not proceed against defendants Trumm, Haines, Facktor, and O'Donnell for dismissing his appeal because "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the violation." *George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2010); *see also Owens v. Hinsley*, 635 F.3d 950 (7th Cir. 2011). A state's inmate grievance procedures do not give rise to a liberty interest protected by the due process clause. *Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996).

Lastly, plaintiff claims that defendants violated his substantive due process rights based on the conduct described in the complaint. The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government action "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Historically, substantive due process claims have been related to matters involving marriage, family, procreation and the right to bodily integrity. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible

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[1] The court notes that plaintiff alleges he is barred from pursuing state-court litigation to obtain redress for the deprivation of his property and liberties identified herein. According to plaintiff, he is more than $10,000 in debt and has at least three strikes in state court which precludes him from proceeding in forma pauperis in state court cases. Based on these allegations, plaintiff appears to allege that Wisconsin's post-deprivation remedies are unavailable to him. However, the test concerns the *adequacy* of the state remedies and, as indicated, the Seventh Circuit has held that Wisconsin's post-deprivation remedies are adequate. *See Leavell v. Ill. Dep't of Nat. Resources*, 600 F.3d 798, 802 (7th Cir. 2010) (plaintiff who did not allege that state post-deprivation remedies were inadequate failed to state a claim upon which relief could be granted).

decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 271-72. Plaintiff has not cited to any legal authority in support of his assertion that his unjustifiable restitution claim violates his right to substantive due process, and the court is not aware of any. Hence, he may not proceed on a substantive due process claim.

2. Retaliatory, Capricious and Discriminatory Deprivation of Property Claim

Plaintiff contends that twenty days after his January 4, 2013, transfer to WCI from WSPF, defendant Levey informed him that the following property items had been deemed contraband and needed to be disposed of: one scientific calculator (Levey claimed its security seals had been tampered with), nine photos (Levey claimed plaintiff was nine photos over the limit, so he selected nine photos he deemed contraband), eighty-five publications (Levey claimed plaintiff was eighty-five publications over the limit so he selected eighty-five publications he deemed contraband), and one bag of legal property (Levey claimed plaintiff was one bag over the limit, and he selected one bag he deemed contraband). According to the complaint, at WSPF, plaintiff's legal materials, publications, and photos were not in excess of property rules. However, WCI's rules allow for less property than at WSPF.

The complaint further asserts that plaintiff asked Levey if he could decide which excess items to dispose of but Levey stated that he and defendant Dahlke would decide instead. After additional requests to select which of his property to dispose of as contraband, including a request from plaintiff's attorney, defendant Warden Pollard advised the attorney that plaintiff would be permitted to review his legal materials and select the contraband items. Some of plaintiff's legal materials that were deemed contraband related to his pending lawsuits against DOC staff and to two criminal cases pending against him

in Grant County, Wisconsin. Plaintiff was expected to dispose of these materials. However, he was eventually permitted to review his legal materials and decide what to keep at the prison.

Defendants disposed of at least eighty-five of plaintiff's publications and they refused to tell him what they destroyed and why. In addition, eleven to twelve pages of plaintiff's artwork were deemed contraband and not returned to him. Plaintiff alleges that on March 19, 2013, he asked exactly what was in the contraband artwork, because he did not want to "blindly send it out & offend people," but defendant Tomasek-Harper did not enlighten him. (Compl. ¶ 56.) Defendant Tomasek-Harper destroyed the artwork on March 25, 2013.

In a section of the complaint titled "General Allegations," plaintiff alleges: "Levey was motivated by his animosity for Lindell's White Nationalistic political beliefs, Lindell's litigation against WCI, and WDOC officials, etc. Apparently, other defendants shared this motivation." (Compl. ¶ 63.) Plaintiff claims that defendants Levey, Strahota, Pollard, Greff, Schneider, Sgt. Dahlke, Cpt. Olson, Moon, Facktor, and O'Donnell conspired to deprive him of "his First Amendment right to free speech (i.e. hold White Nationalistic political beliefs & entertain the ideas in seized books, photos, and papers), to Petition for Redress (i.e. sue prison officials) and Lindell's 14th Amendment right to procedural due process." (Compl. ¶ 66.) He also claims that defendants Levey, Pollard, Schneider, Greff, Moon, Tomasek-Harper, Facktor and O'Donnell caused him "to be deprived of his art and copies of art, deprived and threaten[ed] to deprive Lindell of his First Amendment right to Free Speech (noted above), to Petition for Redress (noted above), and Lindell's 14th Amendment right to procedural due process." (Compl. ¶ 67.)

As an initial matter, there is no basis in the complaint for plaintiff's claim that defendants conspired to deprive him of a First Amendment right to hold or practice any White Nationalistic political beliefs. This allegation is mentioned for the first time in the general allegation quoted in the preceding paragraph. It is conclusory and is not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. There are no facts in the complaint that can be construed as stating a First Amendment free speech claim.

Plaintiff also charges that defendants deprived him of his right to petition for redress, presumably when they deemed as contraband one or two bags of his legal materials that were related to four of his ongoing court cases, two civil and two criminal. However, later in the complaint plaintiff alleges that he was permitted to exchange his bags of legal materials and to decide which should be considered contraband. However, the complaint does not assert that defendants' actions caused plaintiff to suffer an actual injury in any ongoing case. Consequently, he does not state an access to the courts claim. *See Ortiz v. Downey*, 561 F.3d 664, 671 (7th Cir. 2009) (internal quotation and citation omitted) (to state a denial-of-access claim, plaintiff had to explain "the connection between the alleged denial of access to legal materials and an inability to pursue a legitimate challenge to a conviction, sentence, or prison conditions").

Plaintiff's final contention regarding the confiscation of his publications and art work as a violation of his right to procedural due process is misplaced. The complaint alleges that the property was deemed contraband pursuant to WCI policy. However, it also submits that the property was destroyed in contravention of policy and the law. Thus, as explained herein, any procedural due process claim is foreclosed due to the existence of adequate state court remedies. *See Hamlin*, 95 F.3d at 584.

Because the complaint sets forth no arguable basis for relief and fails to make any rational argument in law or fact to support the continuation of this action, this case cannot proceed. *See House v. Belford*, 956 F.2d 711, 720 (7th Cir. 1992) (quoting *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988), aff'd sub nom. *Neitzke v. Williams*, 490 U.S. 319 (1989)).

IT IS ORDERED that plaintiff's motion for leave to proceed in forma pauperis (Doc. 3) is GRANTED.

IT IS FURTHER ORDERED that this action is DISMISSED pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1) for failure to state a claim.

IT IS FURTHER ORDERED that the Clerk of Court document that this inmate has brought an action that was dismissed for failure to state a claim under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1).

IT IS FURTHER ORDERED that the Clerk of Court document that this inmate has incurred a "strike" under 28 U.S.C. §1915(g).

IT IS FURTHER ORDERED that the Secretary of the Wisconsin Department of Corrections or his designee shall collect from plaintiff's prison trust account the $350.00 balance of the filing fee by collecting monthly payments from plaintiff's prison trust account in an amount equal to 20% of the preceding month's income credited to the prisoner's trust account and forwarding payments to the Clerk of Court each time the amount in the account exceeds $10 in accordance with 28 U.S.C. § 1915(b)(2). The payments shall be clearly identified by the case name and number assigned to this action.

IT IS FURTHER ORDERED that a copy of this order be sent to the warden of the institution where the inmate is confined.

I FURTHER CERTIFY that any appeal from this matter would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3) unless the plaintiff offers bonafide arguments supporting his appeal.

Dated at Milwaukee, Wisconsin, this 30th day of September, 2013.

BY THE COURT

/s/ C.N. Clevert, Jr.
C.N. CLEVERT, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NATE A. LINDELL,

Plaintiff,

v. Case No. 13-C-759

CAPTAIN DONALD STRAHOTA, WILLIAM POLLARD,
CO II DAVID LEVEY, BRIAN GREFF,
LT. JESSIE SCHNEIDER, MS. TOMASEK-HARPER,
CAPTAIN OLSON, SGT. J. DAHLKE,
TONIA MOON, CHARLES FACKTOR,
CINDY O'DONNELL, LT. HANFELD,
TISHA LANSING, KELLY TRUMM,
and TIMOTHY HAINES,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT (DOC. 12) AND VACATING IN PART THE SCREENING ORDER OF SEPTEMBER 30, 2013 (DOC. 10)

Plaintiff has filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). He contends that the court erred when it dismissed his complaint for failure to state a claim. (Screening Order, September 30, 2013.) Therefore, plaintiff asks the court to reinstate his First Amendment free speech, retaliation, procedural due process, and substantive due process claims.

Altering or amending a judgment pursuant to Rule 59(e) is permissible when there is newly discovered evidence or where there has been a manifest error of law or fact. *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (citing *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000)). A "manifest error" is a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*

v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (citation omitted). Whether to grant a motion to amend judgment "is entrusted to the sound judgment of the district of the district court." *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

1. Free Speech Claim

Plaintiff contends that the allegations in his complaint regarding the arbitrary deprivation of his art, books, and photos state a First Amendment free speech claim. In its screening order, the court considered whether the asserted deprivation violated plaintiff's due process rights and right of access to the courts. The court also weighed whether the deprivation was motivated in part by plaintiff's political beliefs, as mentioned in paragraph 63 of the complaint. On the other hand, the deprivation of the art, books, and photos was not evaluated as a straight-forward free speech claim. However, now after due consideration of plaintiff's motion, the court finds that the complaint states such a claim. Thus, plaintiff may proceed on his free speech claim against defendants Levey, Pollard, Schneider, Greff, Moon, Tomasek-Harper, Facktor, and O'Donnell. *See Lindell v. Frank*, 377 F.3d 655, 657-58 (7th Cir. 2004).

2. Retaliation

Next, plaintiff contends that he states a retaliation claim regarding the deprivation of his property, citing to paragraph 67 of his complaint in support of the assertion. According to this paragraph, defendants Levey, Pollard, Schneider, Greff, Moon, Tomasek-Harper, Facktor and O'Donnell caused plaintiff, "by their forenoted actions or refusals to act, in furtherance of their colleagues' conspiracy, to be deprived of his art and copies of art, deprived and threaten to deprive [plaintiff] of his First Amendment rights to free speech . . . , to petition for redress . . . , and [his] 14th Amendment right to procedural due

process." (Compl. ¶ 67.) Plaintiff maintains that these defendants acted after his attorney discouraged certain defendants from destroying plaintiff's legal property.

To state a retaliation claim, plaintiff must allege that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the [d]efendants' decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (internal quotations omitted). Suing prison officials is protected activity under the First Amendment. *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Lekas v. Briley*, 405 F.3d 602, 614 (7th Cir. 2005); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996).

The court did not address a potential retaliation claim in the Screening Order because it did not identify one. However, the court notes that the complaint alleges that ultimately, plaintiff was allowed to review his legal papers and to decide which to keep. The allegations regarding other property related to events that preceded his attorney's call to defendants. Also, plaintiff contends that on January 24, 2013, defendant Levey informed him that prison staff decided which of his other property was contraband; however, plaintiff's attorney did not contact Warden Pollard until January 30, 2013. Hence, the complaint fails to set forth the facts that any First Amendment activity supporting a claim was a motivating factor in defendants' actions against plaintiff or his property.

The court notes that the complaint contains general allegations regarding retaliation and a retaliation conspiracy. The heading to section two of the complaint is "Retaliatory, Capricious, and Discriminatory Deprivation of Property." Plaintiff makes a "General Allegation" to that effect near the end of the complaint. (Compl. ¶ 62) (WCI defendants

frequently conspire with each other to abuse their authority by harassing litigious prisoners by "losing", destroying, depriving them of, or misdelivering these prisoners' legal property when such prisoners' property comes under Property Dept. staff's control). However, these conclusory allegations do not state a retaliation claim. *See Iqbal*, 556 U.S. at 679.

3. Procedural and Substantive Due Process Claims

Plaintiff further contends that he states a procedural due process claim based on the deprivation of his property because state post-deprivation remedies are unavailable to him. He alleged that defendant Hanfeld ordered him to pay $1870.37 in restitution for a hospital trip after Hanfeld found him guilty of misuse of prescription medication in violation of Wis. Admin Code § 303.57(1). The court found that plaintiff failed to state a procedural due process claim because Wisconsin's post-deprivation remedies are adequate to address such conduct.

Next, plaintiff asserts that the court failed to recognize that state post-deprivation remedies are unavailable to him because he is barred from pursuing state-court litigation to obtain redress for the deprivation of his property. However, the screening order discloses that the court did recognize and address plaintiff's assertion. (Screening Order at 6, n.1.) But the court will expand on its reasoning to clarify its decision.

According to plaintiff, he is more than $10,000 in debt and he has at least three "strikes" in state court, which precludes him from proceeding *in forma pauperis* in state court cases under the Wisconsin Prison Litigation Reform Act.[1] Plaintiff asserts that "the fact that the state has made [remedies] unavailable to Lindell means that Lindell has a

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[1] *See* Wis. Stat. §§ 801.01(4)(d); 801.05(4) (West, Westlaw through 2013 Wisconsin Act 57).

federally cognizable claim." (Mot. to Alter Judgment at 3.) He cites to *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), in support of his contention that he states a due process claim because post-deprivation remedies are not adequate if they are "non-existent."

However, *Hudson* does not support plaintiff's position. As stated in the Screening Order, the test concerns the *adequacy* of the state remedies. Moreover, the Seventh Circuit has held that Wisconsin's post-deprivation remedies are adequate. *See Leavell v. Ill. Dep't of Nat. Resources*, 600 F.3d 798, 802 (7th Cir. 2010).

The State of Wisconsin provides adequate post-deprivation remedies, i.e, tort remedies, for the plaintiff's alleged loss. Plaintiff also availed himself of the Inmate Complaint Review System by filing an offender complaint and appeal. That plaintiff is not permitted to proceed *in forma pauperis* in state court because he filed at least three actions that the state court deemed frivolous does not render Wisconsin's remedies inadequate. Thus, as set forth in the Screening Order, plaintiff may not proceed on a procedural due process claim.

Finally, plaintiff contends that he states a substantive due process claim based on the unjustified, baseless deprivations of liberty or property interests. However, he has not shown that the order dismissing his substantive due process claim contains a manifest error of law. Therefore,

IT IS ORDERED that plaintiff's motion to alter or amend judgment (Doc. 12) is GRANTED IN PART AND DENIED IN PART as described herein.

IT IS FURTHER ORDERED that the judgment of September 30, 2013, (Doc. 11) is VACATED and court's order of September 30, 2013, (Doc. 10) dismissing the complaint

for failure to state a claim is VACATED IN PART. Plaintiff may proceed on a First Amendment free speech claim against defendants Levey, Pollard, Schneider, Greff, Moon, Tomasek-Harper, Facktor, and O'Donnell. The remaining claims and defendants will remain dismissed.

Dated at Milwaukee, Wisconsin, this 15th day of January, 2014.

BY THE COURT

/s/ C.N. Clevert, Jr.
C.N. CLEVERT, JR.
U.S. District Judge